REPUBLIC OF TURKEY

CONSTITUTIONAL COURT

SECOND SECTION

DECISION

THE APPLICATION OF SERPİL KERİMOĞLU AND OTHERS

(Application Number: 2012/752)

Date of Decision: 17/9/2013

SECOND SECTION

DECISION

President	:	Alparslan ALTAN
Members	:	Serdar ÖZGÜLDÜR
		Celal Mümtaz AKINCI
		Muammer TOPAL
		M. Emin KUZ
Rapporteur	:	Cüneyt DURMAZ
Applicants	:	Serpil KERİMOĞLU
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I. SUBJECT OF APPLICATION

1. The applicants alleged that the right to life and the freedom to claim rights were violated by indicating that their relative Selman KERİMOĞLU had lost his life after being buried under the rubble of a hotel as a result of the earthquake that occurred in Van province on the date of 9/11/2011 and that they could not obtain any result despite having seized legal remedies.

II. APPLICATION PROCESS

2. The application was directly lodged by the attorney of the applicants on 22/11/2012. As a result of the preliminary examination that was carried out in terms of administrative aspects, it was determined that there was no situation which prevented the submission of the application to the Commission.

3. As it was deemed necessary by the Second Commission of the Second Section that a principle decision be delivered by the Section in order for the application to be concluded, it was decided that the admissibility examination be carried out by the Section, that the file be sent to the Section as per paragraph (3) of article 33 of the Internal Regulation of the Constitutional Court.

4. In the session held by the Section on 26/3/2013, it was decided that the examination of admissibility and merits of the application be carried out together as per subparagraph (b) of paragraph (1) of article 28 of the Internal Regulation of the Constitutional Court.

5. The incidents and facts which are the subject matter of the application were notified to the Ministry of Justice on the date of 1/4/2013. The Ministry of Justice presented its opinion to the Constitutional Court on 3/6/2013.

6. The opinion presented by the Ministry of Justice to the Constitutional Court was notified to the applicant on 5/6/2013. The applicant presented its written opinion to the Constitutional Court on 27/6/2013.

III. FACTS AND CASES

A. Facts

7. As expressed in the application petition, the facts are summarized as follows:

8. A 7,2 magnitude earthquake occurred in Van province on 23/10/2011 and numerous people lost their lives. Aftershocks continued after the earthquake and a second 5,6 magnitude earthquake occurred on 9/11/2011. 24 people that were staying at Bayram Otel located in the city centre of Van province including Selman KERİMOĞLU (S.K.), who is the relative of the applicants, lost their lives when the hotel building collapsed as a result of the second earthquake.

9. The Office of the Chief Public Prosecutor of Van initiated ex officio an investigation following the incident. In the expert report that was prepared within the scope of the investigation, to which the spouse and three children of S.K. participated as complainants, it was determined that multiple individuals had responsibility, that the relevant units, which had not carried out damage assessment at the building, were also negligent.

10. Within the scope of the investigation that was conducted by the Office of the Chief Public Prosecutor of Van, a separate viewing was carried out, core sample, reinforcement sample and other samples were taken from the rubble of the building via experts, the investigation file and the samples that were obtained were delivered to the experts in order for them to draft the report. In the decision that was delivered at the end of the investigation on the date of 26/7/2012 in light of the report prepared by the experts, it was indicated that the building in question was constructed in an arbitrary fashion without its static project and statements being performed in its year of construction (1964), that the materials and reinforcements did not fulfill the criteria of the Regulation on Structures to be Constructed in Disaster Areas of the time, that the fact that it had an additional floor compared to the construction license resulted in excessive load on the building, that it was understood that although it remained erect after the first earthquake, it collapsed after having been affected by the aftershocks between the two earthquakes.

11. At the end of the investigation, it was decided that a public action be lodged at Van Assize Court regarding the hotel operator for the crime of leading to the deaths of multiple persons with conscious negligence, that there were no grounds for prosecution on behalf of the public regarding the owner of the building and the other suspects, that a decision of lack of jurisdiction be delivered regarding the Governor of Van and the officials of the Disaster and Emergency Management Authority (AFAD) as per articles 3 and 12 of the Code

on the Trial of Civil Servants and other Public Officials dated 2/12/1999 and numbered 4483 and that the investigation file be sent to the Office of the Chief Public Prosecutor of the Supreme Court of Appeals.

12. The Office of the Chief Public Prosecutor of the Supreme Court of Appeals decided on the date of 9/10/2012 that the complaint not be put into process with the justification that the allegations pertaining to misuse of duty regarding the Governor of Van and the officials of AFAD were not based on concrete information and documents and that no situation that constituted a crime and would require a preliminary examination regarding the concerned existed, this decision was notified to the attorney of the applicants on the date of 23/10/2012.

13. Out of the applicants, the spouse and three children of the late S.K. submitted an objection petition to the 2nd Chamber of the Council of State via their counsels on the date of 2/11/2012 with the request that the decision of the Office of the Chief Public Prosecutor of the Supreme Court of Appeals of not putting in process be lifted and that a preliminary examination be held as per the Code numbered 4483.

14. No objection remedy is envisaged in the Code numbered 4483 against the action of the Office of the Chief Public Prosecutor of the Supreme Court of Appeals of not putting in process, there is no information in the petition with regard to the outcome of the objection filed by the applicants to the 2nd Chamber of the Council of State.

15. In its opinion dated 3/6/2013 pertaining to the incidents that are the subject of the application (§ 5), the Ministry provided the following additional information, which was confirmed by the applicants in their statements in response to the opinion of the Ministry:

16. As a result of the objection filed by the counsel of the applicants against the decision of the Office of the Chief Public Prosecutor of the Supreme Court of Appeals dated 9/10/2012 and numbered investigation 2012/128, not putting in process D.2012/55, the 1st Chamber of the Council of State dismissed the complaint without examination in its decision dated 6/3/2013 and numbered M.2013/258, D.2013/294 due to the fact that no objection remedy exists in the Code numbered 4483 against these decisions of the Offices of Chief Public Prosecutors.

17. Moreover, the applicants filed a case for material and moral compensation via their counsels on the date of 23/1/2013 against Van Municipality, the Ministry of Environment and Urbanization, the Governor's Office of Van, the Prime Ministry representing the Disaster and Emergency Management Authority (AFAD) and the inheritors of the owner of the hotel Mehmet Sıddık Bayram. In the trial conducted before the 2nd Civil Court of First Instance of Van with the number M.2013/36, at the hearing of preliminary examination conducted on the date of 28/2/2013, it was decided that the case filed against the administrations be separated and be registered in a separate merit and that a decision of the lack of competence be issued in terms of legal remedy.

18. The 2nd Civil Court of First Instance of Van decided that the case filed against the defendant administrations which it separated from the other case and registered with the number M.2012/112 be dismissed in terms of legal remedy, that it be determined that the court of competence and venue which would try the case was the Administrative Court. In the justification of the decision, it was stated that as of the date of the case, in accordance with article 3 of the Code of Civil Procedure dated 12/01/2011 and numbered 6100, the provision as to the effect that administrative justice had competence in these sorts of cases was annulled

through the decision of the Constitutional Court dated 16/2/2012 and numbered M.2011/35, D.2012/23, that the decision of annulment entered into force upon publication in the Official Gazette dated 19/5/2012 and numbered 28297, that the plaintiffs relied upon service negligence of the defendant administrations, that administrative courts had competence to try the full remedy actions arising out of administrative acts and actions.

19. It is understood that the decision in question has not become final yet, that it is at the stage of notification to the parties.

20. Within the scope of the investigation conducted by the Office of the Chief Public Prosecutor of Van, a permission for investigation was also requested from the Governor's Office of Van on the officials of the Municipality who were claimed to have been responsible in accordance with the Code numbered 4483. The Governor's Office of Van decided that no permission for investigation be granted on the officials of the Municipality. The Office of the Chief Public Prosecutor of Van submitted an objection application against this decision before the Regional Administrative Court of Van.

21.The applicants lodged an individual application on the date of 22/11/2012 within due time following the notification of the decision of the Office of the Chief Public Prosecutor of the Supreme Court of Appeals of not putting the complaint in process to them.

B. Relevant Law

22. The provisions of the Code dated 26/9/2004 and numbered 5237 pertaining to the crimes of "*reckless homicide*" and "*misconduct in office*", which were made the subject of complaint in the incident that is the subject of the application are as follows:

"*Reckless homicide*

ARTICLE 85. –

(1) A person who causes the death of another through negligence shall be sentenced to a prison sentence of three to six years.

(2) If the act has caused the death of more than one persons or the death of one or more persons along with the injury of one or more persons, the person shall be sentenced to a prison sentence of three to fifteen years.

...

Misconduct in office

ARTICLE 257. - (1) A public official who, outside the circumstances otherwise set forth as a crime in the law, causes the grievance of individuals or loss to the public or who derive unjust benefit for persons by acting in contrary to the requirements of his/her duty shall be penalized with a prison sentence of one to three years.

(2) A public official who, outside of the circumstances otherwise set forth as a crime in the law, causes the grievance of individuals or loss to the public or who derive unjust benefit for persons by showing neglect or delay in carrying out the requirements of his/her duty shall be penalized with a prison sentence of six months to two years.

(3) In the event that this does not constitute the crime of malversation, a public official who derives benefit from individuals for himself/herself or for another person so that s/he behaves in compliance with the requirements of his/her duty or for this reason shall be penalized as per the provisions of paragraph one."

23. Paragraph (1) of article 160 of the Turkish Code of Criminal Procedure (TCCP) dated 4/12/2004 and numbered 5271 with the heading of *"Duty of a Public prosecutor who finds out that a crime has been committed"* is as follows:

"*The Public prosecutor who, through a denunciation or other means, is informed about a situation which gives the impression that a crime has been committed shall immediately commence investigating the fact of the matter in order to decide whether there are grounds to initiate a public action or not.*

24. Nevertheless, the trial of civil servants and other public officials due to crimes they have committed as a result of their duties depends on permission, the instances authorized to give permission and the procedure to be followed are regulated in the Code numbered 4483.

25. Paragraph one of article 12 of the Code numbered 4483 with the heading of "*Instances to carry out the preliminary investigation*" is as follows:

"*The preliminary examination shall be carried out by the competent Office of the Chief Public Prosecutor of venue as per the general provisions. However, a preliminary investigation to be carried out with regard to the Secretary General of the Office of the President of the Republic, Secretary General of the Grand National Assembly of Turkey, undersecretaries and governors shall be conducted by the Chief Public Prosecutor or the Deputy Chief Public Prosecutor of the Supreme Court of Appeals, a preliminary investigation regarding district governors shall be carried out by the Chief Public Prosecutor or the Deputy Chief Public Prosecutor of the province.*"

26. As per the final sentence of article 3 of the Code numbered 4483, in the event that a subordinate civil servant and a superior civil servant participate in the same act, the permission is to be sought from the instance to which the superior civil servant is answerable. In this case, the instance that is authorized to give the trial permission that is requested for a governor or the civil servants serving under him/her is the Chief Public Prosecutor or the Deputy Chief Public Prosecutor of the Supreme Court of Appeals, which is the instance that is authorized to give trial permissions with regard to governors.

27. Paragraphs three and four of article 4 of the Code numbered 4483 with the side heading of "*Referring the incident to the authorized instance, denunciations and complaints that will not be put in process*" are as follows:

"*As per this Code, it shall be compulsory that the denunciations and complaints to be made regarding civil servants and other public officials not be abstract and general in nature, that individuals or incidents be indicated in the denunciations or complaints, that the allegations be based on serious findings and documents, that the correct name, surname and signature as well as the work or residential address of the petition owner figure on the denunciation or complaint petition.*

The denunciations and complaints that do not fulfill the conditions under paragraph three shall not be put in process by Chief public prosecutors and the instances that are authorized to give permission and the situation shall be notified to the individual who has filed the

denunciation or complaint. However, in the event that the allegations are demonstrated via documents whose authenticity do not arouse suspicion, the condition that the name, surname and signature as well as the work or residential address be correct shall not be sought. Chief public prosecutors and the authorized instances shall be obliged to keep the identity information of the denunciator or the complainant confidential."

28. Article 9 of the Code numbered 4483 with the side heading "Objection" is as follows:

"*The authorized instance shall notify its decision regarding the issuance or non-issuance of the trial permission to the Office of the chief public prosecutor, the civil servant or other public official regarding whom the examination has been carried out and the complainant, if applicable.*

The civil servant or other public official regarding whom the examination has been carried out can seize the objection remedy against the decision pertaining to the issuance of trial permission; the Office of the chief public prosecutor or the complainant can seize the objection remedy against the decision pertaining to the non-issuance of the trial permission. The period of objection shall be ten days starting from the notification of the decision of the authorized instance.

The Second Chamber of the Council of State shall hear the objection for those listed under subparagraphs (e), (f), g (except for the permission granted by the President) and (h), the regional administrative court located within the jurisdiction of the authorized instance shall hear it for others.

Objections shall be examined with priority and concluded within three months at the latest. The decisions that are delivered shall be final."

29. No objection remedy is envisaged regarding the decision of not putting in process delivered with regard to denunciations and complaints due to the fact that they do not possess the qualities included under paragraph one of article 4 of the Code numbered 4483.

30. Paragraph (1) of article 13 of the Code of Administrative Procedure dated 6/1/1982 and numbered 2577 with the heading of *"Directly filing a full remedy action"* is as follows:

"Those whose rights are violated due to administrative actions need to request the fulfillment of the rights thereof by applying to the related administration within one year following the date on which they are informed about these procedures upon the notification or in any other way and within five years following the date of the action in any case before they file an administrative case. In the event that these requests are partly or fully dismissed, a case can be filed within the period starting from the date following the notification of the action about this matter or, if no response is provided about the request within sixty days, following the date on which the period for response expires."

31. Article 49 of the Turkish Code of Obligations dated 11/1/2011 and numbered 6098 with the heading of "*Responsibility*" which regulates obligation relations arising from tort actions is as follows:

"Those who incur damages on others as a result of negligent and illegal acts shall be responsible for compensating for such damages.

Even though in case of absence of a rule of law that prohibits damaging acts, those who intentionally harm others as a result of unethical deeds and actions shall be responsible for compensating for such acts."

32. Article 74 of the Code numbered 6098 which regulates the relation of obligation relations arising from tort actions with the Criminal Law is as follows:

"As the judge decides on the fault of the damaging party, on whether or not the latter has a discerning power or whatsoever, s/he shall neither be bound by the provisions on responsibility of the criminal law nor shall s/he be bound by the acquittal decision as ruled by the criminal judge. Similarly, the decision of the criminal judge concerning the evaluation of the fault and establishment of the damage shall not be binding on the judge of common law."

33. Article 4 and article 13 with the heading of "*Technical works to be done in disaster zones*" of the Code on Measures to be Taken and Aid to be Delivered Due to Disasters Impacting Public Life dated 15/5/1959 and numbered 7269 are as follows:

"*Article 4 – A regulation covering the general principles regarding emergency assistance organization and programs shall be prepared by the Ministries of Interior, Development and Housing, Public Works, Health and Social Assistance and Agriculture.*

Within the framework of the principles of this regulation, a program that is to be implemented in matters such as rescue, treatment of the injured, burial of the deceased, extinguishing fires, clearing up debris and accommodation of disaster victims to be fulfilled following the occurrence of a disaster and assigns duties and officials, determines the points of assembly shall be regulated by the governors' offices and the required vehicles shall be prepared and preserved.

The implementation of these programs shall be ensured by the rescue and assistance committees to be established by governors' offices.

…"

"*Article 13 – a) The state of the terrain where the disaster occurred as well as all structures and public facilities shall be examined by the public works boards to be established by the Ministry of Development and Housing and a damage assessment report shall be drafted.*

(Amended: 31/8/1999 - DIFC - 574/1 art.) In circumstances where this is necessary, upon the request of the Ministry of Public Works and Housing, other ministries, organizations and institutions, local administrations, universities, trade associations shall be liable to immediately assign a sufficient number of civil engineers and/or architects, who are experienced in their fields, to damage assessment efforts in order to determine the damage that has taken place in structures.

(Amended: 31/8/1999 - DIFC - 574/1 art.) A separate report shall be submitted to the most senior administrator of the province and subprovince in question regarding those that need to be demolished or evacuated given the hazardous state of the terrain or the damage suffered by buildings. These kinds of buildings shall be immediately

evacuated by these instances. A maximum period of 3 days shall be provided for those that need to be demolished and the owners shall be notified to eliminate the hazard. In the event that there is no owner found on the premises, the situation shall be announced through local means and the notification shall be considered to be made.

...

b) …

c) …

ç) In disasters such as landslide or rockfall, the buildings that are evacuated upon the continuation or the possibility of repeating of the hazard shall not be allowed to be occupied or repaired, for those that have been damaged, until definitive precaution has been taken against the hazard. In the event that it is decided that no precaution can be taken, the buildings that are within the hazardous zone shall be demolished within the framework of the above principles. If the Ministry of Development and Housing deems it more economical to take the necessary precautions against the disaster in the terrain than to demolish the buildings that are prone to hazard and to relocate the community elsewhere, the required allocation for taking these precautions shall be paid from the fund prescribed under article 33. Expenditures made for precautions pertaining to the elimination of the hazard shall not be subject to borrowing.

d) Shacks and houses can be built, commissioned to be built, leased or purchased in order to ensure the temporary accommodation of those who have become or are likely to become disaster victims in places where they are present or in other places.

In circumstances where it will not be possible to fulfill these precautions in a short period of time, financial aid can also be provided to those who wish to take their own temporary accommodation precautions.

…"

34. Articles 1, 2, 4 and 18 of the Code on the Organization and Duties of the Disaster and Emergency Management Authority dated 29/5/2009 and numbered 5902 are as follows:

"*Aim and scope*

ARTICLE 1 – (1) The aim of this Code shall be to regulate the establishment, organization as well as the duties and authorities of the Disaster and Emergency Management Authority answerable to the Office of the Prime Minister in order for it to deliver the services pertaining to disasters and emergencies as well as civil defense. The Prime Minister can exercise his/her authorities pertaining to the Authority via a minister.

(2) This Code shall cover the taking of necessary precautions in order to effectively deliver the services pertaining to disasters and emergencies as well as civil defense on the national level and preparation prior to the occurrence of incidents and damage reduction, ensuring coordination between the organizations and institutions

that carry out the interventions to be made during incidents and the recovery efforts to be conducted in the aftermath of incidents and the production and implementation of policies in these subject matters.

Definitions

Article 2 *- (1) The following included in the Code shall mean the following;*

a) Emergency: Incidents and a state of crisis created by these whereby the normal lives and activities of the entirety or certain segments of the society are halted or disrupted and which require emergency intervention,

b) Disaster: Incidents of natural, technological or human origin that create physical, economic or social losses for the entirety or certain segments of the society, halt or disrupt normal life and human activities,

c) …

h) Risk: Degree of values to be lost according to the hazard possibility in a given area,

ı) Risk reduction: All sorts of planned interventions to be made in order to prevent, reduce to acceptable scales or share the possible risks according to disaster scenarios developed in a given section or area,

i) Risk management: Efforts to determine, reduce and share the risk types and levels on the country, region, city scale and local scale and the planning principles in this field,

j) ...

k) Damage reduction: Risk management and prevention precautions, which aim to eliminate or reduce damages can potentially occur in disasters and emergencies,

collectively.

…"

"ARTICLE 4 – (1) In order to assess information in circumstances of disaster and emergency, determine the precautions to be taken, ensure their implementation and inspect, ensure the coordination between organizations and institutions as well as civil society organizations the Disaster and Emergency Coordination Board shall be established under the presidency of the Undersecretary of the Office of the Prime Minister and shall consist of the undersecretaries of the Ministries of National Defense, Interior, Foreign Affairs, Finance, National Education, Public Works and Housing, Health, Transport, Energy and Natural Resources, Environment and Forestry and the State Planing Organization, the president of the Disaster and Emergency Management Authority, the Director General of the Turkish Red Crescent Society as well as the senior officials of other ministries and organizations to be

assigned by the President of the Board depending on the type of disaster or emergency.

(2) The Board shall convene at least for times per year. Moreover, the Board can convene in extraordinary fashion upon the call of the President of the Board. The Presidency shall ensure the secretariat of the Board."

"*Provincial directorates of disaster and emergency*

ARTICLE 18 – (1) Provincial directorates of disaster and emergency shall be established in provinces, within special provincial administrations, answerable to the governor. The governor shall be responsible for the command and control of the directorate.

(2) The duties of provincial directorates of disaster and emergency shall be the following:

a) Determining the disaster and emergency hazards and risks of the province.

b) Drafting and implementing provincial disaster and emergency prevention and intervention plans in cooperation and coordination with local administrations as well as public organizations and institutions.

c) Managing the provincial disaster and emergency center.

ç) Determining the losses and damage that occur in disasters and emergencies.

d) …

...

g) Setting up and managing warehouses for necessary search and rescue equipment and food, tools, instruments and materials to be used to cater for the accommodation, nutrition and health requirements of the population in disasters and emergencies.

ğ) …

...

(3) …

...

(5) The appointment of the provincial disaster and emergency director and other personnel shall be done by the governor.

…"

35. Articles 4, 6, and 32 of the Regulation on Emergency Assistance Organization and Planning Principles for Disasters published in the Official Gazette dated 19/5/1998 and numbered 19808 are as follows:

"*Responsibility*

Article 4 – Governors and district governors, the ministry, organizations and institutions in charge as well as military units shall be separately responsible for fulfilling the duties that are assigned to them via emergency assistance plans and directives pertaining to emergency assistance to be regulated as per the relevant legislation and this Regulation.

Starting from the occurrence of a disaster, the administrative official of the place where the disaster has occurred shall be responsible for taking all sorts of emergency precautions that need to be taken and fulfilling emergency assistance without waiting for an order."

"*Article 6 – Within the framework of the rules and principles of this Regulation:*

a) In order to conduct emergency assistance services, provincial search and rescue committees shall be established in provinces under the chairmanship of the governor, sub-provincial search and rescue committees shall be established in sub-provinces under the chairmanship of district governors,

b) Governors and district governors shall be responsible in the first degree for the drafting, execution and keeping up to date of the province and sub-province emergency assistance plans. Ministries and central organizations and institutions as well as military units shall assist to the drafting and execution of these plans,

c) The rural organizations of Ministries, organizations and institutions shall be covered within the provincial and sub-provincial plans,

d) The central organizations of Ministries, organizations and institutions as well as military garrison commands in the region shall draft reinforcement and support plans pertaining to their own duties in order to assist the provinces and sub-provinces.

e) In the planning of emergency assistance services, the utilization of the powers and resources of the public organizations and institutions within the boundaries of the sub-province and/or province shall be the basis.

In the event that the requirements cannot be met on time or sufficiently via these resources, the following shall be done in order:

1. Assistance shall be requested from the military units in the region, neighboring governors and district governors,

2. These shall be met through the private enterprises and real persons in the region via liabilities.

...

Preliminary Damage Assessment and Temporary Housing Services Group

Article 32 – The establishment, duties, planning and services of the Preliminary Damage Assessment and Temporary Housing Services Group:

a) Establishment:

...

b) Duties:

1. It shall determine where and in what numbers to send preliminary damage assessment teams based on the news that are received,

2. It shall determine the areas where damage is intensive,

3. It shall provide the required information for definitive damage assessments,

4. It shall take the precautions to ensure the assessment of damage in housing units, all official and private structures and animal shelters in the shortest possible period of time,

5. Annex example of Preliminary Damage Assessment Forms: It shall be made to be completed as per 16. Annex example of Summary forms: It shall be drafted as per form 17 and submitted to the disaster bureau,

6. It shall determine buildings that are ill-advised to be residing in in terms of danger of death and that need to be demolished,

7. It shall determine buildings and facilities that can be used for the requirements of official organizations and the housing of disaster victims,

8. It shall commission the necessary actions in order for the determined buildings to be prepared for utilization,

9. It shall ensure the temporary housing of families that are left outside after having completed preliminary assessment efforts,

10. It shall ensure the allocation of primarily tents, intact schools and other official and private buildings for the short term housing of disaster victims,

11. ...

...

c) Planning:

1. Determining the list of personnel, equipment and instruments to be assigned to services by the organizations as per the principles of paragraphs (l) and (m) of article 12,

2. Places from which reinforcement teams can be requested in the event that the personnel that will carry out preliminary damage assessment does not suffice,

3. Since the temporary housing of disaster victims will be initially ensured in buildings belonging to official organizations, in buildings and facilities belonging to private individuals in the event that these buildings do not suffice, prior determination of these sorts of buildings and facilities,

4. ...

…"

IV. EXAMINATION AND JUSTIFICATION

36. The individual application of the applicant dated 22/11/2012 and numbered 2012/752 was examined during the session held by the court on 17/9/2013 and the following were ordered and adjudged:

A. Claims of the Applicant

37. The applicants alleged that the right to life, which is defined under article 17 of the Constitution, was violated by indicating that the Governor of Van and the officials of AFAD misused their duty by means of not fulfilling the duties assigned to them in the legislation, that no damage assessment was conducted at the hotel, that entry into the hotel was not prohibited despite the damage and that they led to deaths by negligence. The applicants secondly alleged that the freedom to claim rights, which is regulated under article 36 of the Constitution, was violated by indicating that no instance to which they could apply so that a criminal investigation would be conducted against the decision of the Office of the Chief Public Prosecutor of the Supreme Court of Appeals of not putting in process of the complaint that had been submitted due to the inability to find concrete information and documents existed.

B. Evaluation

1. Claim That Article 17 of the Constitution Was Violated

a. In Terms of Admissibility

38. While an assessment as to the admissibility of the complaints was done in the opinion of the Ministry with a view to the applicants' claim that article 17 of the Constitution was violated, it was stated it needed to be considered that the applicants filed a case for material and moral compensation against the relevant administrations, that the trial process was still going on, that in accordance with paragraph (5) of article 47 of the Code on the Establishment and Trial Procedures of the Constitutional Court dated 30/3/2012 and numbered 6216, an individual application could be lodged only after application remedies were exhausted.

39. In response to the opinion of the Ministry regarding the admissibility of the application, the applicants alleged that the mere reception of compensation would not be sufficient in the event that the right to life was violated, that the state had the positive liability to install an effective and preventive criminal system.

40. In order to make a decision pertaining to the matter of exhausting legal remedies while the admissibility examination pertaining to the complaints of the applicants with regard to article 17 of the Constitution is continuing, the scope of the positive liability to "*establish an effective judicial system*" that the State has in order to protect the right to life within the framework of article 17 of the Constitution needs to be determined. Therefore, the evaluation regarding this matter will be conducted jointly with the examination pertaining to the merits.

41. In paragraph (1) of article 46 of the Code numbered 6216, it is adjudged that only those whose current and personal right is directly affected due to the act, action or negligence that is claimed to result in the violation have the right to individual application. In line with the natural quality of the right to life, an application towards this right in terms of people who lose their lives can only be lodged by the late people's relatives who suffer from the incident of death that occurs. The applicants are the spouse, children and siblings of the individual who passed away in the incident that is the subject of the application. Therefore, there is no deficiency in terms of the capacity to apply.

42. Nevertheless, out of the applicants, Mehmet KERİMOĞLU and Mustafa KERİMOĞLU who are two brothers of the late S.K. did not submit a complaint petition to the Office of the Chief Public Prosecutor of Van or the Office of the Chief Public Prosecutor of the Supreme Court of Appeals with regard to the incident, did not submit any document as to the effect that they exhorted effort in order for an investigation to be conducted either. In accordance with paragraph (2) of article 45 of the Code numbered 6216, all of the administrative and judicial application remedies that have been prescribed in the code regarding the transaction, the act or the negligence that is alleged to have caused the violation must have been exhausted before lodging an individual application. In this case, with regard to the applicants' claim that no criminal investigation was conducted due to the decision of not putting in process of the complaint issued by the Office of the Chief Public Prosecutor of the Supreme Court of Appeals, a decision of inadmissibility should be issued due to the fact that application remedies have not been exhausted in terms of Mehmet KERİMOĞLU and Mustafa KERİMOĞLU who are two brothers of the late S.K.

43. It is seen that the part of the application lodged by the spouse and children of S.K., which is to the effect that article 17 of the Constitution was violated is not clearly devoid of justification as per article 48 of the Code numbered 6216. As no other reason for inadmissibility was observed, it should be decided that this part of the application has the quality of being admitted.

b. Examination in Terms of Merits

44. The applicants alleged that the right to life, which is defined under article 17 of the Constitution, was violated by indicating that the Governor of Van and the officials of AFAD did not fulfill the duties assigned to them in the legislation, that they did not take necessary measures between two earthquakes, that no damage assessment was conducted at the hotel, that entry into the hotel was not prohibited despite the damage and that they led to the death of their relative by negligence.

45. In the opinion of the Ministry, while the complaints to the effect that article 17 of the Constitution was violated were being evaluated, the principles adopted by the European Court of Human Rights ("ECtHR") with a view to the right to life were mentioned, it was stated that matters such as the uncertainty as to when the risk to which the relatives of the applicants were subject due to circumstances bearing a life-threatening hazard could

materialize, the status of the individuals who have a role in the emergence of these kinds of circumstances and whether or not the action or negligence attributed to these individuals is intentional need to be taken into consideration during the examination on merits of a certain case in order to determine the responsibility carried by the State with a view to the right to life.

46. In the opinion of the Ministry, it was stated that, within the context of article 2 of the European Convention on Human Rights ("ECHR"), a distinction needed to be observed between cases pertaining to a death incident occurring as a result of intention, attack or ill treatment and cases pertaining to a death incident occurring as a result of negligence. Within this framework, an opinion was included to the effect that the ECtHR concluded that the positive liability regarding the "*establishment of an effective judicial system*" did not require the filing of a criminal action in each and every incident if the violation of the right to life or physical integrity had not been deliberately caused and that it could be sufficient to have civil, administrative and even disciplinary remedies open for the victims.

47. Moreover, it was indicated in the opinion of the Ministry that the state could have access to relevant information and documents more easily in cases pertaining to manslaughter and hazardous activities with loss of life as a result of incidents occurring under the responsibility of public instances according to the ECtHR, that it was accepted that the state had the liability to conduct an official investigation, that in order for this criteria to be applied in the case in question first the public instance to which the duty to conduct examinations regarding the matter of earthquake resistance belonged to during the period when the buildings were constructed and in the following period and then whether or not the instance in question had fulfilled its duty needed to be determined.

48. In response to the opinion of the Ministry with regard to the merits of the application, the applicants asserted that according to article 2 of the ECHR, the state could have access to information and documents relevant to the incident more easily in cases pertaining to manslaughter, that it was accepted that the state had the liability to conduct an official investigation, that therefore, the Office of the Chief Public Prosecutor of the Supreme Court of Appeals needed to initiate the investigation *ex officio*, that in the expert report received within the scope of the investigation conducted on the incident, it was determined that the municipality was responsible, that in the decisions of the Council of State as regards the cases of earthquake, the municipality and the Ministry of Public Works were held responsible for the damages of earthquake, that in the incident which is the subject matter of the application, differently from other cases of earthquake, Bayram Hotel collapsed during the second earthquake and following aftershocks, that the Governor and the officials of AFAD were responsible due to the fact that they did not carry out damage assessment and take other measures.

49. Article 17 of the Constitution with the heading *of "Inviolability and material and spiritual existence of the individual"* is as follows*:*

> "*Everyone has the right to life and the right to protect and improve their material and spiritual existence.*
>
> *Except for medical necessity and the cases specified in law, the bodily integrity of the individual is inviolable; the individual cannot be subjected to scientific and medical experiments without his/her consent.*

No one can be subjected to torture or torment; no one can be subjected to a penalty or treatment which is incompatible with human dignity.

The act of killing in the case of self-defense and under compelling circumstances when law permits the use of a weapon during the execution of warrants of arrest and detention, the prevention of the escape of a detainee or convict, the quelling of a riot or insurgence, the execution of the orders given by an authorized body during martial law or state of emergency is out of the scope of the provision of the first paragraph.

50. The right to life and the right to protect and improve his/her material and spiritual existence of an individual are among his/her rights which are closely tied, inalienable and indispensable. As specified by the Constitutional Court, the fundamental right over the integrity of life and body is among the rights which impose a positive and negative liability on states (see CC, M.2007/78, D.2010/120, D.D. 30/12/2010).

51. Within the scope of the right to life regulated in article 17 of the Constitution, as a negative liability, the state has the liability not to end the life of any individual who is within its jurisdiction in an intentional and illegal way. Furthermore, as a positive liability, the state has the liability to protect the right to life of all individuals who are within its jurisdiction against the risks which may arise out of the actions of public authorities, other individuals or the individual himself/herself (CC, M.1999/68, D.1999/1, D.D. 6/1/1999). The state is responsible for protecting the material and immaterial existence of an individual from all kinds of dangers, threats and violence (CC, M.2005/151 D.2008/37, D.D. 3/1/2008; M.2010/58, D.2011/8, D.D. 6/1/2011).

52. In cases where the loss of life occurs under the conditions which can require the responsibility of the state, article 17 of the Constitution imposes the State the duty of taking effective administrative and judicial measures which will ensure that the legal and administrative framework that is formed in order to protect the right to life is duly applied and that the violations as regards this right are stopped and punished by making use of all available facilities. This liability is valid for all types of activities, public or not, in which the right to life can be in danger.

53. However, by taking into consideration of the preference of the action to be performed or the activity to be carried out by evaluating, in particular, the unpredictability of human behaviors, priorities and resources; positive liability should not be interpreted in a way that will create extreme burden on officials. In order for a positive liability to be applicable, it needs to be known by officials that the life of a specific individual is in real and imminent danger or after the acceptance of the existence of circumstances where this should be known, within the framework of this kind of a situation, it needs to be determined that public authorities have failed to take measures in such a way as to prevent the realization of this danger within reasonable limits and the authorities they have (for the decisions of the ECtHR in the same vein, see *Keenan v. the United Kingdom*, 27229/95, 3/4/2001, §§ 89-92 and *A. and Others v. Turkey*, 27/7/2004, 30015/96, § 44-45, *İlbeyi Kemaloğlu and Meriye Kemaloğlu v. Turkey*, 19986/06, 10/4/2012, § 28).

54. The positive liabilities that the state has within the right to life have also a procedural aspect. Within the framework of this procedural liability, the state is obliged to carry out an effective official investigation which can ensure that those who are responsible for each incident of death which is not natural are determined and punished, if necessary, The main aim of this type of investigation is to guarantee the effective implementation of the law

that protects the right to life and, in the incidents in which public officials or institutions are involved, to ensure that they are accountable against the deaths which occur under their responsibility (for the decisions of the ECtHR in the same vein, see *Anguelova v. Bulgaria*, App. No: 38361/97, § 137, *Jasinskis v. Latvia*, 21.12.2010, App. No: 45744/08, § 72).

55. It is necessary to determine the type of investigation required by procedural liability in an incident depending on whether the liabilities as regards the essence of the right to life require a criminal sanction or not. In cases pertaining to incidents of death occurring as a result of intention or assault or ill-treatment, the state has the liability to conduct criminal investigations of the nature to allow for the determination and punishment of those responsible for the case of lethal assault as per article 17 of the Constitution. In these kinds of incidents, the mere payment of compensation as a result of the administrative and civil investigations and cases that are conducted is not sufficient to eliminate the violation of the right to life and to remove the title of victim.

56. The aim of criminal investigations conducted is to ensure that the provisions of the legislation which protect the right to life are implemented in an effective way and that those who are responsible are accountable with regard to the incident of death. This is not a result liability, but a liability to use the appropriate means. On the other hand, the assessments included herein do not mean in any way that article 17 of the Constitution grants applicants the right to make third parties tried or punished due to a judicial crime (for the decision of the ECtHR in the same vein, see *Perez v. France*, 47287/99, 22/7/2008, § 70), imposes a duty of concluding all trials with a conviction or a certain criminal sentence (for the decision of the ECtHR in the same vein, see *Tanlı v. Turkey*, 26129/95, § 111).

57. The criminal investigations to be conducted should be effective and sufficient so as to allow for those who are responsible to be determined and punished. In order to be able to say that an investigation is effective and sufficient, investigation authorities need to act *ex officio* and collect all evidence which can enlighten the death and can be suitable for the determination of those who are responsible. A deficiency in the investigation that would reduce the likelihood of discovering the cause of the incident of death or those who are responsible bears the risk of clashing with the rule of conducting an effective investigation (for the decisions of the ECtHR in the same vein, see *Hugh Jordan v. the United Kingdom*, 24746/94, 4/5/2001, § 109; *Dink v. Turkey*, 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, 14/9/2010, § 78).

58. One of the matters which ensure the effectiveness of the criminal investigations to be conducted is the fact that the investigation and the consequences thereof are open to public review in order to ensure accountability in practice as in theory. In addition, in each incident, it should be ensured that the relatives of the person who passes away are involved in this process to the extent that it is necessary so as to protect their interests (for the decision of the ECtHR in the same vein, see *Hugh Jordan v. the United Kingdom*, 24746/94, 4/5/2001, § 109).

59. However, a different approach needs to be adopted with a view to cases pertaining to incidents of death occurring as a result of negligence. As a result, if the violation of the right to life or physical integrity has not been caused intentionally, the positive liability regarding the "*establishment of an effective judicial system*" does not require the filing of a criminal action in each and every incident. It can be sufficient that civil, administrative and,

even disciplinary legal remedies are open to victims (for the decisions of the ECtHR in the same vein, see *Vo v. France* [BD], 53924/00, 8/7/2004, § 90; *Calvelli and Ciglio v. Italy*, 32967/96, 17/1/2002, § 51).

60. In addition to this, in circumstances where State officials or organizations are negligent to a point that surpasses a judgment error or lack of attention in incidents of death occurring as a result of negligence, or in other words in circumstances where the instances in question fail to take the required and sufficient measures to eliminate hazards occurring as a result of a hazardous activity by means of neglecting the duties attributed to them despite being aware of the potential consequences, regardless of the legal remedies that may have been applied to by individuals on their own initiative, the lack of any accusation against the individuals who have endangered the lives of people or the failure to try these individuals may result in the violation of article 17 (for the decisions of the ECtHR in the same vein, see *Budayeva and others v. Russia*, 15339/02, 20/3/2008, § 140, *Öneryıldız v. Turkey*, [BD] 48939/99, 30/11/2004, § 93).

61. The ECtHR makes an addition to this exception included within the scope of hazardous activities with regard to the procedural liability of the state. According to this, in an application which those who became victims due to a natural disaster lodged (the relatives of the campers who lost their lives by being carried away by the flood in a camping place which was licensed by the municipality for operation by a private person) (*Murillo Saldías and others v. Spain*, 76973/01, 28/11/2006), the ECtHR decided that the administrative case which was conducted following a comprehensive criminal investigation in relation to the complaints as regards article 2 and was concluded with the adjudging of a reasonable compensation was an effective domestic legal remedy and eliminated the title of victim (*Budayeva and others v. Russia*, 15339/02, 20/3/2008, § 141).

62. In this case, principles with regard to the fact that the state conducts a comprehensive and effective criminal investigation in relation to the incidents which occur due to hazardous activities (§ 60) can also be applied on the applications which are lodged due to disaster incidents. Out of the losses of life which occur as a result of the fact that preventive measures are taken, in cases which require the responsibility of the State, within the scope of "*an effective judicial system*" which needs to be formed as per article 17 of the Constitution, there needs to be an independent and impartial official investigation procedure which meets minimum standards which are determined in terms of effectiveness and ensures that judicial sentences are imposed within the framework of the findings of the investigation. In such cases, competent authorities should work hard and immediately and initiate an investigation *ex officio* in order to determine primarily, the conditions of occurrence of the incident and disruptions in the functioning of the review system, secondarily, the State officials or authorities that play a role in any way in the chain of incidents in question (For the decision of the ECtHR in the same vein see *Budayeva and others v. Russia*, 15339/02, 20/3/2008, § 142).

63. In the incident that is the subject of the application, the relative of the applicants lost his life as a result of the collapse of the hotel where he was staying during the 5,6 magnitude earthquake that took place on the date of 9/11/2011 during the aftershocks which happened in the aftermath of the 7,2 magnitude earthquake on the date of 23/10/2011. With a view to the incident that is the subject of the application, the legal and administrative framework for the liability to protect the right to life, which is included in the liabilities of the state within the framework of the right to life, needs to be constituted and it needs to be

demonstrated (whether or not) the responsibility to implement this framework as it should be exists.

64. In order for a liability of the state to be applicable, it needs to be known by public officials that the life of a specific individual is in real and imminent danger or after the acceptance of the existence of circumstances where this should be known, within the framework of this kind of a situation, it needs to be determined that public instances have failed to take precautions in such a way as to prevent the realization of this danger within reasonable limits and the authorities they have (§ 53).

65. The applicants asserted that differently from other cases of earthquake, Bayram Hotel collapsed during the second earthquake and following aftershock, that the Governor and the officials of AFAD were responsible due to the fact that they did not conduct damage assessment and take other measures in accordance with the legislation on this matter (§ 44). In the opinion of the Ministry, it was stated that matters such as the uncertainty as to when the risk to which the relatives of the applicants were subject due to circumstances bearing a life-threatening hazard could materialize, the status of the individuals who have a role in the emergence of these kinds of circumstances and whether or not the action or negligence attributed to these individuals is intentional needed to be taken into consideration (§ 45).

66. In the case of the occurrence of a disaster such as an earthquake, with a view to the officials regarding whom the applicants request a criminal investigation to be conducted, the duties of immediately determining damaged buildings, evacuating and demolishing those buildings that constitute a hazard as per the damage they have sustained, ensuring the temporary accommodation of disaster victims or those who may potentially become disaster victims wherever they are or in other places are clearly determined in the legislation (§ 33-35) regarding the subject.

67. In the legal regulations in question, it is provided that a program which determines the duties and officials for implementation in matters such as rescue, the treatment of those injured, accommodation, burying the dead, extinguishing fires, debris removal and subsistence for disaster victims, which will be performed following the occurrence of a disaster, and which determines meeting places will be regulated by the offices of governors, that the implementation of these programs will be ensured by the rescue and aid committees to be established by the offices of governors, that it is necessary that following the occurrence of the disaster of earthquake, the hazardous situation and the situation of the buildings which need to be demolished and evacuated in terms of the damage that they inflict be reported to the highest administrative authority of that province and district and that such buildings be immediately made to be evacuated by these authorities, that if necessary, upon the request of the Ministry of Public Works and Settlement, other ministries, institutions and organizations, local administrations, universities and professional chambers are responsible for immediately assigning a sufficient number of civil engineers and/or architects who are experienced in their fields in the activities of damage assessment so as to assess the damage which occurs in structures.

68. In disasters such as landslide, rockfall and, within this scope, earthquake, it is stipulated in these regulations as a liability that the buildings that are evacuated upon the continuation or the possibility of repeating of the hazard will not be allowed to be occupied or repaired, for those that have been damaged, until a definitive measure has been taken against the hazard, that if it is decided that no precaution can be taken, the buildings that are within the hazardous zone shall be demolished within the framework of the above principles.

69. The Disaster and Emergency Management Authority affiliated to the Office of the Prime Minister in order for it to deliver the services pertaining to disasters and emergencies and civil defense was established, provincial directorates of disaster and emergency were established in provinces, within special provincial administrations, affiliated to the governor and it was stated that the governor was responsible for the command and control of these directorates. Determining the losses and damage that occur in disasters and emergencies and setting up and managing warehouses for necessary search and rescue equipment and food, tools, instruments and materials to be used to cater for the accommodation, nutrition and health requirements of the population in disasters and emergencies are listed among the duties of these directorates.

70. In the Regulation on Emergency Assistance Organization and Planning Principles for Disasters, it is stipulated that governors and district governors, the ministry, organizations and institutions in charge as well as military units shall be separately responsible for fulfilling the duties that are assigned to them via emergency assistance plans and directives pertaining to emergency assistance to be regulated as per the relevant legislation and this Regulation, that starting from the occurrence of a disaster, the administrative official of the place where the disaster has occurred shall be responsible for taking all sorts of emergency precautions that need to be taken and fulfilling emergency assistance without waiting for an order.

71. Similarly, through the Regulation in question, it is prescribed that Preliminary Damage Assessment and Temporary Housing Services Group will be formed and this group has been assigned with; 1. Determining where and in what numbers to send preliminary damage assessment teams based on the news that are received, 2. Determining the areas where damage is intensive, 3. Providing the required information for definitive damage assessments, 4. Taking the measures and performing necessary actions to ensure the assessment of damage in housing units, all official and private structures and animal shelters in the shortest possible period of time.

72. When the provisions of the legislation included above are taken into consideration, it is understood that the Governor and AFAD officials, who are alleged by the applicants to have caused the deaths of their relatives by means of failing to take the necessary precautions in the aftermath of the first earthquake, have primary responsibilities with a view to precautions to be taken.

73. Numerous aftershocks occurred in the aftermath of the first big earthquake that took place. The buildings that sustained damages to a certain degree during the first earthquake were in danger of collapsing during the aftershocks that occurred. It needs to be accepted that this situation is a foreseeable risk. The relative of the applicants lost his life by being buried under the rubble of the hotel, which collapsed during the 5,6 magnitude earthquake that occurred 16 days after the first big earthquake. It is also evident that disaster victims or those that came to that city as a result of the earthquake that had occurred would consider using the hotel, which was one of the facilities with the highest capacity among the accommodation places open to the public in the city where the earthquake had occurred, for their accommodation needs. In this case, it can be expected from those responsible to carry out the damage assessment regarding the hotel and to decide that it be evacuated if necessary within the 16 days that had elapsed after the first earthquake.

74. As also specified in the opinion letter of the Ministry, it is stated in the case-law of the ECtHR that if a violation is determined by national authorities in a clear or indirect way by way of a measure or decision being taken in favor of the applicant and this violation is

redressed with an appropriate and sufficient compensation, the relevant party will not be able to assert that she/he/it is a victim any more (*Scordino v. Italy*, 36813/97, 29/3/2006, § 178 and so on). If these two conditions are fulfilled, it will not be necessary for the ECtHR to conduct an examination due to the secondary quality of the protection mechanism regulated with the ECHR (*Eckle v. Germany*, 8130/78, 15/7/1982, § 64-70, *Jensen v. Denmark*, 48470/99, 20/9/2001; *Fatma Yüksel v. Turkey*, 51902/08, 9/4/2013, § 45-46).

75. Paragraphs (1) and (2) of article 45 of the Code numbered 6216 with the side heading *"Right to individual application"* are as follows:

> "*(1) Everyone can apply to the Constitutional Court based on the claim that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights and the additional protocols thereto, to which Turkey is a party, which are guaranteed by the Constitution has been violated by public force.*
>
> *(2) All of the administrative and judicial application remedies that have been prescribed in the code regarding the transaction, the act or the negligence that is alleged to have caused the violation must have been exhausted before making an individual application.*
>
> …"

76. Similar to what is accepted in the case law of the ECtHR (§ 74), the condition of exhausting the legal remedies included under paragraph (2) of article 45 of the Code numbered 6216, is a natural outcome of the fact that the individual application is a final and extraordinary remedy to prevent the violation of fundamental rights. In other words, the fact that administrative instances and courts of instance are primarily liable to resolve violations of fundamental rights renders compulsory the condition of exhausting legal remedies (App. No: 2012/1027, § 20-21, 12/2/2013).

77. The cases for material and moral compensation (§17-20) which the applicants filed against Van Municipality, the Ministry of Environment and Urbanization, the Governor's Office of Van and the Prime Ministry representing the Disaster and Emergency Management Authority (AFAD) and the inheritors of the owner of the hotel Mehmet Sıddık Bayram have not yet been concluded, no permission was granted to initiate a criminal investigation regarding the Governor and the officials of AFAD. In this case, the material aspect of the positive liabilities of the State within the framework of the right to life in the incident that is the subject of the application, that is, whether or not it used all the available means in order to duly implement the legal and administrative precautions envisaged to protect the right to life (§ 52) cannot be examined and no decision can be delivered by the Constitutional Court at this stage.

78. It is not possible to say the same thing as regards the effective criminal investigation aspect of the State's positive liabilities with a view to the right to life and there is no obstacle preventing the Constitutional Court from delivering a decision regarding the matter of whether or not the right to life was violated due to the decision of not putting in process that was finalized. Moreover, it is not compulsory for the full remedy actions filed against public administrations to have been concluded in order for the Constitutional Court to be able to conduct this kind of an examination. Indeed, as mentioned above (§ 60), the prevention of the examination of the responsibilities of officials who are alleged to have put the lives of individuals in danger by means of neglecting their duties and authorities regarding

the matter of eliminating foreseeable risks that occur as a result of a hazardous activity or natural disasters can result in the violation of article 17 of the Constitution by itself. However, it must be noted that the aim of the criminal investigation that needs to be conducted is to ensure that the provisions of the legislation which protects the right to life are implemented in an effective way and that those who are responsible, if any, in the incident of death that has occurred are brought to justice in order for their responsibilities to be determined. This is not a result liability, but a liability to use the appropriate means. On the other hand, the assessments that are contained herein do not refer to the absolute obligation of determining the civil or criminal responsibility of any individual or public instance with regard to the incident.

79. In this case, as brought forward in the opinion letter of the Ministry, while the examination of the admissibility of the complaints is carried out, the objection that the applicants had filed a case for material or moral compensation against the relevant administrations, that the trial process was still going on, that the legal remedies were not exhausted (§ 38) (with regard to the procedural aspect of the positive liabilities of the state within the framework of the right to life) cannot be accepted as regards the decision of not putting in process of the objection that was finalized . The essence of the application is the allegation that the procedural aspect of the positive liability of the state stemming from the right to life had been violated due to the fact that no criminal investigation was initiated regarding the Governor and AFAD officials whom they allege to have caused the deaths of their relatives by failing to take the necessary precautions in the aftermath of the first earthquake.

80. In the incident that is the subject of the application, a decision of lack of jurisdiction with regard to the Governor of Van and AFAD officials was delivered in the criminal investigation conducted by the Office of the Chief Public Prosecutor of Van and the investigation file was sent to the Office of the Chief Public Prosecutor of the Supreme Court of Appeals. The Office of the Chief Public Prosecutor of the Supreme Court of Appeals decided that the complaint not be put into process with the justification that the allegations pertaining to misuse of duty regarding the Governor of Van and the officials of AFAD were not based on concrete information and documents and that no situation that constituted a crime and would require a preliminary examination regarding the concerned existed.

81. One of the matters to be taken into consideration when evaluating the effectiveness of the investigation that was conducted with regard to these individuals is the effectiveness and the sufficiency of the criminal investigation so as to allow for the determination and punishment of those responsible. In order for effectiveness and sufficiency to be fulfilled, the investigation instances need to take action ex officio and all evidence that could elucidate the death incident and serve to identify those responsible need to be collected (§ 57).

82. With regard to the incident that took place, first of all an investigation needs to be initiated in order to establish to what extent the responsibility can be attributed to the negligence of relevant public officials (whom the complainants also allege to be responsible) except for the effect of the natural disaster. In order to be able to answer this question, expert opinions including technical and administrative assessments need to be sought and information that can only be obtained by public authorities need to be accessed. These matters are not matters that individuals (complainants in the incident that is the subject of the application) can prove (for the decision of the ECtHR in the same vein, see *Budayeva and others v. Russia*, 15339/02, 20/3/2008, § 163).

83. Within the framework of the first investigation that was conducted by the Office of the Chief Public Prosecutor of Van, a viewing was conducted, samples were taken and examined, opinions of experts were obtained, the deficiencies and faults that were present in the additions that were later made to the building in question were referred to in light of the report prepared by experts, it was indicated that it was understood that although it stood erect during the first earthquake, it collapsed during the second one after having been affected by the aftershocks between the two earthquakes.

84. With regard to the incident that had consequences as severe as the death of 24 people, the Office of the Chief Public Prosecutor of the Supreme Court of Appeals decided not to put the complaint in process with the justification that the allegations pertaining to misuse of duty were not based on concrete information and documents and that no situation that constituted a crime and would require a preliminary examination regarding the concerned existed without providing any assessment as to the matters that had been taken into consideration during the first investigation and the matters that were made the subject of complaint by the applicants (§ 12). With regard to the principal complaint of the applicants of causing the deaths by means of the failure of the officials to conduct a damage assessment between the two earthquakes and to take other administrative precautions, the Office of the Chief Public Prosecutor did not put the request of initiating an investigation in process without including any evidence or assessments that would demonstrate what sort of actions had been taken by the officials in terms of damage assessment and the prohibition of entry into damaged buildings. Whereas the decision in question could have been subject to oversight through the means of objection had a decision not to give permission for investigation been delivered at this stage by the Office of the Chief Public Prosecutor, the decision that was already delivered by the Office of the Chief Public Prosecutor prevented the evaluation of the request to pursue the investigation by an instance of objection.

85. Another matter to be taken into consideration when evaluating the effectiveness of the investigation that is conducted is that the applicants are able to take part in the investigation that is conducted in such a way as to be able to ensure the openness of the investigation and to protect their legitimate interests (§ 58). In the incident that is the subject of the application, the 1. Chamber of the Council of State dismissed the objection filed by the individuals who had lost their relatives against the decision of the Office of the Chief Public Prosecutor of the Supreme Court of Appeals of not putting in process without examination by referring to the fact that no objection remedy is envisaged in the Code numbered 4483 against these decisions of Offices of Chief Public Prosecutors. There is no instance where the applicants can object to the decision of the Office of the Chief Public Prosecutor of the Supreme Court of Appeals of not putting in process. In this case, it is not possible to consider the investigation to be effective due to the fact that the investigation conducted with regard to these individuals and its consequences are not open. As a matter of fact, the ECtHR ruled that the fact that the close relatives of the applicant (Fırat Dink) in the Dink v. Turkey case were able to object to the objection instances that had conducted their examination merely based on the file could not remedy the deficiencies in the investigation in question with regard to the matter of protecting the legitimate interests of the victims (*Dink v. Turkey*, 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, 14/9/2010, § 89).

86. For the explained reasons, as it is understood that an effective and deterrent criminal investigation had not been conducted, it needs to be accepted that the procedural aspect of the right to life regulated under article 17 of the Constitution was violated.

2. The Claim As to the Effect that Articles 36 and 40 of the Constitution Were Violated

87. The applicants secondly alleged that the freedom to claim rights, which is regulated under article 36 of the Constitution, which corresponds to articles 6 and 13 of the ECHR, was violated by indicating that no instance to which they could apply so that a criminal investigation would be conducted against the decision of the Office of the Chief Public Prosecutor of the Supreme Court of Appeals of not putting in process of the complaint that had been submitted due to the inability to find concrete information and documents existed.

88. In response to the applicants' allegation of violation of article 36 of the Constitution, the Ministry indicated that the rights and principles pertaining to fair trial under article 6 of the ECHR, which regulates the right to a fair trial, were applicable during the conclusion on the merits of "*disputes pertaining to civil rights and obligations*" and "*a criminal charge*", that the fact that the applicants did not have the title of the accused in the criminal investigation in question needed to be taken into consideration and that therefore a decision of rejection of venue in terms of subject needed to be delivered, that article 9 of the Code numbered 4483 only refers to the provisions of objection against decisions delivered by administrative instances, that objections could not be examined as per this provision due to the fact that no regulation is introduced with regard to the decisions of the Office of the Chief Public Prosecutor of not putting in process as per article 4 of the Code numbered 4483, that however, there is not a significant deficiency from a legal point of view given that the applicants whose complaints that are conveyed to Offices of Chief Public Prosecutors are not put in process have the means to take the same matter before the instance of permission and object to any decision emanating from the instance of permission.

89. Article 36 of the Constitution with the side heading of *''Freedom to claim rights''* is as follows:

> "*Everyone has the right to make claims and defend themselves (Amended expression: 3.10.2001-4709/14 art.) either as plaintiff or defendant and the right to a fair trial before judicial bodies through the use of legitimate ways and means.*
>
> No court can avoid hearing a case within its own jurisdiction."

90. Article 40 of the Constitution with the side heading of "*Protection of fundamental rights and freedoms*", which primarily corresponds to article 13 of the ECHR that adjudges that anyone whose rights and freedoms defined under the ECHR are violated has the right to apply to an effective remedy before a national instance, even if the violation in question is carried out by individuals who are charged to conduct an official service, is as follows:

> "Anyone whose rights and freedoms vested by the Constitution are violated has the right to ask for being granted the opportunity to apply to an authorized body without any delay.
>
> *(Additional paragraph: 3.10.2001-4709/16 art.) The State is obliged to indicate in its proceedings the legal remedies and authorities the relevant individuals should apply and the time frames for these.*

Damages incurred by any individual through unfair treatment by public officials are compensated for by the State as per the law. The State reserves the right of recourse to the relevant official having responsibility."

91. Within the framework of the procedural liability of the state to "*establish an effective judicial system*" with regard to the right to life in relation to the incident that is the subject of the application, when assessments were made as to whether or not an effective criminal investigation that could ensure the identification and, if necessary, punishment of those responsible had been conducted in addition to and beyond the legal and administrative remedies for the victims, since the lack of an instance to which the applicants could apply against the decision of the Office of the Chief Public Prosecutor of the Supreme Court of Appeals of not putting in process the complaint so that a criminal investigation would be conducted was accepted as a deficiency and a decision of violation was delivered, it was not deemed necessary to conduct a separate examination on the same subject within the context of articles 36 and 40 of the Constitution.

V. IMPLEMENTATION OF ARTICLE 50 OF THE CODE NUMBERED 6216

92. Paragraph (2) of article 50 of the Code numbered 6216 is as follows:

"(2) If the determined violation arises out of a court decision, the file shall be sent to the relevant court for holding the retrial in order for the violation and the consequences thereof to be removed. In cases where there is no legal interest in holding the retrial, the compensation may be adjudged in favor of the applicant or the remedy of filing a case before the general courts may be shown. The court, which is responsible for holding the retrial, shall deliver a decision over the file, if possible, in a way that will remove the violation and the consequences thereof that the Constitutional Court has explained in its decision of violation."

93. In the application, a request for moral compensation was filed for the spouse of the person who died as 30.000 TL, for each of his three children as 25.000 and for each of his brothers as 15.000 TL and as 135.000 (in total). Due to the violation of the procedural aspect of the right to life, it was decided by discretion that a total of 20.000 TL in moral compensation be paid together to the spouse of Selman Kerimoğlu who passed away, Serpil Kerimoğlu and his children Sinem, Önder Can and Yiğit Ögeday Kerimoğlu out of the applicants. This compensation is relevant to the moral damage arising out of the violation of the constitutional right and it does not have any effect on the cases for material, moral compensation which are going on in administrative justice.

94. The applicants requested the collection of the counsel's fee and trial expenses from the defendants. It was decided that the trial expense made by the applicants be paid to the applicants.

95. Taking into account the fact that the failure to conduct an effective and deterrent criminal investigation violated the right to life with a view to the incident that is the subject of the application, in accordance with paragraphs (1) and (2) of article 50 of the Code numbered 6216, it should be decided that a copy of the decision be sent to the Office of the Chief Public Prosecutor of the Supreme Court of Appeals in order for the violation and the consequences thereof to be removed.

VI. JUDGMENT

In the light of the reasons explained, it is **UNANIMOUSLY** decided on the date of 17/9/2013 that

A. The complaints pertaining to the violation of article 17 of the Constitution brought forward in the application by the spouse and children of Selman Kerimoğlu who lost his life in the incident ARE ADMISSIBLE,

B. The complaints brought forward in the application by Selman Kerimoğlu's two brothers Mehmet Kerimoğlu and Mustafa Kerimoğlu ARE INADMISSIBLE due to the fact that "*application remedies have not been exhausted*",

C. The procedural aspect of the right to life guaranteed under Article 17 of the Constitution WAS VIOLATED,

D. The separate EXAMINATION of the complaints to the effect that articles 36 and 40 of the Constitution were violated IS NOT NECESSARY,

E. A total of 20.000 TL in moral COMPENSATION BE PAID together to Selman Kerimoğlu's spouse Serpil Kerimoğlu and his children Sinem, Önder Can and Yiğit Ögeday Kerimoğlu out of the applicants,

F. Other requests of the applicants in relation to extra compensation BE DISMISSED,

G. The trial expense of 2,812.50 TL in total composed of the fee of 172.50 TL and the counsel's fee of 2,640.00 TL, which were made by the applicants BE PAID TO THE APPLICANTS,

H. The payments be made within four months from the date of application of the applicants to the State Treasury following the notification of the judgment; if there happens to be a delay in payment, legal interest be accrued for the period elapsing from the date when this duration ends until the date of payment,

İ. A copy of the decision be sent to the Office of the Chief Public Prosecutor of the Supreme Court of Appeals in order for the violation and the consequences thereof to be removed as per paragraphs (1) and (2) of article 50 of the Code numbered 6216.

President	Member	Member
Alparslan ALTAN	Serdar ÖZGÜLDÜR	Celal Mümtaz AKINCI

Member	Member
Muammer TOPAL	M. Emin KUZ