



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

FORMER FIRST SECTION

**CASE OF ÖNERYILDIZ v. TURKEY**

*(Application no. 48939/99)*

JUDGMENT

STRASBOURG

18 June 2002

*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 Öneriyıldız v. Turkey,**

The European Court of Human Rights, sitting as a Chamber composed of:

Mrs E. PALM, *President*,  
Mrs W. THOMASSEN,  
Mr GAUKUR JÖRUNDSSON,  
Mr R. TÜRMEŒ,  
Mr C. BİRSAN,  
Mr J. CASADEVALL,  
Mr R. MARUSTE, *judges*,

and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 22 May 2001, 16 October 2001, 23 April 2002 and 27 May 2002,

Delivers the following judgment, which was adopted on the last-mentioned date:

**PROCEDURE**

1. The case originated in an application (no. 48939/99) 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 two Turkish nationals, Mr Ahmet Nuri Çınar and Mr Maşallah Öneriyıldız, on 18 January 1999.

2. The applicants were represented by Ms Esra Yıldız, of the Istanbul Bar. The Turkish Government ("the Government") were represented by their co-Agent, Mrs Deniz Akçay, assisted by Mrs Gökşen Acar, Counsel.

3. Relying on Articles 2, 8 and 13 of the Convention and on Article 1 of Protocol No. 1, the applicants claimed that the national authorities were responsible for the death of thirteen members of their families and for the destruction of their property as a result of a methane-gas explosion which had occurred on 28 April 1993 in the municipal rubbish tip of Ümraniye (Istanbul). They complained further that the administrative proceedings conducted in the present case were incompatible with the requirements of fairness and speed set forth in Article 6 § 1 of the Convention.

4. The application was allocated to the First 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. By a decision of 22 May 2001, the Court decided to disjoin the application and reserve the proceedings in so far as they concerned Mr Ahmet Nuri Çınar, who had since died. It declared the application admissible with regard to the applicant, Maşallah Öneriyıldız ("the

applicant”), who had applied to the Court both on his own behalf and on behalf of nine members of his family, namely his wife, Gülnaz Öneriyıldız, his concubine, Sıdıka Zorlu, and his children, Selahaddin, İdris, Mesut, Fatma, Zeynep, Remziye and Abdülkerim Öneriyıldız, who had all died in the accident of 28 April 1993, which is the subject of the present application.

6. On 14 September 2001 the applicant filed two documents: his supplementary observations and his claims for just satisfaction under Article 41 of the Convention. The Government filed observations on the merits of the case and on the claims for just satisfaction on 17 September and 12 October 2001 respectively. On 3 November 2001 the applicant replied to the Government's observations on the merits. On 10 October 2001 the Government sent the Registry copies of documents relating to a case on which they relied in support of their submissions.

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 16 October 2001 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mrs D. AKÇAY,	<i>co-Agent,</i>
Mrs G. ACAR,	
Mr S. KARAKUL,	<i>Counsel;</i>

(b) *for the applicant*

Mr E. DENİZ,	<i>Counsel,</i>
Mr Ş. ACAR,	<i>Adviser.</i>

The Court heard addresses by Mr Deniz, Mrs Akçay and Mrs Acar.

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

8. The applicant, who is a Turkish national, was born in 1955 and is now living in Çobançeşme (Alibeyköy, Istanbul). At the material time he and the twelve members of his family were living in the slum quarter (*gecekondu mahallesi*) of Kazım Karabekir in Ümraniye (Istanbul).

### **A. The Ümraniye site for the storage of household waste**

9. Since the beginning of the 1970s a household-refuse tip had been in operation in Hekimbaşı, a slum area adjoining Kazım Karabekir. On 22 January 1960 an easement had been created *de facto* over the site in question, which belonged to the Forestry Commission (and therefore to the Treasury), in favour of Istanbul City Council (“the city council”) for a term of ninety-nine years. Situated on a slope overlooking a valley, the site spread out over a surface area of approximately 350,000 square metres and was used as a rubbish tip by the districts of Beykoz, Üsküdar, Kadıköy and Ümraniye under the authority and responsibility of the city council and, ultimately, the ministerial authorities.

When the rubbish tip started being used, the area was uninhabited and the closest built-up area was approximately 3.5 km away. However, as the years passed, rudimentary dwellings were illegally built in the zone surrounding the rubbish tip, which ultimately developed into the slums of Ümraniye.

### **B. The steps taken by Ümraniye District Council**

#### *1. In 1989*

10. Following the local elections of 26 March 1989 and from 4 December of that year Ümraniye District Council began dumping heaps of earth and rubbish onto the land surrounding the Ümraniye slums in order to redevelop the site of the rubbish tip.

However, on 15 December 1989 M.C. and A.C. – two inhabitants of the Hekimbaşı area – brought proceedings against the district council in the Fourth Division of the Üsküdar District Court to establish title to land. They complained of damage to their plantations and requested the works to be halted. In support of their request, they produced documents showing that M.C. and A.C. had been liable for council tax and property tax since 1977 under tax no. 168900. In 1983 the authorities had asked them to fill in a standard form for the declaration of illegal buildings so that their title to the property and land could be validated (see paragraph 50 below). Following their request, on 21 August 1989, the city council water and mains authority had ordered a water meter to be installed in their house. Furthermore, copies of electricity bills show that M.C. and A.C., as consumers, regularly paid for the water they had used on the basis of the readings taken from a meter installed for that purpose.

11. In the District Court the defendant district council based its defence on the fact that the land claimed by M.C. and A.C. was situated on the waste-collection site; that residence there was contrary to the health regulations; and that their application for validation of their title to the property conferred no rights on them.

In a judgment delivered on 2 May 1991 under case no. 1989/1088, the District Court found for M.C. and A.C., holding that there had been interference with the exercise of their right over the land in question.

However, the Court of Cassation set the judgment aside on 2 March 1992. On 22 October 1992 the District Court followed the Court of Cassation's judgment and dismissed M.C. and A.C.'s claims.

## *2. In 1991*

12. On 9 April 1991 Ümraniye District Council applied to the Third Division of the Üsküdar District Court for experts to be instructed to determine whether the rubbish tip complied with the relevant regulations, in particular Regulation no. 20814 of 14 March 1991 on solid-waste control. A committee was set up for that purpose, composed of a professor of environmental engineering, a land-registry official and a forensic doctor.

According to their report, drawn up on 7 May 1991, the rubbish tip in question did not conform to the technical requirements set forth in Articles 24 to 27, 30 and 38 of Regulation no. 20814 and, accordingly, presented a certain number of dangers liable to give rise to a major health risk for the inhabitants of the valley, particularly those living in the slum areas: no wall or fencing separated the tip from the dwellings situated fifty metres from the mountain of refuse, and the tip was not equipped with collection, composting, recycling or combustion systems; nor had drainage or drainage-water purification systems been installed. The experts concluded from this that the Ümraniye tip “exposed humans and animals and the environment to every form of danger”. In that connection the report, drawing attention first to the fact that some twenty contagious diseases might spread, underlined the following:

“... In any waste-collection site methane, carbon-dioxide and hydrogen-sulphide gases, among others, form. These substances must be collected under supervision and ... burnt. The tip in question is not equipped with such a system, however. If methane is mixed with air in a particular proportion, it can explode. This installation contains no means of preventing an explosion of methane occurring as a result of the decomposition [of the waste]. May God preserve us, as the damage could be very substantial given the neighbouring dwellings. ...”

On 27 May 1991 the city council was made aware of that report and on 7 June 1991 the governor was informed of it and asked to brief the Ministry of Health and the Prime Minister's Environmental Office (“the Environmental Office”).

13. On 9 June 1991 Nurettin Sözen, the mayor of Istanbul, requested the report to be ruled inadmissible on the ground that it had been ordered and prepared without his knowing about it.

14. However, the Environment Council, which had been advised of the same report on 18 June 1991, made a recommendation (no. 09513) urging

the Istanbul Governor's Office, the city council and Ümraniye District Council to remedy the problems identified in the present case:

“... The report prepared by the committee of experts indicates that the waste-collection site in question breaches the Environment Act and the Regulation on Solid-Waste Control and consequently poses a health hazard to men and animals. The measures provided for in Articles 24, 25, 26, 27, 30 and 38 of the Regulation on Solid-Waste Control must be implemented at the site of the tip ... I therefore ask for the necessary measures to be implemented ... and for our council to be informed of the outcome.”

15. On 27 August 1992 Şinasi Öktem, the mayor of Ümraniye, applied to the First Division of the Üsküdar District Court for the implementation of temporary measures to prevent the city council and the neighbouring district councils from using the waste-collection site. He requested, *inter alia*, that no further waste be dumped, that the tip be closed and the damage repaired.

On 3 November 1992 the mayors of Istanbul and Beykoz opposed that request. To that end Mr Sözen submitted, in particular, that a plan to redevelop the site of the tip had been put out to tender and would be implemented during the year 1993.

16. While those proceedings were still pending before the Fourth Civil Division of the Court of Cassation, Ümraniye District Council informed the mayor of Istanbul that from 15 May 1993 no dumping of waste would be authorised.

### **C. The accident**

17. Prior to that date, however, at about 11 a.m. on 28 April 1993 a methane explosion occurred at the site. Following a landslide caused by mounting pressure, the refuse erupted from the mountain of waste and buried some ten slum dwellings situated below it, including the one belonging to the applicant. Thirty-nine people died, including nine members of the Öneriyıldız family.

### **D. The proceedings instituted in the present case**

#### *1. The initiative of the Ministry of the Interior*

18. Immediately after the accident two members of the municipal police force attempted to establish the facts. After taking evidence from the victims, including the applicant, who explained that he had built his house in 1988, they reported that thirteen huts had been engulfed.

On the same day a crisis committee, set up by the Istanbul Governor's Office, also went to the site and found that the landslide had indeed been caused by a methane-gas explosion.

19. The next day, on 29 April 1993, the Ministry of the Interior (“the Ministry”) ordered the circumstances in which the catastrophe had occurred to be examined by the administrative investigation department (“the investigation department”) in order to determine whether proceedings should be instituted against the two mayors, Mr Sözen and Mr Öktem.

## *2. The criminal inquiry*

20. While those administrative proceedings were under way, on 30 April 1993 the Üsküdar public prosecutor (“the public prosecutor”) went to the scene of the accident, accompanied by a committee of experts composed of three civil-engineering professors from three different universities. In the light of his preliminary observations, he instructed the committee to determine the share of responsibility for the accident attributable to the public authorities and that attributable to the victims.

21. On 6 May 1993 the applicant lodged a complaint with the local police station. He stated that “if it was the authorities that, through their negligence, caused my house to be engulfed and caused my wives' and children's death, I hereby lodge a criminal complaint against the authority or authorities concerned”. The applicant's complaint was added to the investigation file (no. 1993/6102) which had already been opened by the public prosecutor of his own motion.

22. On 14 May 1993 the public prosecutor heard evidence from a number of witnesses and victims of the accident in question. On 18 May 1993 the committee of experts submitted the report ordered by the public prosecutor. The experts confirmed that the landslide – affecting land which had been unstable as it was – could be explained both by the mounting pressure of the gas inside the tip and by the explosion of the tip. Reiterating the obligations and duties on the public authorities under the relevant regulations, the experts concluded that liability for the accident should be attributed as follows:

(i) 2/8 to the Istanbul City Council, which failed to act sufficiently early to prevent the technical problems which already existed when the tip was first created in 1970 and had continued to deteriorate since then, or to indicate to the district councils concerned an alternative waste-collection site, as it was obliged to do under Law no. 3030;

(ii) 2/8 to Ümraniye District Council for implementing a development plan for the area while omitting, contrary to Regulation no. 20814, to provide for a 1,000 metre-wide buffer zone to remain uninhabited, and for attracting illegal dwellings to the region and taking no steps to prevent them from being built, despite the experts' report of 7 May 1991;

(iii) 2/8 to the inhabitants of the slum for endangering the members of their families by settling near a mountain of waste;



(iv) 1/8 to the Ministry of the Environment for failing to monitor the tip effectively in accordance with Regulation no. 20814 on solid-waste control;

(v) 1/8 to the Government for encouraging the spread of this type of illegal dwelling by granting an amnesty on a number of occasions and property titles to the occupants.

23. On 21 May 1993 the public prosecutor declined jurisdiction *ratione personae* and referred the case to the Governor of Istanbul, considering that it fell within the Prosecution of Civil Servants Act, the application of which was a matter for the administrative council of the province of Istanbul ("the administrative council"). The public prosecutor stated, in his order, that in respect of Istanbul City Council and Ümraniye District Council, the applicable provisions were Articles 230 and 455 § 2 of the Criminal Code.

On 27 May 1993, when the investigative department had completed the preliminary inquiry, the public prosecutor's file was transmitted to the Ministry.

### 3. *The outcome of the administrative inquiry*

24. On 27 May 1993, having regard to the conclusions of its own inquiry, the investigative department sought authorisation from the Ministry to commence a criminal investigation in respect of the two mayors implicated in the case.

25. The day after that request was made Ümraniye District Council made the following announcement to the press:

"The sole waste-collection site on the Anatolian side stood in the middle of our district of Ümraniye like an object of silent horror. It has broken its silence and caused death. We knew it and were expecting it. As a district council, we had been hammering at all possible doors for four years to have this waste-collection site removed. We were met with indifference by Istanbul City Council. It abandoned the decontamination works ... after laying two spades of concrete at the inauguration. The ministries and the Government were aware of the facts, but failed to take much notice. We had submitted the matter to the courts and they had found in our favour, but the judicial machinery could not be put into action. ... We are now faced with a responsibility and will all account for this to the inhabitants of Ümraniye..."

26. The authorisation sought by the investigative department was granted on 17 June 1993 and a chief inspector from the Ministry ("the chief inspector") was accordingly put in charge of the case.

In the light of the investigation file compiled in the present case, the chief inspector took down Mr Sözen and Mr Öktem's defence. The latter stated, among other things, that in December 1989 his district council had begun decontamination works in the Hekimbaşı slum area, but that these had been suspended at the request of two inhabitants of the area (see paragraph 10 above).

27. The chief inspector finalised his report on 9 July 1993. It confirmed the conclusions reached by all the experts instructed hitherto and took

account of all the evidence gathered by the public prosecutor. It also mentioned two other scientific opinions sent to the Istanbul Governor's Office in May 1993, one by the Ministry of the Environment and the other by a professor of civil engineering at Boğaziçi University. These two opinions confirmed that the fatal landslide had been caused by the methane explosion. The report also indicated that on 4 May 1993 the inspection department had requested the city council to inform it of the measures actually taken in the light of the expert report of 7 May 1991, and it reproduced Mr Sözen's reply:

“Our city council has both taken the measures necessary to ensure that the old sites can be used in the least harmful way possible until the end of 1993 and completed all the preparatory steps for the construction of one of the biggest and most modern installations ... ever undertaken in our country. We are also installing a temporary waste-collection site satisfying the requisite conditions. Alongside that, rehabilitation works are continuing at former sites [which have run their course]. In short, over the past three years our city council has been studying the problem of waste very seriously... [and], currently, the works are continuing...”

28. The chief inspector concluded, lastly, that the death of twenty-six people and the injuries to eleven others (figures available at the material time) on 28 April 1993 had been caused by the two mayors' failure to take appropriate steps in the exercise of their duties and that they should account for their negligence under Article 230 of the Criminal Code. In spite of, *inter alia*, the expert report and the recommendation of the Environment Office, they had knowingly breached their respective duties: Mr Öktem because he had failed to comply with his obligation to order the destruction of the illegal huts situated around the rubbish tip, as he was empowered to do under section 18 of Law no. 775, and Mr Sözen because he had refused to comply with the above-mentioned recommendation, had failed to rehabilitate the rubbish tip or order its closure, and had not complied with any of the provisions of section 10 of Law no. 3030, which required him to order the destruction of the slum dwellings in question, if necessary by his own means.

#### *4. Allocation of a subsidised dwelling to the Öneriyıldız family*

29. In the meantime, the Department of Housing and Rudimentary Dwellings asked the applicant to attend its offices, informing him that, by an order (no. 1739) of 25 May 1993, the city council had allocated him a flat in the subsidised housing complex of Çobançeşme (Eyüp, Alibeyköy). On 18 June 1993 the applicant signed for possession of flat no. 7 in building C-1 of that complex. That transaction was officialised by an order (no. 3927) of 17 September 1993 of the city council. On 13 November 1993 the applicant signed a notarised declaration in lieu of a contract stipulating that the flat in question had been “sold” to him for 125,000,000 Turkish liras (TRL), a quarter of which was payable immediately and the remainder in

monthly instalments of TRL 732,844. The applicant paid the first monthly instalment on 9 November 1993. Since then he has been living in the flat in question.

### 5. *The criminal proceedings*

30. In an order of 15 July 1993, the administrative council decided, by a majority, on the basis of the chief inspector's report, to institute proceedings against Mr Sözen and Mr Öktem for breach of Article 230 of the Criminal Code.

Mr Sözen and Mr Öktem appealed against that decision to the Supreme Administrative Court, which dismissed their appeal on 18 January 1995. The case file was consequently sent back to the public prosecutor, who, on 30 March 1995, committed both mayors for trial in the Fifth Division of the Istanbul Criminal Court ("the Division").

31. The proceedings began before the Division on 29 May 1995. At the hearing Mr Sözen stated, among other things, that he could not be expected to have complied with duties which were not incumbent on him or be held solely responsible for a situation which had endured since 1970. Nor could he be blamed for not having rehabilitated the Ümraniye tip when none of the 2,000 sites in Turkey had been rehabilitated; in that connection, relying on a number of measures which had nonetheless been taken by the city council, he argued that the tip could not have been fully redeveloped as long as waste continued to be dumped on it. Lastly, he submitted: "the elements of the offence of negligence in the exercise of duties have not been made out because I did not act with the intention of showing myself to be negligent (*sic*) and because no causal link can be established" between the incident and any negligence on his part.

Mr Öktem submitted that the groups of dwellings which had been buried dated back to before his election on 26 March 1989 and that since then he had never allowed slum areas to develop. Accusing the Istanbul City Council and Governor's Office of indifference to the problems, Mr Öktem alleged that responsibility for preventing the construction of illegal dwellings lay with the forestry officials and that, in any event, his district council lacked the staff necessary to undertake the destruction of these huts.

32. In a judgment of 4 April 1996, the Division found the two mayors guilty as charged, considering their defence to be unfounded.

In reaching that conclusion, the judges held as follows:

"... although they were aware of the [experts'] report, the two defendants took no proper preventive measures. Just as a person who shoots into a crowd should know that people will die and, accordingly, cannot then claim to have acted without intending to kill, the defendants cannot allege in the present case that they did not intend to neglect their duties. They do not bear the entire responsibility, however. ... They were negligent, as were others. In the instant case the main error consists in building dwellings beneath a refuse tip situated on a hillside and it is the inhabitants of these slum dwellings who are responsible. They should have had regard to the risk that

the mountain of rubbish would one day collapse on their heads and that they would suffer damage. They should not have built dwellings fifty metres from the tip. They have paid for that lack of foresight with their lives...”

33. The Division sentenced Mr Sözen and Mr Öktem to the minimum prison sentence provided for in Article 230 of the Criminal Code, namely three months, and to fines of TRL 160,000. Under section 4(1) of Law no. 647, the Division commuted the prison sentences to fines, so the penalties ultimately imposed were fines of TRL 610,000. Satisfied that the defendants would not reoffend, the Division also decided to suspend enforcement of the penalties in accordance with section 6 of the same Law.

34. Both mayors appealed on points of law. They submitted, *inter alia*, that the Division had exceeded the scope of Article 230 of the Criminal Code in assessing the facts, and had treated the case as one of unintentional homicide within the meaning of Article 455 of that Code.

In a judgment of 10 November 1997 the Court of Cassation upheld the Division's judgment.

35. The applicant has apparently never been informed of those proceedings or given evidence to any of the administrative bodies of investigation or the criminal courts; nor does any court decision appear to have been served on him.

#### *6. The applicant's administrative action*

36. On 3 September 1993 the applicant sued the mayors of Ümraniye and Istanbul and the Ministries of the Interior and the Environment for both pecuniary and non-pecuniary damages. The amount claimed by the applicant was broken down as follows: TRL 150,000,000 in damages for the loss of his dwelling and household goods; TRL 2,550,000,000, 10,000,000, 15,000,000 and 20,000,000 in compensation for the loss of financial support incurred by himself and his three surviving sons, Hüsameddin, Aydın and Halef respectively; and TRL 900,000,000 in non-pecuniary damages for himself and TRL 300,000,000 for each of his three sons.

37. In letters of 16 September and 2 November 1993 respectively, the mayor of Ümraniye and the Minister for the Environment rejected the applicant's claims. The other authorities did not reply.

38. The applicant then sued the four authorities for damages in his own name and on behalf of his three children in the Istanbul Administrative Court (“the court”). He complained that their negligent omissions had resulted in the death of his relatives and the destruction of his house and household goods, and claimed the aforementioned amounts again.

On 4 January 1994 the applicant was granted legal aid.

39. The court gave judgment on 30 November 1995. Basing its decision on the experts' report of 18 May 1993 (see paragraph 22 above), it found a direct causal link between the accident of 28 April 1993 and the contributory negligence of the four authorities in question. Accordingly, it

ordered them to pay the applicant and his children TRL 100,000,000 in non-pecuniary damages and TRL 10,000,000 in pecuniary damages (at the material time those sums amounted to approximately 2,077 and 208 euros respectively).

The latter amount, determined on an equitable basis, was limited to the destruction of household goods, save the domestic electrical appliances, which the applicant was not supposed to own. On that point the court appears to have confined its assessment to the authorities' submissions that "these dwellings had neither water nor electricity". The court dismissed the remainder of the claim; in its view, the applicant could not claim to have been deprived of financial support because he had been partly responsible for the damage incurred and the victims had been young children or housewives who had not been in paid employment such as to contribute to the family's living expenses. The court held that it also ill befitted the applicant to claim compensation for the destruction of his slum dwelling given that, following the accident, he had been allocated a subsidised flat and that, even if the Ümraniye District Council had not exercised its power to destroy the dwelling, nothing could have prevented it from doing so at any time.

The court decided, lastly, not to apply default interest to the damages awarded for non-pecuniary damage.

40. The parties appealed against that judgment to the Supreme Administrative Court, which dismissed their appeal in a judgment of 21 April 1998.

An application for rectification of the judgment, lodged by the City Council, was not successful either, whereupon the judgment became final and was served on the applicant on 10 August 1998.

The damages in question have still not been paid to date.

41. The Ümraniye tip no longer exists today. The local council had it covered with earth and installed air ducts on it. Furthermore, land-use plans are currently being prepared for the areas of Hekimbaşı and Kazım Karabekir. The city council has planted trees on a large area of the former site of the tip and has had sports grounds laid. Two monuments have also been erected there in memory of the victims of the accident of 28 April 1993.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

### A. Turkish criminal law

42. The relevant provisions of the Criminal Code read as follows:

**Article 230 §§ 1 and 3**

“Any agent of the State who, in the exercise of his public duties ... acts negligently and delays or who, for no valid reason, refuses to comply with the lawful orders ... of his superiors shall be sentenced to a term of imprisonment of between three months and one year and to a fine of between 6,000 and 30,000 Turkish liras. ...

In every ... case, if third parties have suffered any damage on account of the negligence or delay by the civil servant in question, the latter shall also be required to compensate for such damage.”

**Article 455 § 1 and 2**

“Anyone who, through carelessness, negligence or inexperience in his profession or craft, or through non-compliance with laws, orders or instructions, causes the death of another shall be sentenced to a term of imprisonment of between two and five years and to a fine of between 20,000 and 150,000 Turkish liras.

If the act has caused the death of more than one person or has been the cause of the death of one person and the injuries of one or more others ... the perpetrator shall be sentenced to a term of imprisonment of between four and ten years and to a heavy fine of a minimum of 60,000 Turkish liras.”

**Article 29 § 8**

“The judge has full discretion to determine the principal sentence, which can vary between a minimum and maximum, taking account of factors such as the circumstances in which the offence was committed, the means used to commit it, the importance and seriousness of the offence, the time and place at which it was committed, the various special features of the offence, the seriousness of the damage caused and the risk [incurred], the degree of [criminal] intent ... the reasons and motives for the offence, the aim, the criminal record, the personal and social status of the perpetrator and his conduct following the act [committed]. Even where the minimum penalty is imposed, the reasons for the choice of sentence must be mentioned in the judgment.”

**Article 59**

“If the court considers that, other than the statutory mitigating circumstances, there are other circumstances favourable to reducing the penalty [imposed] on the perpetrator, capital punishment shall be commuted to life imprisonment and life imprisonment to a term of imprisonment of thirty years.

Other penalties shall be reduced by a maximum of one-sixth.”

43. Sections 4(1) and (6) of Law no. 647 on the Execution of Sentences read as follows:

**Section 4(1)**

“Apart from imprisonment, short custodial sentences may, having regard to the personality and state of the defendant and to the circumstances in which the offence was committed, be commuted by the court:

(1) to a heavy fine ... of 5,000 to 10,000 Turkish liras per day; ...”

**Section 6(1)**

“Anyone who has never been sentenced ... to a penalty other than a fine and is sentenced to ... a fine ... and/or a [maximum] term of one year's imprisonment may have his sentence suspended if the court is satisfied that [the offender], having regard to his criminal record and criminal tendencies, will not reoffend if his sentence is thus suspended ...”

44. Under the Turkish Code of Criminal Procedure a public prosecutor who – in any way whatsoever – is informed of a situation which gives rise to a suspicion that an offence has been committed must investigate the facts with a view to deciding whether or not criminal proceedings should be brought (Article 153). However, if the suspected offender is a civil servant and if the offence was committed during the performance of his duties, the preliminary investigation of the case is governed by the Prosecution of Civil Servants Act of 1914, which restricts the public prosecutor's jurisdiction *ratione personae* with regard to that stage of the proceedings. In such cases it is for the relevant local administrative council (for the district or province, depending on the suspect's status) to conduct the preliminary investigation and, consequently, decide whether to prosecute.

An appeal to the Supreme Administrative Court lies against a decision of the council. If a decision not to prosecute is taken, the case is automatically referred to that court.

**B. Administrative and civil remedies against agents of the State***1. Administrative proceedings*

45. With regard to civil and administrative liability arising out of criminal offences, section 13 of Law no. 2577 on administrative procedure 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. If this claim is rejected in whole or in part or if no reply is received within sixty days, the victim may bring administrative proceedings.

46. With regard to the status and organisation of the administrative courts, the status of the court judges and the organisation of the courts are governed by Law no. 2576 of 6 January 1982 on the powers and

constitution of the administrative courts and by Law no. 2575 on the Supreme Administrative Court. Under these Laws, it is in theory the law faculties which recruit judges to the administrative-court benches. Civil servants who are not trained lawyers but have graduated from a law faculty can be recruited on the basis of relevant experience.

Under the Turkish Constitution all administrative judges enjoy, while in service, constitutional safeguards identical to those of civilian judges (Article 140); they may not be removed from office or made to retire early without their consent (Article 139); they sit as individuals (Article 140); and their independence is enshrined in the Constitution, which prohibits any public authority from giving them instructions concerning their judicial activities or influencing them in the performance of their duties (Article 138 § 2).

## *2. Civil proceedings*

47. Under the Code of Obligations, anyone who suffers damage as a result of an illegal act, be it a crime or a tort, may bring an action for damages for pecuniary loss (Articles 41-46) and non-pecuniary loss (Article 47). The civil courts are not bound by either the findings or the verdict of the criminal courts as to a defendant's guilt (Article 53).

However, under section 13 of Law no. 657 on State employees, anyone who has sustained loss as a result of an act done in the performance of duties governed by public law may, in theory, only bring an action against the public authority by whom the civil servant concerned is employed and not directly against the civil servant (see Article 129 § 5 of the Constitution and Articles 55 and 100 of the Code of Obligations). That is not, however, an absolute rule. Where an act is found to be tortious or criminal and, consequently, is no longer an “administrative” act or deed, the civil courts may allow a claim for damages to be made against the official concerned, without prejudice to the victim's right to bring an action against the authority on the basis of its joint liability as the official's employer (Article 50 of the Code of Obligations).

## **C. Enforcement of court decisions by the authorities**

48. Article 138 (4) of the Constitution of 1982 provides:

“The bodies of executive and legislative power and the authorities must comply with court decisions; they cannot in any circumstances modify court decisions or defer enforcement thereof.”

Article 28 § 2 of the Code of Administrative Procedure provides:

“2. Decisions determining appeals on matters of both law and fact and concerning a specific amount shall be enforced ... in accordance with the provisions of the ordinary law.”



Under section 82(1) of Law no. 2004 on enforcement and bankruptcies, State property and property which, according to the appropriate law, is not subject to seizure cannot be seized. Section 19(7) of Law no. 1580 of 3 April 1930 on municipalities provides that municipal property can be seized only if it is not being used for a public service.

According to Turkish legal theory in this field, the effect of the above provisions is that if the authorities do not themselves comply with a final and enforceable court decision ordering compensation, the interested party can bring enforcement proceedings under the ordinary law. In that event the appropriate authority has power to impose on the administration the measures provided for by Law no. 2004, although seizure remains exceptional.

#### **D. Regulations governing illegal buildings and sites for the storage of household waste**

##### *1. Slums*

49. The information and documents in the Court's possession show that, since 1960, when inhabitants of underprivileged areas started migrating in their masses to the larger rich provinces, Turkey has been confronted with the problem of slums, consisting in most cases of permanent structures to which further floors were soon added. It would appear that currently more than one-third of the population live in such dwellings. Researchers who have looked into the problem maintain that these built-up areas have not sprung up merely as a result of deficiencies in urban planning or shortcomings on the part of the municipal police. They point to the existence of more than eighteen amnesty laws which have been passed over the years in order to regularise the slum areas and, they believe, satisfy potential voters living in these dwellings.

50. Regarding the fight against slum development, the following are the main provisions of Turkish law:

Section 18 of Law no. 775 of 20 July 1966 provides that, after the Law enters into force, any illegal building, whether it is in the process of being built or is inhabited, must be immediately destroyed without any prior decision being necessary. Implementation of these measures is the responsibility of the administrative authorities, which may have recourse to the security forces and other means available to the State. With regard to dwellings built before the Law entered into force, section 21 provides that, under certain conditions, slum inhabitants can purchase the land they occupy and take out low-interest loans in order to finance the construction of buildings which conform to the regulations and urban-development plans. The built-up areas to which the provisions of section 21 apply are

declared to be “slum rehabilitation and clearance zones” and are treated in accordance with a plan of action.

Under Law no. 1990 of 6 May 1976, amending Law no. 775, illegal constructions built before 1 November 1976 were also considered to be covered by the above-mentioned section 21. Law no. 2981 of 24 February 1984 concerning buildings which do not conform to the slum and town-planning legislation also provided for measures to be taken for the conservation, regularisation, rehabilitation and destruction of illegal buildings erected prior to that date.

Lastly, Law no. 4706 was passed on 29 June 2001. This Law, which is designed to strengthen the Turkish economy, lays down the terms and conditions of sale to third parties of real estate belonging to the Treasury.

## *2. Sites for the storage of household and industrial refuse*

51. Pursuant to section 6-E, paragraph (j) of Law no. 3030 and Regulation 22 of the Public Administration Regulations implementing that Law, the city councils have a duty to designate waste sites for the deposit of household and industrial waste and to install or have installed systems for recycling and destroying the waste from such sites. Pursuant to Articles 5 and 22 of Regulation no. 20814 of 14 March 1991 on solid-waste control, district councils are responsible for organising the use of waste-collection sites and implementing all measures necessary to prevent rubbish tips from damaging the environment and the health of man and animals. Accordingly, no dwelling can be built at a distance of less than 1,000 metres from a rubbish tip. Regulation 31 empowers city councils to issue permits for the operation of district waste-collection sites.

52. The general information which the Court has been able to procure as to the risk of a methane explosion at such sites can be summarised as follows: methane (CH<sub>4</sub>) and carbon dioxide (CO<sub>2</sub>) are the two main products of methanogenesis, which is the final and longest stage of the anaerobic process. These substances are generated, *inter alia*, by the biological and chemical decomposition of waste. The risks of explosion and fire are mainly due to the large proportion of methane in the bio-gas. The risk of an explosion occurs when there is between 5% and 15% of CH<sub>4</sub> in the air. Above 15% methane will catch fire, but not explode.

## **E. The work and conventions of the Council of Europe**

53. Concerning the various texts adopted by the Council of Europe in the field of the environment and the industrial activities of the public authorities, mention should be made, among the work of the Parliamentary Assembly, of Resolution 587 (1975) on problems connected with the disposal of urban and industrial waste, Resolution 1087 (1996) on the consequences of the Chernobyl disaster, and Recommendation 1225 (1993)

on the management, treatment, recycling and marketing of waste and, among the work of the Committee of Ministers, Recommendation R (96) 12 on the distribution of powers and responsibilities between central authorities and local and regional authorities with regard to the environment.

Mention should also be made of the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (ETS no. 150 – Lugano, 21 June 1993) and the Convention on the Protection of the Environment through Criminal Law (ETS no. 172 – Strasbourg, 4 November 1998), which have to date been signed by nine and thirteen States respectively.

54. It can be seen from these documents that primary responsibility for the treatment of urban waste falls on local authorities, which the Governments are obliged to provide with financial and technical assistance. The operation by the public authorities of a site for the storage of waste is described as a “dangerous activity” and a “death” resulting from the deposit of waste on a site for the permanent deposit of waste is considered to be “damage” incurring the liability of the public authorities (see, *inter alia*, the Lugano Convention, Articles 2 §§ 1 (c)-(d) and 7 (a)-(b)).

55. In that connection the Strasbourg Convention calls on the Parties to adopt such appropriate measures as may be necessary to establish as criminal offences the unlawful storage of hazardous waste which causes or is likely to cause death or serious injury to any person, specifying that this offence can also be committed with “negligence” (Articles 2 to 4). Article 6 of that Convention requires further that such appropriate measures as may be necessary also be taken to make those offences punishable by criminal sanctions which take into account the serious nature of those offences and include imprisonment of the perpetrators.

56. With regard to such hazardous activities, public access to clear and full information is deemed to be a basic human right, it being the case that under, *inter alia*, Resolution 1087 (1996) cited above, that right must not be deemed to be limited to the risks associated with the use of nuclear energy in the civil sector.

## THE LAW

### I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

57. The applicant complained first that the death of nine members of his family in the accident of 28 April 1993 and the flaws in the relevant proceedings constituted a violation of Article 2 of the Convention, the relevant part of which reads:

“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. ...”

58. The Government disputed that submission.

## **A. Applicability of Article 2 of the Convention**

### *1. Arguments of those appearing before the Court*

59. Drawing attention to the meaning of the verb “inflict” in Article 2 of the Convention, the Government submitted that the concept of a positive obligation deriving from that Article could not be construed as imposing on States a duty to protect the life of others in circumstances, such as those of the present case, giving rise to “allegations of negligence”.

60. In any event, they submitted that the operation of an installation for the storage of household waste, which involved only a very slight risk, should not be regarded as the exercise of a potentially dangerous activity or situation, comparable to those pertaining to the spheres of public health and nuclear or industrial installations.

61. The applicant replied, *inter alia*, that the death of his relatives had been caused by the overt negligence of the relevant authorities and therefore fell within the scope of Article 2 of the Convention.

### *2. The Court's assessment*

62. The Court reiterates that the first sentence of Article 2 § 1 of the Convention enjoins the State not only to refrain from the intentional and unlawful taking of life, but also guarantees the right to life in general terms and, in certain well-defined circumstances, imposes an obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction (see, *inter alia*, *L.C.B. v. the United Kingdom*, judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-III, p. 1403, § 36; *Calvelli and Ciglio v. Italy*, [GC], no. 32967/96, § 48, ECHR 2002-I; *Eriksson v. Italy* (dec.), no. 37900, 26 October 1999, unreported; and *Leray and Others v. France* (dec.), no. 4461/98, 16 January 2001, unreported).

63. Although not every presumed threat to life obliges the authorities, under the Convention, to take concrete measures to avoid that risk, the position is different, *inter alia*, if it is established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an individual or individuals and that they failed to take measures within the scope of their powers which might have been expected to avoid that risk (see, *mutatis mutandis*, *Osman v. the United Kingdom*, judgment of 28 October 1998, *Reports* 1998-VIII, p. 3159, § 116).

64. In the light of those principles, the Court must first point out that a violation of the right to life can be envisaged in relation to environmental issues relating not only to the spheres mentioned by the Government (see paragraph 60 above; see, among other authorities, the examples provided by the above-cited *L.C.B.* judgment; *Guerra and Others v. Italy*, judgment of 19 February 1998, *Reports* 1998-I, and *Calvelli and Ciglio*, cited above; see also, in respect of cases examined under Article 8 of the Convention, *Botta v. Italy*, judgment of 24 February 1998, *Reports* 1998-I, p. 422, §§ 33 and 34), but also to other areas liable to give rise to a serious risk for life or various aspects of the right to life.

In that connection it should be reiterated that the recent development of European standards in this respect merely confirms an increased awareness of the duties incumbent on the national public authorities in the environmental field, particularly with regard to installations for the storage of household waste and the risks inherent in operating them (see paragraphs 53 and 54 above).

65. In the Court's view, the positive obligation which derives from Article 2 (paragraphs 62 and 63) is indisputably also applicable to the sphere of public activities in question here; contrary to the Government's assertions (see paragraph 59 above), no distinction needs to be drawn between acts, omissions and "negligence" by the national authorities when examining whether they have complied with that obligation. Any other approach would be incompatible with the object and purpose of the Convention as an instrument for the protection of individual human beings which require that its provisions be interpreted and applied so as to make its safeguards practical and effective (see, for example, *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, Series A no. 324, pp. 45-46, §§ 146-47).

66. The Court accordingly concludes that Article 2 is applicable in the instant case.

## **B. Compliance with Article 2 of the Convention**

### *1. Responsibility for the death of the applicant's relatives*

67. In the instant case the Court's first task is to determine whether substantial grounds have been shown for believing that the respondent State did not comply with its duty to take all necessary measures to prevent lives from being unnecessarily exposed to danger and, ultimately, from being lost.

To that end it will examine the parties' submissions and the evidence in the case before it under two heads: the implementation of preventive regulations (see, for example, *Leray and Others*, and *Calvelli and Ciglio*, § 49, cited above) and respect for the public's right to information, as

established by the case-law of the Convention (*Guerra and Others*, cited above, p. 228, § 60).

**(a) The implementation of preventive measures in respect of the Ümraniye installation for the storage of waste and the neighbouring slum areas**

*(i) Arguments of those appearing before the Court*

68. The Government considered unfounded the allegations that the State had not fulfilled its obligation to protect the lives of the members of the Öneriyıldız family. They submitted that the Turkish authorities had always gone to great lengths to implement all measures possible to fight against the development of slums both in Ümraniye and throughout the country. The city council had, *inter alia*, undertaken one of the most ambitious rehabilitation projects in Turkey in respect of waste storage, and in early 1993 had raised funds for state-subsidised housing in order to rehouse the inhabitants of these slums.

69. With regard to the local district council, at the material time it had employed eight members of the municipal police force to carry out the lawful destruction of dwellings situated in the area surrounding the rubbish tip; their attempts to carry out their orders had been met with violent resistance on the part of the inhabitants, however. The difficulties had not stopped there, moreover. The Government cited as an example a case (case no. 89/1088) concerning an action to establish title to land which had been brought against the Ümraniye District Council by inhabitants of the slum seeking to halt rehabilitation work in the area which had commenced in December 1989.

70. Accordingly, the Government submitted, the applicant could not claim to have been in any way encouraged to set up home near the rubbish tip, in an area lacking any installations and public services, moreover.

71. At the hearing the applicant submitted that the problem of slums, in which one-third of Turkish citizens currently lived, had arisen as a result of the waves of immigration knowingly encouraged for political ends by the successive amnesty laws passed to legalise these dwellings. It therefore ill-befitted the Government, he argued, to declare now that they had done anything at all to prevent this problem from occurring.

72. In that connection the applicant rebutted the Government's argument that these areas were not equipped with any public services. Relying on supporting documents drawn up on behalf of two other inhabitants of the slum, he pointed out that the authorities concerned had not only provided the region with all the essential installations and services, but had also levied a land tax on the inhabitants.

*(ii) The Court's assessment*

73. The Court notes the existence of safety regulations in both areas which are at the heart of the present dispute: the operation of the two installations for the storage of household waste (see paragraph 51 above) and the rehabilitation and clearance of slum areas (see paragraph 50 above). It nonetheless remains to be determined whether, in the instant case, the national authorities can be deemed to have complied with those regulations.

74. The Court notes in that connection that an expert report drawn up on 7 May 1991 at the request of the Ümraniye District Council lists in detail the major deficiencies found at the rubbish tip in question at the material time. It also points to the serious dangers which the rubbish tip represented for the health and life of the inhabitants of the neighbouring slum quarters and explicitly draws attention, among other things, to the risk of a methane explosion (see paragraph 12 above).

The conclusions of this report suggest that long before the accident in question occurred, the Ümraniye rubbish tip had failed to conform to the technical standards in several respects because the local and ministerial authorities had clearly failed to take the measures required by the relevant regulations (see paragraphs 22 and 51 above).

75. The Government referred to the decontamination works commenced by the Ümraniye District Council in December 1989 but halted by the inhabitants of the slums themselves (see paragraph 69 above). On that point the Court confines itself to pointing out that the cessation of the works in question was ordered by a court (see paragraph 11 above), that is, an organ of the State, whose decision can only be deemed to have contributed to prolonging the deplorable situation with regard to the rubbish tip. Furthermore, the applicant was not involved in the proceedings before that court (see paragraph 10 above) and, in any case, the plaintiffs' claims were dismissed by a final decision of 22 October 1992 delivered more than six months before the accident occurred. It would appear that nobody had attempted to resume the works in question in the meantime.

76. At the hearing the Government also pointed out that the above-mentioned expert report of 7 May 1991, which had never been given the status of a definitive judicial finding, could not be deemed to have categorically confirmed the existence of a "real and immediate danger"; indeed, it had devoted only a single very short paragraph to the risks resulting from the accumulation of methane, without mentioning any risk of a "landslide".

77. These arguments do not satisfy the Court for the following reasons.

It finds, like the Government, that the report in question did indeed provoke a fierce controversy between the Ümraniye District Council and Istanbul City Council. According to the evidence on the file, the city council first chose to thwart the implementation of the report on the ground of a mere procedural flaw, without succeeding in scientifically refuting its

conclusions, which were disturbing to say the least. On the pretext of having started its own rehabilitative works (see paragraph 27 above), it did not comply with the injunction of the Prime Minister's Environmental Office (see paragraph 14 above) which, having been advised of the report, had ordered the technical shortcomings to be remedied.

When the mayor of Ümraniye finally attempted to obtain a decision from the judicial authorities to close the rubbish tip, the mayor of Istanbul again obstructed the proceedings by opposing that application, again on the ground that major redevelopment plans were currently under way (see paragraph 15 above).

78. In the Court's opinion, the city council's fierce opposition to the expert report of 7 May 1991 does not in any way affect the significance of that report's conclusions, especially as they have never been invalidated by any judicial decision (see paragraph 16 above).

79. In that connection the lack of any express reference in the report to the risk of a "landslide" is inconsequential because, in the opinion of the various experts consulted by the investigating authorities (see paragraphs 18, 22 and 27 above), the sole cause of that phenomenon was none other than the explosion.

Similarly, it is of little significance that the report devoted only one paragraph to the risk of a methane explosion. Indeed, having regard to the evidence on the file and the general information available to it (see paragraph 53 above), the Court has been able to satisfy itself that, in respect of a field as technical as that of the operation of rubbish tips, it was impossible for the administrative and municipal departments responsible for monitoring the relevant installations not to have known of the risks inherent in methanogenesis or of the necessary preventive measures, particularly as there were specific regulations in the area which, moreover, were not in any way complied with.

In the Court's opinion, the expert report merely highlighted a situation of which the municipal authorities should have been aware and which they should have been able to master.

80. In the light of these observations, the Court does not find it necessary to rule on the significance of the city council's planned rehabilitative works, which had still not been effected at the material time (see paragraphs 27 and 68 above), or to examine in detail the range of measures allegedly taken to prevent the slums from spreading (see paragraphs 49, 50 and 68).

Indeed, although the Court is prepared to accept that the national authorities never encouraged the applicant to set up home in the vicinity of a rubbish tip (see paragraph 70 above), neither did they, in all probability, attempt to discourage him from doing so. Reference merely has to be made to the expert report of 18 May 1993 (see paragraph 22 above) in this regard, the conclusions of which have never been called into question by the



domestic courts and in which the Ümraniye District Council and the then Government were blamed for wrongfully “provoking” the development of slums.

81. Accordingly, the Court does not see any reason to depart from the domestic courts' findings of fact with regard to the extent of the authorities' negligent omissions, at various levels, as regards the hazards posed by the Ümraniye rubbish tip for the citizens living in the area (see, *mutatis mutandis*, *Tanlı v. Turkey*, no. 26129/95, § 110, ECHR 2001-III, and *Klass v. Germany*, judgment of 22 September 1993, Series A no. 269, p. 17, §§ 29-30). It observes that the factors referred to in the various expert reports attached to the file, particularly the one of 7 May 1991, suffice to establish a causal link between, on the one hand, those negligent omissions and, on the other, the occurrence of the accident on 28 April 1993 and the ensuing loss of lives (see, *mutatis mutandis*, *L.C.B.*, cited above, p. 1404, § 39).

Having regard to the latter finding, the Court must next determine whether the Turkish authorities at least endeavoured to respect the public's right to information.

**(b) Respect for the public's right to information**

*(i) Arguments of those appearing before the Court*

82. On this subject the Government referred to the numerous seminars, meetings and press conferences organised by the Ümraniye District Council in order to raise public awareness of the environmental problems affecting the district. In their submission, the applicant could not claim to have been kept in the dark: he knowingly chose to set up home in the vicinity of a rubbish tip without even attempting to enquire of the national authorities about the health hazards and risks of a landslide to which he was knowingly exposing his relatives. He could accordingly be considered to have accepted the consequences of his own choice.

83. The applicant alleged that he had no other possibility of meeting his accommodation needs than to live in a slum. He submitted further that he could not have known of the potential dangers for himself and his family, dangers of which the relevant authorities had been aware from the outset.

*(ii) The Court's assessment*

84. The Court reiterates that, in the *Guerra and Others* case, it held that the State had infringed Article 8 of the Convention for failing to communicate to the applicants essential information “that would have enabled them to assess the risks they and their families might run if they continued to live at Manfredonia, a town particularly exposed to danger in the event of an accident at the factory” (see the judgment cited above, *ibid.*; see, also, paragraph 56 above).

The Court does not see any aspect in the circumstances of the present case distinguishing it from the circumstances of *Guerra and Others*, taking into account that the reasoning in that judgment is applicable *a fortiori* in respect of Article 2 and, moreover, fully applies to the present case.

85. The Court notes at the outset that the file is silent as to the many seminars, meetings and press conferences purportedly organised by the Ümraniye District Council. Moreover, it points out that, contrary to the Government's assertions, the information about the risk of a methane explosion cannot be deemed to have been directly available to the applicant. In truth, the ordinary citizen such as he could not have been expected to know of the specific risks inherent in the process of methanogenesis and of a possible landslide (see paragraphs 22, 52 and 82 above).

86. The information in question could not have been imparted to the public other than by action on the part of the administrative authorities which were in possession of that information, and the latter could not expect Mr Öneriyıldız to complain to them of the harmful effects of the environment in which he lived.

The fact that the applicant was in a position to assess some of the risks, particularly health risks, to his family's existence but failed to complain of those risks to the national authorities cannot absolve the authorities from the responsibility they incurred for letting the members of the Öneriyıldız family continue to expose themselves to real and imminent dangers which, even before the rubbish tip began to endanger life, already threatened the sphere of private life – within the meaning of Article 8 – encompassing physical integrity (see, among other authorities, *Niemietz v. Germany*, judgment of 16 December 1992, Series A no. 251-B, p. 33, § 29), or from failing to comply with their duty to impart information about those specific dangers, of which only they had knowledge, and which the applicant cannot knowingly have accepted at the cost of the death of his relatives.

**(c) The Court's conclusion with regard to this part**

87. The Court therefore arrives at the conclusion that in the present case the administrative authorities knew or ought to have known that the inhabitants of certain slum areas of Ümraniye were faced with a real and immediate risk both to their physical integrity and their lives on account of the deficiencies of the municipal rubbish tip. The authorities failed to remedy those deficiencies and cannot, moreover, be deemed to have done everything that could reasonably be expected of them within the scope of their powers under the regulations in force to prevent those risks materialising.

Furthermore, they failed to comply with their duty to inform the inhabitants of the Kazım Karabekir area of those risks, which might have enabled the applicant – without diverting State resources to an unrealistic degree – to assess the serious dangers for himself and his family in

continuing to live in the vicinity of the Hekimbaşı rubbish tip (see, *mutatis mutandis*, *L.C.B.*, cited above, p. 1404, §§ 40-41).

88. In these circumstances a violation of Article 2 of the Convention should be found under this head, unless the applicant's complaints can be considered to have been dealt with at domestic level by effective implementation of the relevant judicial machinery.

*2. Redress afforded by legal avenues: compliance with the requirements deriving from the procedural obligation inherent in Article 2*

89. It is the Court's task to determine how the courts should have reacted in the particular context of the instant case and to assess, in the light of the relevant principles of case-law, how the case was dealt with here.

**(a) Determination of how the courts should have reacted in the circumstances of the case**

90. The Court reiterates that the procedural obligation imposed on Contracting States under Article 2 of the Convention presupposes above all the setting-up of an efficient judicial system which, under certain circumstances, must include recourse to the criminal law (see, among other authorities, the above-mentioned cases of *Calvelli and Ciglio v. Italy*, §51, and *Demiray v. Turkey*, § 48), based on the implementation of investigations which are efficient and not arbitrary as to the assessment of the facts causing the death (*Leray and Others*, cited above). This obligation is based on the – more general – obligation under Article 13, and requires an “adequate and effective” domestic remedy in respect of the violation alleged allowing the appropriate national authority both to deal with the substance of an “arguable complaint” and to grant appropriate relief for the said violation.

91. The Court has held on several occasions that, with regard to the fundamental right to protection of life, Article 2 entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the death (see, among many other authorities, *Kaya v. Turkey*, judgment of 19 February 1998, *Reports* 1998-I, pp. 324 and 329-30, §§ 86 and 105-07) and the putting in place of effective criminal-law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions (*Kılıc v. Turkey*, no. 22492/93, § 62, ECHR 2000-III; *Mahmut Kaya v. Turkey*, no. 22535/93, § 85, ECHR 2000-III, and *Osman*, cited above, p. 3159, § 115; concerning Article 8, see *X. and Y. v. the Netherlands*, judgment of 26 March 1985, Series A no. 91, p. 13, § 27).

92. If the infringement of the right to life or to personal integrity is not caused intentionally, the positive obligation imposed by Article 2 to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy in every case. As stated in the *Calvelli and Ciglio* case, in the specific sphere of medical negligence, such obligation may for instance also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts (*Calvelli and Ciglio* *ibid*; see also, *mutatis mutandis*, *Powell v. the United Kingdom* (dec.), no. 45305/99, unreported).

93. However, having regard to the sector of public activities at the origin of the applicant's complaints (see paragraphs 51 and 64 above), to the number and status of the authorities found to have breached their duties, to the fact that the repercussions of the risk in question were likely to affect more than one individual (see paragraphs 22 and 81 above), and, lastly, to the tragic nature of the events which occurred in the instant case, the Court finds that the case of Mr Öneriyıldız bears no comparison with that of the applicants *Calvelli and Ciglio*.

It concludes from this that, in the circumstances of the present case, a domestic remedy which could merely result in an award of compensation cannot be considered to be a proper avenue of redress or one capable of discharging the respondent State of its obligation to set up a criminal-law mechanism commensurate with the requirements of Article 2 of the Convention (see, also, the information provided in paragraph 55 above).

94. Indeed, the Court notes that administrative and criminal proceedings were instituted against those responsible for the accident of 28 April 1993. The first resulted in an order against the latter to pay damages (see paragraph 39 above) and the second to a finding of guilt (see paragraph 33 above).

The Court must now determine whether those proceedings can be deemed to have been adequate and effective.

**(b) Adequacy and effectiveness of the legal remedies used**

*(i) Arguments of those appearing before the Court*

95. In the alternative, the Government submitted that they should be considered to have complied with all the procedural requirements under Article 2 of the Convention. They maintained that the applicant was not in a position to make any comment on the proceedings relating to his case: he had never expressly complained of "homicide" to the authorities or attempted to exercise his right of intervention in the criminal proceedings; neither had he applied for rectification of the Supreme Administrative Court's judgment or brought civil proceedings for compensation under the Turkish Code of Obligations.

96. The Government maintained that the authorities, on the other hand, had done everything in their power to compensate the applicant for the damage he had sustained. Firstly, only a few weeks after the accident, the authorities had provided the applicant with subsidised housing. Secondly, the administrative courts had established clearly and thoroughly the share of responsibility incumbent on the authorities, showing no indulgence towards them. Thirdly, the applicant had been awarded compensation; the reason why this had never been paid to him was that he had never claimed it.

97. Lastly, the criminal justice system had functioned very efficiently from the preliminary investigation up to the cassation proceedings: the mayors had been found guilty and given final sentences.

At the hearing the Government submitted, *inter alia*, that the penalties imposed on the mayors could not be considered to have been non-punitive since they had sufficed to ruin their political careers. The classification of an offence constituting a crime was a matter for the national authorities, so it was not the Court's task to assess for itself the circumstances which had led a domestic court to reach one decision rather than another, or to substitute for the national authorities' assessment a different assessment of what might be the best policy in this area.

98. The applicant, for his part, asserted, *inter alia*, that the investigation into the accident had dealt only with responsibility for negligent omission in the performance of public duties within the narrow confines of Article 230 of the Criminal Code. That had allowed the tribunals of fact to "keep up appearances" by sentencing the two mayors in question to ridiculously low fines, which they had not even had to pay.

At the hearing he also argued that, given the circumstances in which his relatives had died, the mayors should have been convicted of unintentional homicide. The applicant went on to submit that if he had been able to participate in the trial effectively he could have had some say in the criminal classification of the offence under Article 455 of the Criminal Code.

99. The applicant also maintained that the derisory compensation awarded by the Administrative Court reflected above all the contempt with which the economic realities of an underprivileged family were viewed. In his opinion, that compensation, which was still outstanding, could not afford him any proper satisfaction; nor could the subsidised housing, which he had had to buy.

*(ii) The Court's assessment*

100. In the light of the arguments submitted by the parties, the Court considers that it must first examine the criminal proceedings, and then the administrative proceedings for compensation, having regard to the possibility that all the remedies available under domestic law may, in certain circumstances, collectively satisfy the requirements of Article 2, even if none of them, taken alone, fully satisfies that provision.

(α) Criminal-law remedy

101. In the instant case the Court observes that, in a judgment of 4 April 1996, the Fifth Criminal Division of the Istanbul Criminal Court finally sentenced the two mayors in question to fines of 610,000 Turkish liras (TRL) (equivalent at the material time to approximately 9.70 euros (EUR)), suspended, for negligent omissions in the performance of their duties within the meaning of Article 230 of the Criminal Code (see paragraphs 33 and 42 above).

102. In that connection the Court notes at the outset that the grievance submitted in the criminal complaint lodged on 6 May 1993, which was undeniably an “arguable” one (see paragraphs 88 and 90 above), concerned the death of the applicant's relatives, and the accusation made by the applicant under that head was directed against the public authorities, should they be found guilty of negligent omission (see paragraph 21 above). The Government's assertion that this complaint contained no explicit allegation of unintentional homicide is therefore incorrect (see paragraph 95 above), since that issue related exclusively to the criminal classification of the facts, which first had to be established by the criminal authorities.

103. In truth, the finding is inescapable that the public prosecutor, without specifically basing his decision on the applicant's complaint, had indeed considered that the evidence he had gathered pointed to the offence of negligently causing death. In his decision of 21 May 1993 he thus requested that the mayors be charged with “negligence in the performance of their duties” under Article 230 of the Criminal Code and causing “the death of twenty-six persons, the disappearance of eleven others and injuries to three individuals, by their negligence and carelessness” under Article 455 of the same Code (see paragraph 23 above).

The Court notes that from the time the file compiled by the public prosecutor was transferred to the administrative bodies in charge of the investigation up until the close of the criminal proceedings, no one appears to have considered the life-endangering aspect of the offence.

104. This deficiency transpires first of all from the chief inspector's report of 9 July 1993 and the administrative council's committal order of 15 July 1993 (see paragraphs 27 and 30 above).

Although those bodies were instructed to examine the accident of 28 April 1993 which had caused the “loss of property and human lives” and to establish whether the accident had been caused by negligence attributable to the authorities concerned, they based their examination exclusively on the existence of a causal link between the “accident” and “the negligent omissions of the authorities”, without taking account of the link which also existed between those negligent omissions and “the loss of human lives” which occurred in the present case (see paragraphs 19 and 81 above).

The Court considers that this manner of presenting the situation in fact and in law weakened the substance of the investigation carried out hitherto

because it tended to restrict the subject of the trial to “negligence” as such (see paragraph 42 above).

105. Admittedly, once the case had been brought before the Fifth Criminal Division of the Istanbul Criminal Court, that court had full jurisdiction to judge freely the facts submitted to it. However, its judgment of 4 April 1996 (see paragraph 32 above) shows that the court, whose judgment was, moreover, upheld by the Court of Cassation (see paragraph 34 above), did not see any reason to depart from the reasoning followed in the committal order and left in abeyance any question of the possible responsibility of the authorities for the death of the applicant's nine relatives.

106. In these circumstances, the criminal proceedings in question, of which the sole purpose was to establish the possible liability of the authorities for “negligence in the performance of their duties” could not in itself be regarded as “adequate” with regard to the allegations of violations of the applicant's right to life (see paragraphs 21, 57 and 90 above).

107. The judgment of 4 April 1996 does, admittedly, contain passages in which the Criminal Court referred to the deaths which had occurred in the present case as a factual element. The mayors complained of this, moreover, before the Court of Cassation, criticising the judges for treating the case as if it had been one of unintentional homicide (see paragraph 34 above).

The Court considers, however, that it cannot be inferred from these passages alone that there was an acknowledgement, albeit tacit, of the mayors' responsibility for the deaths (see paragraph 32 above).

Indeed, the operative provisions of the judgment of 30 November 1995 are silent on this point and do not give any precise indication that the tribunal of fact had sufficient regard to the serious damage which had resulted from the accident of 28 April 1993. This is clear from, *inter alia*, the fact that the two mayors, who benefited from the application of rules giving discretionary power to the criminal authorities, were ultimately sentenced to fines of an amount equivalent to EUR 9.70, which were, moreover, suspended (see paragraphs 33, 42 and 43 above).

108. In that regard the Court does not agree with the Government that the applicant remained passive in the criminal proceedings in question.

It points out that, irrespective of the issue whether the applicant could or could not satisfy the national authorities that the mayors had been guilty of homicide (see paragraph 98 above), he had a right to be given the opportunity of participating effectively in the proceedings in question (see, *mutatis mutandis*, *Kaya*, cited above, pp. 330-31, § 107; *Güleç v. Turkey*, judgment of 27 July 1998, *Reports* 1998-IV, p. 1733, § 82; and *Oğur v. Turkey* [GC], no. 21594/93, § 92, ECHR 1999-III). There is nothing in the file to show that the judicial authorities gave him that opportunity: they did not, apparently, inform the applicant that criminal proceedings were being instituted or were under way (see paragraph 35 above).

In these circumstances, the Court cannot give any weight either to the argument that the applicant did not avail himself of his right to join the criminal proceedings as a civil party. Indeed, even supposing that the applicant had, in theory, had the possibility of doing so, there is nothing to show that he was in a position to provide fresh evidence capable of influencing the opinion of the criminal authorities, which had not even considered it worthwhile to hear evidence from the applicant in his capacity as complainant (see paragraph 35 above).

109. The Court considers that the criminal authorities' reluctance to examine the life-endangering aspect of the present case served merely to grant the mayors virtual impunity.

That amounts to a disregard for the State's obligation to deal with acts that cause death by strictly applying the criminal-law machinery set up under domestic law, involving above all a procedure designed to penalise effectively those responsible for such acts and, accordingly, to deter others from committing them.

110. The Court concludes, on the strength of these observations, that the criminal-law remedy, as used in the present case, cannot be regarded as adequate and effective: accordingly, it could not provide appropriate redress.

111. In the Court's view, such a deficiency in the application of the Turkish criminal-law machinery could not be remedied either by the alleged effects of the criminal trial on the political career of the mayors concerned or the offer of accommodation made to the applicant (see paragraphs 96 and 97 above).

(β) Administrative compensatory remedy

112. The Court reiterates that, in a judgment of 30 November 1995, the Istanbul Administrative Court had ordered the four administrative authorities to pay the applicant TRL 100,000,000 for non-pecuniary damage, which was the equivalent at the material time of approximately EUR 2,077 (see paragraph 39 above).

113. It points out first in that connection that compensation for the loss sustained by the applicant can only constitute adequate reparation if it is paid within a reasonable time (see *Guillemin v. France*, judgment of 21 February 1997, *Reports* 1997-I, p. 164, § 54) and also takes into account the seriousness of the damage sustained and the victim's personal circumstances.

114. With regard to the first point, the Court notes that on 3 September 1993 Mr Öneriyıldız had addressed an initial claim for compensation to the mayors of Ümraniye and Istanbul and to the Ministries of the Interior and the Environment, but was met with implicit or explicit rejections (see paragraphs 36 and 37 above).



The applicant therefore had to bring legal proceedings for compensation. Having regard to the undeniable importance of what was at stake in the proceedings in question for the applicant, who lost nine relatives (see, *mutatis mutandis*, *Silva Pontes v. Portugal*, judgment of 23 March 1994, Series A no. 286-A, p. 15, § 39), special diligence was called for in expediting the proceedings, particularly as all the evidence in the case had already been gathered during the criminal investigations conducted uninterruptedly from 29 April to 15 July 1993 (see paragraphs 19 and 30 above). Moreover, it is clear from the judgment delivered on 30 November 1995 that, in apportioning the share of responsibility of each authority concerned, the tribunal of fact merely confirmed the conclusions of an expert report drawn up at the request of the public prosecutor on that precise issue, which had been available since 18 May 1993 (see paragraph 22 above).

The applicant's right to compensation was not recognised until 10 August 1998, when the proceedings definitively ended with service of the judgment of rectification (see paragraph 40 above; *Poiss v. Austria*, judgment of 23 April 1987, Series A no. 117, p. 103, § 50), which was four years, eleven months and ten days after the applicant's first claims for compensation had been dismissed (see *Karakaya v. France*, judgment of 26 August 1994, Series A no. 289-B, p. 42, § 29).

115. Consequently, the Court cannot accept that the administrative courts did everything that could be expected of them to ensure that the applicant's right to compensation was recognised within a reasonable time.

116. The Court also notes that the applicant was ultimately awarded compensation of a clearly dubious amount, which, furthermore, has still not been paid to date.

In that connection the Court reiterates the principle of the rule of law, which is one of the fundamental principles of a democratic society and is a concept inherent in all the Articles of the Convention (see *Amuur v. France*, judgment of 25 June 1996, *Reports* 1996-III, pp. 850-51, § 50). It entails a duty on the part of the State or other public authority to comply with judicial orders or decisions against it. That duty is of even greater importance in the context of administrative proceedings since the administrative authorities form one element of a State subject to the rule of law and their interests accordingly coincide with the need for the proper administration of justice (see, *inter alia*, *Hornsby v. Greece*, judgment of 19 March 1997, *Reports* 1997-II, p. 511, § 41; *Antonetto v. Italy*, no. 15918/89, § 28, 20 July 2000; *Immobiliare Saffi v. Italy* [GC], no. 22774/93, § 74, ECHR 1999-V; *Lunari v. Italy*, no. 21463/93, § 43, 11 January 2001; and *Logothetis v. Greece*, no. 46352/99, § 14, 12 April 2001).

117. Admittedly, the applicant has never requested payment of the compensation awarded him, a fact that he did not dispute moreover.

However, the Court considers that, given the protractedness of the proceedings to which he was a party (see paragraph 115 above), Mr Öneriyıldız cannot be blamed for not having also brought enforcement proceedings. Besides that, the Government have not shown in what respect the judgment of 30 November 1995, upheld by the Supreme Administrative Court, was not enforceable, contrary to what the relevant provisions of the Turkish Constitution appear to suggest (see paragraph 48 above).

118. Accordingly, notwithstanding the existence of remedies by which the applicant could have compelled the Turkish authorities to comply with a final judicial decision, the authorities should at least have paid the compensation due to the applicant immediately, if only on account of the distressing situation he was in and considering that his failure to bring enforcement proceedings (see paragraph 48 above) was detrimental only to himself because the compensation in question did not even bear default interest (see paragraph 39 above).

119. The Court therefore considers that the administrative proceedings were also ineffective in a number of respects.

120. This conclusion renders it unnecessary for the Court to rule also on the remedies available under the civil law referred to by the Government (see paragraph 95 above), the aim of which would not essentially have been any different from that of the administrative remedy used by the applicant (see, *mutatis mutandis*, *De Moore v. Belgium*, judgment of 23 June 1994, Series A no. 292-A, p. 17, § 50).

**(c) The Court's conclusion with regard to this part**

121. In the light of the above considerations, the Court considers that the legal remedies used at domestic level, even taken as a whole, cannot in the specific circumstances of the case be deemed to have complied with the requirements of the procedural obligation under Article 2 of the Convention or, accordingly, to have afforded appropriate redress for the applicant's complaints under that provision.

*3. Final conclusion with regard to Article 2 of the Convention*

122. Referring to the preliminary conclusions set out in paragraphs 87, 88 and 121 above, the Court holds that there has been a violation of Article 2 of the Convention on account of the death of Mr Öneriyıldız's relatives and the ineffectiveness of the Turkish judicial machinery as implemented in the present case.

## II. ALLEGED VIOLATIONS OF ARTICLES 6 AND 13 OF THE CONVENTION

123. The applicant complained of the excessive length of the proceedings in the Administrative Court, and submitted that they had been unfair, given the partial judgment in which they had culminated. In those respects the applicant relied on Article 6 § 1 of the Convention, the relevant part of which provides:

“1. In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...”

With regard to the facts in relation to Article 2 of the Convention, the applicant also complained that the criminal proceedings brought against those responsible for the death of his relatives and the administrative remedy used to claim compensation for the damage suffered had proved to be completely ineffective and therefore incompatible with the requirements of Article 13 of the Convention, which provides:

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

124. The Government submitted that all the foregoing complaints were unreasonable because the applicant had had the full benefit of the remedies available under domestic law which he now claimed were incompatible with the Convention.

125. Having regard to the special circumstances of the present case and to the reasoning which led the Court to find a violation of the procedural aspect of Article 2 of the Convention (see paragraphs 114, 119 and 121 above), the Court holds that it is not necessary to examine the case under Articles 6 § 1 and 13 as well.

## III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

126. The applicant also complained of interference with his private and family life in so far as he had found himself in a situation of indescribable distress as a result of the negligent omissions and indifference of the authorities, which had violated his rights under Article 8 of the Convention, the relevant passages of which read as follows:

“1. Everyone has the right to respect for his private and family life...”

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

127. The Government argued that this allegation was manifestly ill-founded and submitted, *inter alia*, that neither the accident in question nor the ensuing loss of lives could be deemed to be interference by the Turkish public authorities within the meaning of Article 8 of the Convention.

128. The Court observes that these complaints concern the same facts as those examined under Article 2 and, having regard to its conclusion under that provision (see paragraphs 87 and 122 above), considers it unnecessary to examine them separately.

#### IV. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

129. The applicant complained, lastly, that the loss of his house and all his household goods following the accident of 28 April 1993 amounted to a violation of Article 1 of Protocol No. 1, which reads:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

130. The Government disputed that submission.

##### **A. Arguments of those appearing before the Court**

###### *1. The applicant*

131. The applicant, who asserted that Turkish law recognised the right of acquisition of property by adverse possession, claimed that he had used his house continuously and for a sufficiently long time to be deemed to be the owner. On that point he alleged that the authorities' failure to intervene when the dwelling was inhabited and the State's provision of essential services and, above all, the scope of the laws passed over time regularising the dwellings in order to satisfy potential voters living in the built-up areas, suggested that his right of property had been tacitly acknowledged.

On that subject the applicant also referred to the new Law no. 4706 (see paragraph 50 above) according to which no one could argue that real estate belonging to the Treasury could not be purchased.

132. With regard to the issue of redress for the wrongs he had suffered, the applicant pointed out that, contrary to the provisions of the judgment of the Istanbul Administrative Court on the subject of subsidised housing, there had never been any question of providing him with accommodation

free of charge and that at the date on which the sale had been agreed, his down payment alone would have been sufficient to purchase a flat comparable to the one offered him.

133. With regard to the compensation of TRL 10,000,000 awarded for pecuniary damage, the applicant criticised the – to his mind – contemptuous reasoning of the administrative courts, which found that the Öneriyıldız family was not supposed to own household electrical appliances. The reason he had been unable to supply proof to the contrary was that it had been buried under the ruins.

At any rate, the compensation in question, which had still not been paid, had become insignificant owing to the high monetary depreciation observed in Turkey since the above-mentioned judgment had been delivered.

## *2. The Government*

134. The Government denied that there had been any interference in breach of Article 1 of Protocol No. 1 because, they alleged, the applicant's dwelling had been “doubly illegal”. Firstly, as it had been built without a permit it could not as such give rise to “a right of property” or constitute “a possession” for the purposes of that provision; moreover, no such recognition would ever have been forthcoming under domestic law, either tacitly or expressly.

135. Secondly, the applicant could not claim any right to the land he had occupied, which was then and still is property belonging to the Treasury, because, under section 18(2) of Law no. 1617, it could not be acquired by adverse possession.

At the hearing the Government also stressed that, contrary to the applicant's suggestion, the “amnesties” regarding the construction of dwellings, far from serving electoral aims, were merely intended to monitor the essential services in the slums and ensure their integration into the existing urban fabric. In any event, the Government submitted, no “ordinary amnesty” could ever have offset the illegal occupation of the land on which the applicant had built his slum dwelling.

136. In the alternative, the Government requested the Court to take account of the fact that, shortly after the accident in question, the applicant had been provided with subsidised housing for the modest price of TRL 125,000,000, one quarter of which had been payable immediately and the remainder in token monthly instalments staggered over a long period: that sale had had “an entirely social purpose”.

137. Besides that, the Government reiterated that the Administrative Court had awarded the applicant substantial (and in no way negligible) compensation for pecuniary damage.

## **B. The Court's assessment**

### *1. Preliminary observations*

138. In the light of the parties' arguments and the evidence in its possession, the Court notes at the outset that the more general questions raised by the present case, relating, *inter alia*, to the regularising laws passed in Turkey and the operation of public installations (see paragraphs 49, 50, 71, 131 and 135 above) are of general interest and any doubt which may arise as to the measures taken by the national authorities in that area are, in the Court's opinion, a matter for public and political debate which falls outside the scope of application of Article 1 of Protocol No. 1.

The Court, which must as far as possible confine itself to examining the issues raised by the actual case before it, considers that it does not therefore have to examine those issues.

### *2. Existence of a "possession"*

139. The Court reiterates that the concept of "possessions" in Article 1 of Protocol No. 1 has an autonomous meaning and certain rights and interests constituting assets can also be regarded as "property rights", and thus as "possessions" for the purposes of this provision (see *Iatridis v. Greece* [GC], no. 31107/96, § 54, ECHR 1999-II, and *Beyeler v. Italy* [GC], no. 33202/96, § 100, ECHR 2000-I).

Although it is true that the determination and identification of a right of property is governed by the national legal system and that the applicant must establish both the exact nature of the right he claims and his prerogative to freely enjoy that right, the Court considers that neither the lack of recognition by the domestic laws of a private interest such as a "right" nor the fact that these laws do not regard such interest as a "right of property", does not necessarily prevent the interest in question, in some circumstances, from being regarded as a "possession" within the meaning of Article 1 of Protocol No. 1 (see, *mutatis mutandis*, *Tre Traktörer AB v. Sweden*, judgment of 7 July 1989, Series A no. 159, p. 21, § 53, and *Van Marle and Others v. the Netherlands*, judgment of 26 June 1986, Series A no. 101, p. 13, § 40).

The issue that accordingly needs to be examined is whether the circumstances of the case, considered as a whole, conferred on the applicant title to a substantive interest protected by Article 1 of Protocol No. 1 (see, among other authorities, *Zwierzynski v. Poland*, no. 34049/96, § 63, ECHR 2001-VI).

140. In that connection the Court notes at the outset that title to the land on which the applicant had built his slum dwelling was vested in the Treasury. The applicant was, moreover, unable to establish that he had any property right or claim in respect of the land in question; neither could he

show that he had brought any proceedings of any kind to establish a right of acquisition by adverse possession (see paragraphs 11 and 131 above).

The Court therefore considers, like the Government (see paragraph 135 above), that the fact that the applicant had occupied land belonging to the Treasury for approximately five years cannot amount to a “possession” within the meaning of Article 1 of Protocol No. 1, given that there is no evidence in the file from which to conclude that the applicant was entitled to claim a transfer of title to the land in question under section 21 of Law no. 775 (see paragraph 50 above) and that in this respect the hopes he might have entertained (see paragraph 131 above) are of no relevance since Article 1 of Protocol No. 1 applies only to a person's existing possessions and does not guarantee the right to become the owner of property (see *Marckx v. Belgium*, judgment of 13 June 1979, Series A no. 31, p. 23, § 50, and *Zwierzyński*, cited above, § 61).

141. That said, the dwelling built by the applicant on the land in question calls for a different assessment.

It is certainly not the Court's task to determine the legal position with regard to the slum dwelling in question in the light of all the domestic legal provisions; the little evidence it has been able to gather of its own motion shows, however, that the edifice built by the applicant breached the relevant town-planning regulations (see paragraphs 50, 51 and 131 above). That was not contested by the applicant, moreover.

It must be accepted, however, that notwithstanding that breach of the planning rules and the lack of any valid title, the applicant was nonetheless to all intents and purposes the owner of the structure and fixtures and fittings of the dwelling he had built and of all the household and personal effects which might have been in it. Since 1988 he had been living in that dwelling without ever having been bothered by the authorities (see paragraphs 28, 80 and 86 above), which meant he had been able to lodge his relatives there without, *inter alia*, paying any rent. He had established a social and family environment there and, until the accident of 28 April 1993, there had been nothing to stop him from expecting the situation to remain the same for himself and his family.

It should be pointed out that those factors and, *inter alia*, the noted failure to take adequate measures (see paragraph 87 above and 146 below), which amounted to implicit tolerance by the authorities of Mr Öneriyıldız's position, enable this case to be distinguished from that of Mrs Chapman (see *Chapman v. the United Kingdom* [GC], no. 27238/95, ECHR 2001-I) in which the applicant, a Gypsy by birth, had been ordered to leave her land on which she had installed her caravan without obtaining the statutory residence permit, as required by domestic law, and had been fined twice before she would leave. In the specific context of that case the Court stated that it would be slow to grant protection, under Article 8 of the Convention, to those who consciously defied the prohibitions of the law and, having

regard to the circumstances of that case, it concluded that the judicial measures imposed on the applicant could be regarded as proportionate to the legitimate aim of protecting the “rights of others” through preservation of the environment (see §§ 82, 102 and 105).

142. In short, the Court considers that the dwelling built by the applicant and his residence there with his family represented a substantial economic interest. That interest, which the authorities allowed to subsist over a long period of time, amounts to a “possession” within the meaning of the rule laid down in the first sentence of Article 1 § 1 of Protocol No. 1 (see *Iatridis*, cited above, § 55).

### 3. Whether there was “interference”

143. In the instant case the applicant complained not of an act by the State, but of its failure to act. In his submission, the loss of his possessions was entirely due to the negligent omissions of the authorities. The Government disputed that submission.

144. The Court has long held that, although the essential object of many provisions of the Convention is to protect the individual against arbitrary interference by public authorities, there may in addition be positive obligations inherent in an effective respect of the rights concerned. It has found that such obligations may arise under Article 2 (see paragraph 62 above), Article 3 (see *Assenov and Others v. Bulgaria*, judgment of 28 October 1998, *Reports* 1998-VIII, p. 3265, § 102), Article 8 (see paragraphs 65 and 85 above; see, among others, *Botta v. Italy*, cited above, p. 422, § 33, and the references made thereto), Article 10 (*Özgür Gündem v. Turkey*, no. 23144/93, § 43, ECHR 2000-III) and Article 11 (*Plattform “Ärzte für das Leben” v. Austria*, judgment of 21 June 1988, Series A no. 139, § 32).

145. The Court reiterates the key importance of the right enshrined in Article 1 of Protocol No. 1 and considers that the real and effective exercise of that right does not depend merely on the State's duty not to interfere, but may require positive measures of protection. In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which is inherent throughout the Convention. This obligation will inevitably arise, *inter alia*, where there is a direct link between the measures which an applicant may legitimately expect from the authorities and his enjoyment of his possessions.

146. The Court reiterates that it has already established in the present case the existence of such a causal link with regard to the accident that occurred on 28 April 1993 (see paragraph 81 above). It goes without saying that the same is true of the burial of the applicant's slum dwelling. Accordingly, the Court holds that the accumulation of omissions by the administrative authorities regarding the measures necessary to avoid the risk



of a methane-gas explosion and an ensuing landslide (see paragraph 87 above) also runs counter to the requirement of “practical and effective” protection of the right guaranteed by Article 1 of Protocol No. 1.

Such a situation amounts to a clear infringement of the applicant's right to peaceful enjoyment of his “possessions” and, for the purposes of the examination of this part of the application, can be regarded as “interference”.

#### *4. Justification of the “interference”*

147. Having regard to the foregoing, the Court reiterates that the applicant was definitively deprived of his home and all the possessions used to run his daily family life.

In that connection it merely needs to be pointed out that the negligent omissions of the authorities which resulted in that deprivation were penalised under Turkish administrative and criminal law (see paragraphs 33 and 39 above). The interference in question was thus manifestly in breach of the domestic legislation.

148. This conclusion makes it unnecessary for the Court to take its examination further (see, *mutatis mutandis*, *Iatridis*, cited above, § 62); there has accordingly been a violation of Article 1 of Protocol No. 1.

That being so, the Court must determine in this respect also (see paragraph 88 above) whether the applicant's complaint can be deemed to have been addressed at domestic level.

#### *5. Redress for the applicant's complaints*

149. In that respect it notes that, in a judgment of 30 November 1995 (see paragraph 39 above), the applicant was awarded TRL 10,000,000 (approximately EUR 210) in pecuniary damages for one category of household goods: the administrative court ruled that he could not claim compensation for his dwelling because it could have been destroyed at any time by municipal workers; nor could he claim damages for the loss of any household electrical appliances because the dwelling had not been supplied with electricity.

In view of the circumstances of the case, the Court is not satisfied by that assessment.

150. Firstly, the argument that the administrative authorities could have destroyed the applicant's slum dwelling at any time under the relevant regulations (see paragraph 50 above) does not carry much weight. The important point is that, during the above-mentioned period, the authorities in question neither took nor envisaged taking any such measure (see paragraphs 50, 106 and 141 above), and let the Öneriyıldız family enjoy their possessions entirely undisturbed. In that connection it should be pointed out that even if the authorities had envisaged demolishing the slum dwelling,

they would have been obliged to make every effort to maintain a fair balance between the demands of the general interest and the requirements of the rights of the individual; the respondent State would then have had to satisfy the Court that such measure constituted a legitimate objective which was in the public interest and that it was proportionate to the aim sought to be achieved for the purposes of Article 1 of Protocol No. 1 (see, among other authorities, *Pressos Compania Naviera S.A. and Others v. Belgium*, judgment of 20 November 1995, Series A no. 332, p. 23, § 38). In the instant case the Court presupposes that in the event that such a measure had had to be taken, the authorities would at least have been required to grant the applicant a reasonable length of time in which to defend his interests, or at least salvage as many possessions as possible, including certain fittings which could be removed from his dwelling. The administrative court never considered those questions, however.

In confining its examination to the statements of the defendant authorities, the administrative court also prejudiced the issue by excluding the household electrical appliances from its examination without bothering to enquire as to whether the Kazım Karabekir area was connected to the electricity network, despite the probative evidence which militated against the defence put forward by the authorities (see paragraphs 10 and 72 above).

151. The Court reiterates, moreover, that the length of the administrative proceedings is also a factor to be taken into account in determining whether there has been adequate compensation for the alleged violation (see *Guillemin*, cited above, p. 164, § 54, and *Erkner and Hofauer v. Austria*, judgment of 23 April 1987, Series A no. 117, p. 66, § 76). As the Court has already found above, the applicant's right to compensation was not recognised within a reasonable time (see paragraph 115 above).

152. In these circumstances the Court cannot accept that the applicant's claims for pecuniary damages were carefully and speedily examined with a view to awarding him compensation proportionate to the loss actually sustained, particularly as in the instant case the tribunal of fact did not find the administrative authorities in any way liable in respect of the complaint submitted by the applicant on precisely the loss of his possessions (see paragraphs 21, 39 and 129 above).

153. Subject to any subsequent assessment of the applicability of Article 41 of the Convention, the Court considers that neither the amount which might be paid to the applicant if he were to bring enforcement proceedings against the authorities, which to date have not made any payment (see paragraphs 40, 48 and 116-18 above), nor the advantageous terms for repayment of the cost of the house sold to the applicant (see paragraphs 29, 133 and 136 above) can suffice to conclude that the national authorities have acknowledged and then afforded redress for the violation alleged.

154. The Court therefore concludes that there has been a breach of Article 1 of Protocol No. 1.

## VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

155. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

### A. Damage

#### *1. The parties' submissions*

156. The applicant claimed, under the head of pecuniary damage sustained by himself and his three minor children, a total sum of 400,000 US dollars (USD), which he broke down as follows:

(i) USD 2,000 for funeral expenses for the nine members of his family who had died. In that connection the applicant relied on a newspaper article which reported that another victim of the same accident, C.Ö., had been billed 550,000,000 Turkish liras (TRL) by the city council for the burial of his wife and four children;

(ii) USD 100,000 for the loss of financial support as a result of the death of his wife and concubine, who had had daytime jobs as cleaners;

(iii) USD 150,000 for the loss of the financial support which his seven children who had died could have provided in future;

(iv) USD 50,000 for loss of the financial support with which the children's mother would have provided her children in the future;

(v) USD 98,000 for the total destruction of his house and household goods. The applicant accepted that he was not in a position to provide any evidence in support of his claims under this head and left it to the Court's discretion to assess the relevant damage.

The applicant also claimed, on his own behalf and on behalf of his surviving children, compensation of USD 800,000 for non-pecuniary damage.

157. As their main submission, the Government maintained that no redress was necessary in the instant case. In the alternative, they asked the Court to dismiss the applicant's claims, which they considered to be exorbitant and based on notional estimates.

With regard to pecuniary damage, they submitted that a newspaper cutting could not serve as a basis for claims for funeral expenses. With

regard to the alleged loss of financial support, they confined themselves to the submission that the claim was merely speculative.

With regard to the dwelling and chattels, the Government stressed that the applicant had submitted no evidence in support of that claim. They submitted that the applicant had never acquired title to the slum dwelling in question and reiterated that a much more comfortable flat had been offered him in the district of Alibeyköy for a sum which, at the material time, was the equivalent of USD 9,237 (9,966 euros), only one quarter of which had been made as a down payment. In that connection they submitted examples of advertisements for similar flats in that district at prices of, on average, between TRL 11,000,000,000 and 19,000,000,000 (approximately 7,900 and 13,700 euros respectively). They also supplied a list drawn up by the city council showing that house prices in Alibeyköy-Çobançeşme varied between TRL 9,100,000,000 and 13,000,000,000 (approximately 6,600 and 9,400 euros respectively). With regard to the household goods, the Government submitted catalogues of such goods and drew attention to the need to take account of the compensation which had been awarded by the Administrative Court under that head.

With regard to the head of non-pecuniary damages, the Government submitted that the claim was excessive and tended towards an unjust enrichment, contrary to the spirit of Article 41 of the Convention. In that connection they criticised the applicant for deliberately choosing not to claim payment of the compensation awarded by the Administrative Court under that head, in the hope of increasing his chances of being awarded a higher sum by the Court.

## 2. *The Court's assessment*

158. Regarding the pecuniary damage referred to by the applicant, the Court's case-law has established that there must be a clear causal link between the damage claimed and the violation of the Convention and that this may, in appropriate cases, include compensation in respect of financial support (see, among other authorities, *Barberà, Messegue and Jabardo v. Spain*, judgment of 13 June 1994 (Article 50), Series A no. 285-C, pp. 57-58, §§ 16-20; *Salman v. Turkey* [GC], no. 21986/93, § 137, ECHR 2000-VII; and *Demiray v. Turkey*, no. 27308/95, § 67, ECHR 2000-XII).

159. With regard first to the violation found of Article 2 (see paragraph 122 above), the Court considers that such a link does exist with regard to the claim for reimbursement of funeral expenses. Although the applicant's claim under that head has not been duly documented, the Court assesses the damage on an equitable basis, under Article 41 of the Convention, at 1,000 euros (EUR).

The file does not contain any evidence of the income of the applicant's wife, concubine and children before their death. The amounts claimed under that head are therefore speculative, as the Government have pointed out.

However, having regard to the evidence pertaining to the applicant's family and social situation, the Court recognises that if the deceased were still alive, they would have been able to contribute to supporting the family. It therefore considers that compensation should be awarded under this head and awards an aggregate sum of EUR 16,000.

160. In respect of non-pecuniary damage, the Court considers that the applicant undoubtedly suffered a great deal as a result of the violation of Article 2 it has found: not only did he lose several members of his family, but he must also have felt powerless in the face of the unsatisfactory workings of justice with regard to those responsible. The Court agrees with the Government, however, that the amounts claimed are excessive. It can therefore rule only on an equitable basis, having regard to the particular circumstances of the case, to the suffering which must also have affected the applicant's three surviving children and to the compensation previously awarded to the applicant by the domestic courts for non-pecuniary damage (see paragraph 39 above). Having taken these matters into account, the Court assesses the damage suffered at EUR 133,000.

161. With regard next to the breach the Court has found of Article 1 of Protocol No. 1 (see paragraph 154 above), the Court observes that there was a direct causal link between that breach and the loss of possessions sustained by the applicant. With regard to the applicant's claims, the Court notes that he has requested an aggregate amount of USD 98,000 without supporting that claim with any documentary or other evidence relating to the amount or value of his loss. Given that the events in question occurred in a slum, the Court considers that the lack of title deeds is not decisive for the assessment of the damage sustained. It also accepts that the applicant, whose dwelling was destroyed and buried under the ruins, must have encountered special difficulties in producing evidence in support of his claim. That said, the Court agrees with the Government that the amount of USD 98,000 claimed by the applicant is unreasonable.

In assessing the pecuniary damage sustained by the interested parties the Court will accordingly take account of the methods of calculation used in comparable cases (see *Akdivar and Others v. Turkey* (former Article 50), judgment of 1 April 1998, *Reports* 1998-II, and *Menteş and Others v. Turkey* (former Article 50), judgment of 24 July 1998, *Reports* 1998-IV) and of the evidence contained in the file, namely the amount of compensation awarded for pecuniary damage (see paragraph 39 above), the conditions of sale of a flat to the applicant by the city council (see paragraph 29 above), the market price of flats in the Çobançeşme area (see paragraph 157 above), the price of certain household items shown in the catalogues submitted to the Court and the economic data concerning Turkey. Given the limited nature of this evidence, the Court's assessment will inevitably involve a degree of speculation (see, respectively, p. 718, § 19, and p. 1693, § 12 of the aforementioned judgments).

162. As regards the alleged loss of the slum dwelling, the Court has made its assessment on the basis of 50% of the cost of a decent dwelling proposed by the city council in the area of Çobançeşme (see paragraph 157 above). From that sum it has deducted the economic profit which, according to the available figures and rates of exchange and inflation, the applicant must have made from the arrangements for reimbursement of the cost of his dwelling. On the basis of its own calculations, the Court considers that it can accept that the real loss sustained by the applicant on account of the destruction of his slum dwelling amounts to EUR 2,500.

163. As regards the value of the chattels and despite the lack of any indication by the applicant, the Court considers, having regard to considerations of equity and to the living conditions of a family on a low income, that the applicant should be awarded EUR 1,500 under this head.

164. In conclusion, the Court awards the applicant EUR 154,000 in pecuniary and non-pecuniary damages, on the understanding that this sum, to be converted into Turkish liras at the date applicable on the date of settlement, shall be exempt from all taxes and duties.

## **B. Costs and expenses**

165. The applicant claimed USD 30,000 in legal fees for 200 hours of work by his lawyer at the rate of USD 150 per hour, as determined by the Istanbul Bar's scale of minimum fees. He also claimed reimbursement of photocopying, translation, fax and other expenses, which he assessed at USD 790 in all, USD 200 of which were the cost of travelling to the Supreme Administrative Court in Ankara. In support of his claim, the applicant submitted copies of postal receipts and a bill for translation services.

166. The Government submitted that the applicant's claims for costs and expenses were also excessive and unjustified. They maintained, moreover, that the USD 200 for the journey between Ankara and Istanbul was not directly related to the instant case and that the amount of USD 500 claimed for translation expenses was unacceptable because the relevant bill was for only TRL 240,000,000, which was approximately USD 184.

167. The Court notes firstly that the applicant has not supplied a breakdown of the number of hours worked by his lawyer and has not submitted any bill of costs and fees. In accordance with Rule 60 § 2 of the Rules of Court, the Court cannot therefore accept that request as such. The fact remains, nonetheless, that the applicant did necessarily incur costs for the work done by his lawyer to represent him in both the written and oral proceedings before the Court (see, *mutatis mutandis*, *Labita v. Italy* [GC], no. 26772/95, § 210, ECHR 2000-IV).

Ruling on an equitable basis and having regard to the other disbursements, in so far as they have been supported by evidence, the Court

considers it reasonable to award the applicant EUR 10,000, less the EUR 2,286.50 paid by the Council of Europe by way of legal aid. That sum, to be converted into Turkish liras at the rate applicable at the date of settlement, shall also be exempt from all taxes and duties.

### **C. Default interest**

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

### **FOR THESE REASONS, THE COURT**

1. *Holds* by five votes to two that there has been a violation of Article 2 of the Convention;
2. *Holds* unanimously that there is no need to examine separately the complaints lodged under Article 6 § 1 and Articles 8 and 13 of the Convention;
3. *Holds* by four votes to three that there has been a violation of Article 1 of Protocol No. 1 of the Convention;
4. *Holds* by five votes to two that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 154,000 (one hundred and fifty-four thousand euros) in respect of pecuniary and non-pecuniary damage;
5. *Holds* unanimously
  - (a) that the respondent State is to pay the applicant, on the same terms as those set out under 4 above, EUR 10,000 (ten thousand euros) in respect of costs and expenses, less the EUR 2,286. 50 (two thousand two hundred and eighty-six euros fifty cents) already received from the Council of Europe; and
  - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
6. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in French, and notified in writing on 18 June 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE  
Registrar

Elizabeth PALM  
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) partly dissenting opinion of Mr Türmen and Mr Maruste;
- (b) partly dissenting opinion of Mr Casadevall, joined by Mr Türmen and Mr Maruste.

E.P.  
M.O.B



PARTLY DISSENTING OPINION  
OF JUDGE CASADEVALL, JOINED BY  
JUDGES TÜRMEK AND MARUSTE

(Translation)

1. As the State breached its obligation to take the necessary and adequate measures to protect the lives of Mr Öneriyıldız's next of kin, I voted – unhesitatingly – in favour of finding that there had been a violation of Article 2 of the Convention. However, my view differs from that of the majority regarding a violation of Article 1 of Protocol No. 1 because I consider this provision to be inapplicable in the circumstances of this case.

2. Article 1 of Protocol No. 1 guarantees in substance the right of property and, according to the established case-law of the Convention institutions, aims to protect only existing possessions and does not guarantee a right to become the owner of property<sup>1</sup>. Accordingly, the determination and identification of a right of property are governed by the national legal system and it is for the applicant to show the precise nature of the right on which he or she relies under domestic law and his or her prerogative to enjoy such a right.

3. As noted by the Court<sup>2</sup>, the land on which the applicant built his dwelling belongs to the Treasury. The applicant has not proved that he had any right to the land or that he took any proceedings whatsoever to claim a right to ownership by adverse possession or that he could legitimately have claimed transfer of title to property under section 21 of Law no. 775 of 20 July 1966<sup>3</sup>. The applicant's slum dwelling was illegal because he had not obtained a building permit and the dwelling did not conform to the technical and health regulations or to the town-planning and building laws.

4. Admittedly, the notion of “possessions” in Article 1 of Protocol No. 1 has an autonomous meaning and certain interests constituting assets can also be regarded as “possessions” for the purposes of this provision. It is also true that the failure to give legal recognition to an interest determined as a “right of ownership” does not necessarily exclude the applicability of Article 1 of Protocol No. 1. However, I must first express my hesitation as to whether, in the particular circumstances of the present case, the references made, *mutatis mutandis*, to the *Tre Traktörer AB v. Sweden* and *Van Merle and Others v. the Netherlands* cases (judgments of 7 July 1989 and 26 June 1986 respectively) suffice to lead to the conclusion reached in paragraph 142 of the judgment and, prior to that, to justify the grounds referred to in paragraph 141 for departing from the conclusions in the Chapman judgment, which, in my view, did not constitute a precedent that had to be surmounted. Indeed, even supposing that in the present case the applicant had acquired an economic interest on account of having set up his dwelling on the land surrounding the rubbish tip, I am still not convinced

that such an interest attracts the protection of Article 1 of Protocol No. 1, considering that it was acquired completely unlawfully<sup>4</sup>.

5. It is also a fact that the applicant and his family lived in the slum dwelling for five years, until the accident of 28 April 1993, undisturbed and benefiting from the implicit tolerance of the authorities. In that connection I note the point expressed by the Court in its preliminary observations (see paragraph 138 of the judgment) on the “more general questions raised by the present case” which are “of general interest”: in the majority's view, the Court is not required to consider those issues. The Court could have taken the same view with regard to this “implicit tolerance” that stems from the intricate social and economic problems with which Turkey is faced<sup>5</sup>. That said, I consider that neither this implicit tolerance nor other humanitarian considerations suffice to legitimise the applicant's action under Article 1 of Protocol No. 1. Nor, in my view, should they be used by the Court to justify a conclusion which is tantamount to removing the applicant from the ambit of the domestic town-planning and building laws<sup>6</sup> and, to an extent, indirectly condoning the spread of these illegal dwellings despite its own findings of fact in the judgment with regard to the disastrous consequences of this for human life, consequences which have given rise to a violation of Article 2 of the Convention.

6. My view on the inapplicability of Article 1 of Protocol No. 1 does not in any way mitigate the State's responsibility for its negligence and failure to comply with its positive obligations to protect the Ümraniye slum inhabitants' lives. It merely underscores, in my view, the point that the primacy of the obligations on States under Article 2 of the Convention bears no comparison to that accorded by the majority to the right enshrined in Article 1 of Protocol No. 1 which it describes as being of “key importance” before ultimately deciding, somewhat hastily, that the Contracting States will henceforth have to satisfy positive obligations in this regard (see paragraphs 144 and 145 of the judgment).

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1. *Marckx v. Belgium*, judgment of 13 June 1979, Series A no. 31, §§ 50 and 63, and *Van der Mussele v. Belgium*, judgment of 23 November 1983, Series A no. 70, § 48.

2. Paragraph 140 of the present judgment.

3. A judgment of 4 May 1976 of the Turkish Court of Cassation establishes the legal position with regard to slum dwellings built illegally in the so-called “slum rehabilitation and clearance zone” which can, under certain conditions, be regularised under section 21 of Law no. 775.

4. See, *mutatis mutandis*, *Chapman v. the United Kingdom*, no. 27238/95, § 102, ECHR 2001-I.

5. This tolerance issue leads to a broader socio-economic analysis in the context of the migration to the major cities which has occurred in Turkey and the consequent severe housing shortage.

6. See, *mutatis mutandis*, *Chapman*, cited above, § 115.

## PARTLY DISSENTING OPINION OF JUDGES TÜRMEN AND MARUSTE

We regret we are unable to agree with the majority's opinion concerning Article 2 of the Convention.

We agree with the majority that the first sentence of Article 2 creates an obligation for the State not only to refrain from the intentional taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. This principle also applies to the environment field. Therefore, Article 2 is applicable.

The expert report of 7 May 1991 underscored the existence of a real and immediate danger due to the methane gas that was emitted from the rubbish tip. In view of this fact, we can also agree with the majority that both the mayor of Ümraniye and the mayor of İstanbul knew or ought to have known at the time that there was a real and immediate risk to the lives of those living in the vicinity of the tip. Due to negligence, they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk (*Keenan v. United Kingdom*, 3 April 2001, paragraphe 89).

On the other hand, the fact that the applicant also contributed to the loss of lives by constructing a house illegally close to the tip, a location strictly prohibited by law, cannot be disregarded. In the *Chapman v. United Kingdom* case, it was stated by the Court that “where a dwelling has been established without the planning permission which is needed under the national law, there is a conflict of interests between the right of the individual ... and the right of others in the community. The Court will be slow to grant protection of those who, in conscious defiance of the prohibitions of the law, establish a home on an environmentally protected site” (judgment of 18 January 2001, paragraph 102). Although the *Chapman* judgment was related to Article 8 of the Convention and was about building a dwelling on an environmentally protected site, the general principle quoted above also applies *mutatis mutandis* to our case.

It is not possible to say that the authorities remained passive after the accident. Three separate investigations were conducted by the police, by the crisis committee established by the Governor of İstanbul and by the Ministry of Interior.

As a result of the investigations, criminal proceedings were brought against the two mayors by the Public Prosecutor of Üsküdar. The Fifth Chamber of the İstanbul Criminal Court found them guilty of negligence in the course of their duty and sentenced them to three-months' imprisonment and a fine. The prison sentences were commuted to fines in accordance with Law no. 647. The Court of Cassation confirmed the judgment of the court of first instance. The applicant was not an intervening party in the criminal

proceedings and therefore had no right to oppose the judgment of the Court of first instance before the Court of Cassation.

The applicant applied to the Administrative Court for compensation. This court decided to award the applicant an amount of 100,000,000 Turkish liras (TRL) for non-pecuniary damage and 10,000,000 TRL for pecuniary damage.

In addition, the Government sold a house to the applicant on very favourable terms and he is still living there.

Several conclusions flow from the above-mentioned facts:

The national system affords a remedy in the criminal courts as well as in the civil courts (which the applicant did not make use of) and the administrative courts. Criminal proceedings was brought against the two mayors and they were convicted. Their conviction was upheld by the Court of Cassation. It is an established principle of the Court's case-law that the assessment of the facts is a matter for the national courts. This is a consequence of the subsidiary role of the Strasbourg Court. The national court in this case examined the facts and decided to apply Article 230 of the Turkish Criminal Code and not Article 455. There is nothing in the judgment to suggest that the Turkish courts acted arbitrarily. Under the circumstances, to find a violation of Article 2 due to the fact that the national court did not apply Article 455 of the Criminal Code is in our opinion, a clear example of the Court acting as a court of fourth instance.

In view of the above, we cannot share the conclusion reached by the majority that the local remedies considered as a whole were inadequate or ineffective and did not satisfy the procedural obligation in Article 2 of the Convention to carry out an effective investigation.

Moreover, even if we accept that the criminal-law remedy in this specific case was not adequate, in view of the *Calvelli and Ciglio* judgment where the Grand Chamber stated that “if the infringement of the right to life or to personal integrity is not caused intentionally, the positive obligation imposed by Article 2 to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy in every case” (*Calvelli and Ciglio v. Italy*, no. 32967/96, 17 January 2002, § 51), the compensation awarded by the Administrative Court should have been a sufficient basis on which to find that there has been no violation of Article 2. In *Calvelli and Ciglio*, the Court reached the conclusion that there was no violation of Article 2 in spite of the fact that the doctor was not prosecuted under the criminal law.

We are not persuaded by the reasons adduced by the majority in paragraph 94 to distinguish this case from the *Calvelli and Ciglio* judgment.

On the contrary, both cases fall under a special category of Article 2 cases, in which loss of life is not due to the use of force by the authorities, but to the negligence of the public authorities.

We conclude therefore that there has been no violation of Article 2 of the Convention.