Kaya v Turkey

Kiliç v Turkey

Failure to protect victims at risk

A case report

Part of a series of cases brought to the European Court of Human Rights by the Kurdish Human Rights Project and the Human Rights Association of Turkey

KHRP

Kurdish Human Rights Project

KAYA v. TURKEY
&
KILIÇ v. TURKEY:

Failure to Protect Victims at Risk

June 2001

Acknowledgements

The Kurdish Human Rights Project gratefully acknowledges the financial support of:

Bishop's Commission for MISEREOR (Germany), The John Merck Fund (USA), The Lyndhurst Settlement (UK), The Ruben and Elisabeth Rausing Trust (UK), The Bromley Trust (UK), The Law Society of England and Wales, National Lottery Charities Board (UK), Norwegian Ministry of Foreign Affairs (Norway), Lawyers for Lawyers Foundation (Netherlands), The Avenue Charitable Trust (UK), Stichting Cizira Botan (Netherlands), ACAT Suisse – Action des Chrétiens pour l'Abolition de la Torture (Switzerland), UNISON (UK); Finnish Ministry of Foreign Affairs (Finland), The Co-operative Bank (UK), Diakonisches Werk (Germany), The Royal Netherlands Embassy in Ankara (Netherlands); the Netherlands Ministry of Foreign Affairs (Netherlands); and the World Organisation Against Torture [OMCT] (Switzerland).

We also wish to express our thanks to both the Human Rights Association of Turkey (Insan Haklari Dernegi), Diyarbakir branch, for their generous contribution to the preparation of these cases, and the Turkish Bar Associations.

The legal team of the Kurdish Human Rights Project consists of:

In Turkey: Emin Aktar, Cihan Aydin, Osman Baydemir, Orhan Kemal Cengiz, Tahir Elci, Osman Ergi, Metin Kilavuz, Mahmut Sakar, Kenan Sidar, Sezgin Tanrikulu, Sinan Tanrikulu and Reyhan Yalcindag.

In Britain: David Anderson QC; Michael Birnbaum QC; Professor Bill Bowring; Professor Kevin Boyle; Louis Charalambous, solicitor; Louise Christian, solicitor; Andrew Collender QC; Fiona Darroch, barrister; Tim Eicke, barrister; Ben Emmerson QC; Joanna Evans, barrister; Tony Fisher, solicitor; Edward Grieves, barrister; John Guess; Matthew Happold, Lecturer in Law; Professor Françoise Hampson; Gill Higgins, barrister; Andrea Hopkins, barrister; Murray Hunt, barrister; Philip Kirkpatrick, solicitor; Philip Leach, solicitor and KHRP Legal Director; Professor Sheldon Leader; Fiona McKay, solicitor and KHRP Deputy Director; Mark Muller, barrister; Caroline Nolan, solicitor; Mark O'Connor, barrister; Tim Otty, barrister; Gita Parihar, solicitor; Gareth Peirce, solicitor; Rajesh Rai, barrister; Aisling Reidy, barrister; Paul Richmond; Michael Rollason, barrister; Jessica Simor, barrister; Keir Starmer, barrister; Nicholas Stewart QC; Jemima Stratford, barrister; Alice Faure Walker, solicitor; Colin Wells, barrister; and Chris Williams, barrister.

In Norway: Arild Humlen, Jon Rud, Ola Maeland, Øvind Østberg and Knut Rognlien (Norwegian Bar Association).

ISBN: 1 900175 38 X
Published by the Kurdish Human Rights Project, London (June 2001)
This report was written by Andrea Hopkins and edited by the Kurdish Human Rights Project.

Editorial Team
Kerim Yildiz
Fiona McKay
Philip Leach
Sally Eberhardt

For further information on the cases, please contact the Kurdish Human Rights Project, Suite 319, Linen Hall, 162-168 Regent Street, London W1B 5TG, England. Telephone: +44 20 7287 2772 Facsimile: +44 20 7734 4927 E-mail: khrp@khrp.demom.co.uk Website: http://www.khrp.org

We wish to acknowledge that the Commission's Article 31 Reports and the Court's judgments contained in this report, were produced in their original form by the European Commission of Human Rights, Council of Europe, F-67075 Strasbourg Cedex, France. Website: http://www.dhcour.coe.fr

The price of this publication (£10) covers printing and other costs associated with its production and distribution.

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FOREWORD

In 1993 the body of Hasan Kaya, a doctor practising in Elazig, was found under a bridge near Tunceli. He had been shot through the head. In the same year, Kemal Kiliç, a journalist with the *Özgür Gündem* newspaper in Şanliurfa, was shot dead by four men on his way home from work.

In July 2000 the European Court of Human Rights delivered its judgments in the cases of *Mahmut Kaya v Turkey* and *Cemil Kiliç v Tukey*. Both cases involved the right to life as protected by Article 2 of the European Convention on Human Rights. The Court found that the right to life included positive obligations on the part of the State to protect such a right and to conduct an effective and thorough investigation into the circumstances of killings associated with the security forces and the gendarmerie. In the cases of *Mahmut Kaya* and *Cemil Kiliç* the Court found violations of both obligations. In the case of *Mahmut Kaya*, the Court also found that the victim, Hasan Kaya, had suffered inhuman and degrading treatment prior to his death, in violation of Article 3 of the Convention.

Mahmut Kaya and *Cemil Kiliç* are only two of the numerous cases brought by Turkish citizens of Kurdish ethnic origin with the assistance of the Kurdish Human Rights Project (KHRP)[1]. The conduct of legal proceedings before the European Court of Human Rights requires close co-operation of many individuals and organisations. In assisting individuals to bring applications, KHRP has worked with human rights organisations in Turkey[2], the United Kingdom[3] and in Europe[4]. Due to the length of proceedings in the European Court of Human Rights, usually at least five years, a long-term commitment is required from all who are involved in the case.

KHRP aims to improve the level of awareness of the human rights abuses endured by Kurdish people in Turkey, to provide education on international human rights standards and to promote the rule of law in the Kurdish regions (including Turkey, Syria, Iran, Iraq and parts of the former Soviet Union). General knowledge of, and access to, the decisions in *Mahmut Kaya* and *Cemil Kiliç* and other cases have an important part to play in advancing these aims.

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[1] *Akdivar and Others v Turkey* (merits) judgment 16 September 1996; *Aksoy v Turkey* judgment18 December 1996; *Aydin v Turkey* judgment 25 September 1997; *Mentes and Others (merits) v Turkey* judgment 27 November 1997; *Mehmet Kaya v Turkey* judgment 19 February 1998; *Selcuk and Asker v Turkey* judgment 24 April 1998; *Gundem v Turkey* judgment 25 May 1998; *Kurt v Turkey* judgment 25 May 1998 ; *Tekin v Turkey* judgment 9 June 1998; *Ergi v Turkey* judgment 28 July 1998; *Yasa v Turkey* judgment 2 September 1998; *Aytekin v Turkey* judgment 23 September 1998 ; *Tanrikulu v Turkey* judgment 8 July 1999; *Cakici v Turkey* judgment 8 July 1999; *Ozgur Gundem v Turkey* judgment 16 March 2000; *Kaya v Turkey* judgment 28 March 2000; *Kiliç v Turkey* 28 March 2000; *Ertak v Turkey* judgment 9 May 2000; *Timurtas v Turkey* judgment 13 June 2000; *Salman v Turkey* judgment 26 June 2000; *Ilhan v Turkey* judgment 26 June 2000; *Aksoy v Turkey* judgment 10 October 2000; *Akkoç v Turkey* 10 October 2000; *Taş v Turkey* judgment 14 November 2000; *Bilgin v Turkey* judgment 16 November 2000; *Gül v Turkey* judgment 14 December 2000; *Dulas v Turkey* judgment 30th January 2001; *Çiçek v Turkey* judgment 27 Feb 2001; *Berktay v Turkey* judgment 1 March 2001; *Tanli v Turkey* judgment 10 April 2001, *Sarli v Turkey* judgment 22 May 2001, *Akdeniz v Turkey* judgment 31 May 2001.

[2] For example, the Human Rights Association of Turkey (IHD) and the Bar Associations in Turkey.

[3] For example, the Human Rights Centre at Essex University, the Law Society of England and Wales and the Bar Human Rights Committee of England and Wales.

[4] The Human Rights Committee of the Norwegian Bar Association.

Since 1998 Turkey has been included within the formal European Union enlargement process. The EU membership criteria (often referred to as the Copenhagen Criteria) were designated by the EU Member States in 1993. Membership requires that the candidate country has achieved, amongst other things,

"stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities"

Since 1998 the European Commission has submitted regular reports on Turkey's progress towards accession. Their most recent report was published in November 2000[5]. In this report, the European Commission gives consideration to the judgments adopted by the European Court of Human Rights on individual cases involving Turkey. Furthermore, progress in civil and political rights is measured by reference to the need to bring domestic legal procedures in Turkey into line with the provisions of the European Convention on Human Rights and the relevant case law of the Court.

It is clear that bringing individual applications such as those of *Mahmut Kaya* and *Cemil Kiliç* before the Court are essential to highlight the continuing violations of human rights in Turkey that must be addressed before Turkey is permitted to accede to the European Union. The individual cases brought against Turkey with the assistance of the Kurdish Human Rights Project ensure that the pressure upon the Turkish Government to improve their human rights record remains strong.

The Introduction to this Case Report assesses the legal aspects of the cases of *Mahmut Kaya* and *Cemil Kiliç*. Part I outlines the legal procedure, the legal arguments submitted and the Commission's and the Court's reasoning and findings in *Mahmut Kaya*. Part II deals with the case of *Cemil Kiliç*. The Appendices contain the decisions of the former European Commission of Human Rights, the Court judgments and a report entitled '*Inadequacies of Investigations in Southeast Turkey as established in the Article 31 Reports of the European Commission of Human Rights and the Judgments of the European Court of Human Rights*'(1 December 1999). A summary guide to the system and procedure under the European Convention on Human Rights is also included in the Appendices. Outlines of the applicants' opening speeches and verbatim records can be obtained from KHRP.

KHRP would like to thank Andrea Hopkins who wrote this report, Philip Leach for his essential on-going hard work and commitment to the legal work of KHRP, and the lawyers in both the UK and Turkey who represented the applicants with us.

Kerim Yildiz
Executive Director
Kurdish Human Rights Project

London
June 2001

[5] 2000 Regular Report from the Commission on Turkey's Progress Towards Accession, 8 November 2000. Available on www.europa.eu.int/com/enlargment.

INTRODUCTION

The cases of *Mahmut Kaya* and *Cemil Kiliç* deal with the problems of 'disappearances' and killings that were prevalent in Southeast Turkey particularly during 1993 and 1994. In these two cases, the families concerned alleged that the security forces were either directly or indirectly responsible for the 'disappearance' and killing of their loved ones. In both cases the former European Commission of Human Rights held fact-finding hearings in Turkey (a feature of the Strasbourg system which has been very rarely used, other than in relation to the cases against Turkey since the mid-1990s).

The cases both concern violations of Article 2 of the Convention. Article 2 represents one of the most fundamental rights enshrined in the European Convention on Human Rights: the right to life. A number of obligations arise under Article 2. A State will be accused of violating the provision when it is proven beyond reasonable doubt that the fatality was caused by agents of the State. A further obligation arises in conjunction with the State's general duty under Article 1 of the Convention "to secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", which implies both a duty to protect the right to life, and to carry out effective investigations of killings involving the use of force.

These cases are significant principally for two reasons. Firstly, the judgments of the European Court include an analysis of the legal system in Southeast Turkey, in the light of all available information including the *Susurluk Report*[6], and highlight the way in which the security forces in the region were often unaccountable for their actions during this period.

Secondly, even though the Court found there was insufficient evidence to prove the involvement of State agents in the killings, *Mahmut Kaya* and *Cemil Kiliç* are important examples of cases that reinforce the principle that the State has a duty to take positive steps to protect individuals whose lives the authorities know, or ought to know, are at risk. The judgments of the Court in these two cases recognise that certain groups were known to be at risk from criminal elements acting with the authority, connivance or acquiescence of the state authorities in Southeast Turkey at this time. Hasan Kaya, as a doctor suspected of treating wounded members of the PKK, and Kemal Kiliç, as a journalist at a 'pro-Kurdish' newspaper, were both considered to be at risk. Yet despite this knowledge, and having measures available which could have been taken to protect them, the Turkish authorities did nothing.

It remains disappointing, however, that both the Commission and the Court appear reluctant to go further and find the State responsible for a killing where the evidence is circumstantial and where the victim was not a detainee of the State.

Notwithstanding Turkey's candidacy to the European Union and the recent Progress Report of the European Commission[7], human rights violations as brutal as kidnappings, inhuman and degrading treatment and killings still occur, although they are constantly denied by the Turkish authorities. Such human rights abuses are at the core of the *Mahmut Kaya* and *Kiliç* cases.

[6] See note 8 below
[7] See note 5 above.

It should be emphasised in this context that applications to the European Court of Human Rights represent a remedy of last resort, and the primary responsibility for protecting and promoting human rights in accordance with the European Convention on Human Rights lies with the member states themselves. Unfortunately, these cases show that within Turkey the domestic legal system does not provide individuals with adequate protection.

MAHMUT KAYA v. TURKEY (No. 22535/93)

SUMMARY OF CASE

The applicant in the case of *Mahmut Kaya v Turkey* was Mr Mahmut Kaya, a Turkish citizen of Kurdish origin, born in 1958 and living in the Elazig province. He applied to the Commission on behalf of himself and his brother, Dr Hasan Kaya. The applicant alleged that his brother was kidnapped, tortured and killed by or with the connivance of State agents and that there was no effective investigation, redress or remedy for his complaints. The applicant claimed before the European Court of Human Rights ('the Court') that the Turkish authorities had violated the right to life (Article 2), the prohibition of torture, (Article 3), the right to a fair trial (Article 6), the right to an effective remedy (Article 13), and the prohibition of discrimination (Article 14).

THE FACTS

The facts as presented by the applicant

Dr Hasan Kaya was born in 1966 and was a medical doctor who had practised medicine in the province of Elazig since 1992. Prior to that, he practised in the province of Sirnak. On the evening of 20 February 1993 Metin Can, director of the Elazig Human Rights Association ('HRA'), received a telephone call at home from two unknown men asking to meet him. On 21 February Metin Can, along with Serafettin Ozcan, a journalist and member of the HRA, met the men in a coffee shop. They claimed that they needed medical assistance for a wounded person. They said they could not bring this person to town, but would take him to a house in a nearby village. Metin Can called Hasan Kaya who agreed to help.

Around 7 o'clock that evening, Metin Can and Hasan Kaya went together to the village in Hasan Kaya's brother's car. The two men did not return home. At noon the following day, Fatma Can, the wife of Metin Can, received a telephone call from a man who stated "*I'm Vedet. We killed both of them, my condolences...*" Fatma Can contacted the police and made a statement to both the police and the Public Prosecutor.

On 23 February anonymous telephone calls were made to Fatma Can and to Hasan Kaya's home. The calls to Hasan Kaya's home consisted of sounds of torture with Kurdish music being played in the background. The police were informed and a request made that the calls be traced. On the same day, Ahmet Kaya, the applicant's father, submitted petitions to the Governor of Elazig and to the police of Elazig requesting information about his son's 'disappearance'. On the night of 23 February, a watchman found a bag with two pairs of shoes in it. One of them was identified as belonging to Metin Can.

On 24 February Fatma Can and others met with the Prime Minister's office and the Public Prosecutor's office. A protest and hunger strike started at the Social

Democratic People's Party ('SHP') offices in Elaziğ as a reaction to the abduction of the two men.

On 26 February news was heard that two people had been killed at Tunceli Security headquarters. This information was passed on to the police who said that it was groundless. On 27 February the bodies of Metin Can and Hasan Kaya were found under Dinar Bridge, 15km from Tunceli village. The bodies were found with their hands bound behind their back, and a single bullet wound to each of their heads. Hasan Kaya had received a bullet wound shot from behind the left ear which exited at the right ear. There was blood in his nostrils and right ear. He had bruising on his forehead above the right eyebrow and bruising under the fingernails of both hands. There were markings from wire which had bound his hands and wrists. He had grazing to his knees and ankles, and his feet showed signs of having been exposed to water or snow for a long time.

The facts as presented by the Government

The Government alleged that Hasan Kaya and Metin Can were called to a meeting point by unknown persons who were probably known to the deceased. The reason for their departure on the night of 21 February 1993 was to assist in treating a wounded or sick member of the Kurdish Workers Party ('PKK'). The ballistic report showed that the weapon that had killed Hasan Kaya and Metin Can had been used in other terrorist incidents. They maintained that there was no evidence that the two men had been taken into custody by State officials or taken to Tunceli Security headquarters, nor did the autopsy reports disclose any signs of torture. The Government claimed that unidentified killings were continuously carried out by the militants of the PKK terrorist organisation for the purposes of intimidation.

Proceedings before the domestic authorities

A preliminary investigation by the Public Prosecutor into the killings began after the bodies were found and was continuing at the time of the hearing before the Commission and the Court. No significant progress had been made.

The findings of fact by the European Commission of Human Rights (Article 31 report)

As the facts relating to the events which took place between the 20 and 27 of February 1993 were disputed between the parties, the Commission conducted an investigation in accordance with former Article 28(1) of the Convention. Over three hearings which took place in 1997 in Ankara and Strasbourg, the Commission's delegates heard oral evidence from 11 witnesses, and considered documentary evidence including witness statements, newspaper reports, the *Sursuluk Report*[8], official documents and autopsy reports.

[8] In January 1998 the report of an official inquiry was made public by order of the Prime Minister of Turkey. It became known as the 'Susurluk Report'. The report was prepared following a political scandal in Turkey that resulted from a road accident near the town of Susurluk in November 1996. It was discovered that in the car were Sedat Bucak, member of Parliament and Kurdish clan chief from Urfa, Siverek district; Hüseyin Kocadağ, a senior police officer who was director of the İstanbul police college, founder of the special forces operating in the Southeast and who had once been the senior police officer in Siverek; and Abdullah Çatlı, a former extreme right-wing militant accused of killing seven students, at one time arrested by the French authorities for drug smuggling, extradited to and imprisoned in Switzerland from where he escaped and who was allegedly both a secret service agent and a member of an organised crime group.

The Commission heard oral evidence from the following witnesses:- the applicant, Mr Mehmet Kaya; Serafettin Özcan; Bira Zordag, a member of the Tunçeli Human Rights Association and friend of Metin Can, who in December 1992 had been tortured and questioned at Elazig Security Headquarters about his knowledge of Hasan Kaya and Metin Can; Fatma Can; Süleyman Tutal and Hayati Eraslan, Public Prosecutors in Elazig and Tunçeli at the time of the incident; Judge Major Ahmet Bulut Public Prosecutor at the Malatya State Security Court at the time of the incident; Hüseyin Soner Yalçin the editor of a private television channel in Ankara, who gave evidence concerning Major Cem Ersever;[9] Mesut Mehmetoglu, a former PKK activist turned confessor;[10] Mustafa Özkan the man in charge of Pertek police station; and Bülent Ekren a district gendarme commander in Pertek.

Several witnesses were summoned by the Commission but did not appear – Dr Ergin Toy and Dr Ergin Dulger, the doctors who carried out the autopsy on the bodies of Hasan Kaya and Metin Can; Fevzi Elmas, Public Prosecutor at Elazig at the time of the incidents; and Hasan Coskul Cetinbinici, Public Prosecutor at Erzincan State Security Court. All of them stated that they could not attend either due to work or leave commitments, save for Dr Dulger who stated that he had no useful information to provide.

Huseyin Kaykac and Ali Kurt, eyewitnesses to the events at the Pertek beerhouse, were also summonsed but did not appear. The Government stated that summonses were delivered to their addresses but that they had not made any response.

The Government were also requested to locate and serve summonses on Yusuf Geyik, Orhan Ozturk and Mahmut Yildirim. However, they claimed that these persons were not known to the authorities.

In its assessment of the facts, the Commission first considered the general background to the case. They heard evidence from the applicant that Hasan Kaya had in the past been subjected to house searches and surveillance as a result of his treating of wounded demonstrators and protestors. Bira Zordag told how he had been held in custody, tortured and questioned about the activities of Hasan Kaya and Metin Can. Fatma Can told the Commission that her husband had come under pressure when he founded the People's Labour Party, and had suffered threats due to his activities for the HRA. Şerafettin Özcan gave evidence that Hasan Kaya, Metin Can and himself were subject to regular threats at the time of the incident. The Commission was satisfied that Metin Can and Hasan Kaya had reasonable grounds to consider that they were subjects of interest to the authorities.

In relation to the 'disappearance' of the victims in February 1993 the Commission accepted the accounts given by Faman Can and Şerafettin Özcan who they found to be genuine, credible and convincing witnesses. The Commission rejected the Government's allegation that Metin Can or Hasan Kaya knew the men who took them away and later killed them.

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[9] Major Cem Ersever was a gendarme officer and head of the Diyarbakir unit of the gendarmerie anti-terrorist branch (JITEM) who had served in Southeast Turkey for a considerable time. In 1993 he voluntarily retired from service, and was murdered a short time later. Soner Yalcin had interviewed him in Ankara before he died. Major Cem Ersever told Soner Yalcin, inter alia, how he set up teams of PKK confessors (see note 10 below).

[10] 'Confessors' were men who spoke Kurdish and wore PKK dress. They gathered intelligence about PKK sympathisers, would pick them up, interrogate and then kill them.

The applicant and the families of both men claimed that the victims had been tortured before they died. The Commission had available two autopsy reports detailing the condition of the two bodies. Although the body of Metin Can showed clear signs of deliberately inflicted and significant physical injury, the report in relation to Hasan Kaya indicated fewer signs of ill-treatment, and the causes of the injuries were not clear. The Commission regretted that the two doctors had not appeared to give evidence. However they considered that the reports provided undisputed evidence that Hasan Kaya suffered injuries prior to his death and that during his captivity his feet were exposed to snow or water for a significant period of time.

Concerning the investigation by the authorities into the death of Hasan Kaya and Metin Can, the Commission noted that the responsibility for the investigation had changed hands four times. The Commission found that there had been available to the authorities a body of evidence implicating a number of persons in the killing of Metin Can. This evidence included statements from eyewitnesses, hearsay, rumours and press reports. However, even though the investigation by the authorities had followed up most of those leads, they had only done so up to a certain point, coming conclusively to a halt at the first denials or obstacles. As a result, the investigation had not provided sufficient evidence either to show that allegations were groundless or that they were substantiated.

The applicant submitted that there was nevertheless overwhelming evidence that Hasan Kaya and Metin Can were killed by agents of the state. The Commission found that although both men were under suspicion by the authorities, there was no evidence that they had received direct threats from official sources. They accepted the applicant's allegations that it would have been extremely difficult to transport two people or bodies from Elazig to Tunçeli as it was necessary to pass through approximately eight checkpoints. However, this did not of itself indicate official involvement. The Commission heard evidence about the alleged involvement of Yusif Geyik in the killing of Metin Can and Hasan Kaya. This evidence centred upon an incident in a beerhouse in Pertek where a man believed to be Geyik was overheard admitting to the killings of the two men and when the other customers turned on him, he was taken away by local gendarmes. However, due to the failure to properly investigate this incident, and the conflicting evidence given to the Commission, they could not conclude that Yusif Geyik was involved in the killing of Metin Can and Hasan Kaya or that he was linked to the security forces.

Soner Yalçin told the Commission about his interviews with Major Cem Ersever who had described how he set up teams of PKK confessors, who would pick up, interrogate and kill PKK sympathisers. He referred to the Can and Kaya murders as an example of this pattern. The Commission noted that the evidence of Soner Yalçin, was consistent with the description of events recounted by Fatma Can and Şerafettin Özcan. They considered his evidence strongly probative concerning the formation of confessor groups by the security forces and the involvement of such groups in unlawful killings, including those of Metin Can and Hasan Kaya. Furthermore, the Commission found that the *Susurluk Report* was an indication that strong suspicions existed as to contra-guerrilla and State involvement in the deaths of Metin Can and Hasan Kaya but no more.

In light of all this evidence, the Commission could not find that it was established beyond reasonable doubt that Hasan Kaya and Metin Can were killed by PKK confessors acting under the direction or with the knowledge of any State authority.

The Commission did find that there was a significant body of evidence which supported a strong suspicion of connivance or knowledge by some elements of State security or intelligence agencies.

The findings of fact by the European Court of Human Rights

The facts as established before the Commission were not substantially in dispute between the parties by the time of the hearing before the Court.

However, the applicant urged the Court to find that the facts as found by the Commission disclosed sufficient evidence to hold beyond reasonable doubt that persons acting with the acquiescence of certain State forces and with the knowledge of the authorities were responsible for the killing of Hasan Kaya.

The Government submitted that the testimony of the applicant and his witnesses Fatma Can, Bira Zordag and Şerafettin Özcan were unreliable and invited the Court to discount any findings based on their evidence.

The Court found no elements which might have required it to exercise its own powers to verify the facts. It accordingly accepted the facts as established by the Commission.

MAP OF THE AREA WHERE THE INCIDENT OCCURRED

THE LEGAL PROCEEDINGS

Chronology of Events, including legal proceedings

21 February 1993	Hasan Kaya and Metin Can kidnapped by two men claiming they needed medical assistance for a wounded person
22 February 1993	The applicant's father, Ahmet Kaya, submits petitions to the Provincial Governorship of Elazığ and to the Police in Elazığ requesting an investigation into his son's whereabouts.
27 February 1993	The bodies of Hasan Kaya and Metin Can found under the Dinar bridge, 15 km from Tunceli village. The bodies were found with their hands bound behind their backs, and a single bullet wound to each of their heads.
20 August 1993	The applicant applies to the European Commission of Human Rights alleging violations of Articles 2, 3, 6, 13 and 14 of the Convention.
9 January 1995	Commission declares application admissible.
20 January 1997	Commission delegates hear evidence from applicant and two of his witnesses in Strasbourg.
4-5 February 1997	Commission delegates hear evidence in Ankara.
5 July 1997	Commission delegates hear evidence in Strasbourg.
23 October 1997	Commission adopts Article 31 Report.
8 March 1999	Commission refers case to the European Court of Human Rights.
31 March 1999	Panel of the Grand Chamber of the Court decides pursuant to Art 5.4 of Protocol No. 11 to assign the case to the First Section of the Court.
18 January 2000	Hearing before the Chamber of the First Section.
28 March 2000	Court delivers judgment and holds Turkey to have breached Articles 2, 3, and 13 of the Convention.

How the case was brought before the European Commission and Court of Human Rights

On 1 November 1998, Protocol 11 to the European Convention on Human Rights came into force.[11] The Protocol establishes a full-time, single court to replace the former European Commission of Human Rights and the former European Court of Human Rights. Under the new procedure all applications are to be submitted to the European Court. Each case is registered and will be assigned to a Judge Rapporteur. The Judge Rapporteur may refer the application to a three-judge committee, which may by unanimous decision declare the application inadmissible. An oral hearing may be held to decide admissibility, although this is rare. If the application is not referred to a Committee, a Chamber of seven judges will examine it in order to determine the merits of the case and any issue as to the Chamber's competence to adjudicate in the case.

The examination of the case may, if necessary, involve an investigation. States are obliged to furnish "all necessary facilities" for investigations (Article 38). In the establishment of the facts, witnesses may be examined and on-the-spot investigations may be carried out, although, once again, this is rare. The Rapporteur then carries out a detailed examination of the merits. It is also worth noting that the role of the Committee of Ministers is reduced to supervising the execution of the judgments.

The procedure involved in lodging a complaint with the former Commission has already been explained in KHRP's previous publication *Ergi v Turkey and Aytekin v Turkey – A Case Report* (London, August 1999).[12]

The investigation hearings under the old procedure

Under the pre-protocol 11 procedure, if the Commission considered it necessary, it could "undertake...an investigation the effective conduct of which the State concerned shall furnish all necessary facilities" (former Article 28(1)(a), now Article 38(1)(a) of the Convention). In the case of individual complaints, where the facts were in dispute and the allegations were amenable to clarification from oral testimony, the Commission's actions under Article 28(1)(a) took the form of investigations whereby the applicant's and the Government's witnesses gave oral evidence before a select number of Commission Delegates (usually three). Investigation hearings were held *in camera* with the parties in attendance. For convenience, the hearings were usually conducted in the country whose conduct was in issue.

[11] The new system is described in Appendix E

[12] Further information about the procedure can be obtained from the relevant editions of human rights textbooks such as *The Law of the European Convention of Human Rights* by D.J Harris, M O'Boyle and C.Warbrick (Butterworths, London, Dublin and Edinburgh), *Theory and Practice of the European Convention on Human Rights* by P. van Dijk and G.J.H van Hoof (Kluwer Law and Taxation Publishers, The Netherlands), *A Practitioner's Guide to the European Convention on Human Rights* by Karen Reid (Sweet & Maxwell, London), *Taking a Case to the European Court of Human Rights* by Philip Leach (Blackstones, London).

In the *Mahmt Kaya* case the Commission decided, after consultation with the parties, to conduct an investigation. As well as considering documentary evidence, three Delegates took oral evidence from 11 witnesses at three hearings in Ankara and Strasbourg in 1997.

Preliminary Objections to the Court's Jurisdiction

Former Article 26 of the Convention[13] provides as follows:

The Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.

The Government submitted that the applicant had not exhausted domestic remedies available and so, had failed to comply with Article 26 of the Convention. There was an ongoing investigation by the Public Prosecutor of Erzincan. After the investigation was complete, the applicant could challenge the decision. As the investigation was still continuing, all domestic remedies had not been exhausted. It was also submitted that if the perpetrators were found, the applicant could introduce an action in the civil courts.

The applicant maintained that as any remedies would be illusory, inadequate and ineffective. This was because, inter alia, the operation in question was officially organised and executed by agents of the State. The applicant referred to a failure by the State to provide effective domestic remedies. The investigation by the Public Prosecutor of Erzican was being left open and no ongoing inquiries were being made.

The Commission stated that Article 26 only required the exhaustion of remedies which related to breaches of the Convention. The State had the burden of proving the remedies provided effective and sufficient redress. The Commission noted it had been almost two years since the killing and the state investigation was incomplete. Due to the serious nature of the crime and the delays in investigation, the Commission was not satisfied that the inquiry was an effective remedy under Article 26.

The Commission concluded that the applicant had complied with Article 26 of the Convention.

Referral to the Court

The Commission referred the case to the Court on 8th March 1999.

[13] Now Article 35(1) .

THE APPLICANT'S COMPLAINTS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Before the Court, the applicant in *Mahmut Kaya v Turkey* complained that Turkey had violated Articles 2, 3, 13,14, and 18 of the Convention. He did not pursue his original complaint of violation of Article 3 in respect of himself and of Article 6. In addition, the applicant sought an award of damages pursuant to Article 41 of the Convention. The Court held that there had been a violation of Articles 2, 3, 13 and awarded damages under Article 41 as set out in Table 1 below.

Table 1

Articles allegedly violated	**Commission's Decision**	**Court's Judgment**
Article 2 (right to life)	Violation (failure to protect the life of Hasan Kaya) - 27 votes : 1	Violation (failure to protect the life of Hasan Kaya) – 6 votes : 1
Article 2 (right to life)	Violation (failure to conduct an effective investigation into the circumstances of the death of Mehmet Kaya) - 27 votes : 1	Violation (failure to conduct an effective investigation into the circumstances of the death of Mehmet Kaya) – unanimous
Article 3 (prohibition of torture)	Violation (in respect of the treatment of Hasan Kaya) - 26 votes : 2	Violation – 6 votes : 1
Article 3 (prohibition of torture)	No Violation (in respect of the anxiety and suffering of the applicant) - unanimous	Violation – 6 votes : 1
Article 13 (right to an effective remedy)	Violation – 27 votes : 1	Violation – 6 votes : 1
Article 14 (prohibition of discrimination)	No separate issue arises	Decision unnecessary to examine complaint - unanimous
Article 41 (just satisfaction)		Award of damages

Article 2: Right to life

Article 2 of the Convention provides as follows:

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

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

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

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

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

The applicant submitted, agreeing with the Commission's report, that the authorities had failed to ensure the effective implementation and enforcement of law in the Southeast region in or about 1993. He alleged that there was a lack of accountability on the part of the security forces which was incompatible with the rule of law. The evidence showed that Hasan Kaya did not enjoy the guarantees of protection required by law and that the authorities were responsible for failing to protect his life as required by law. He further argued that the investigation into Hasan Kaya's death was fundamentally flawed referring to numerous failings including: the failure to conduct proper autopsies or forensic examination, the failure to determine whether the two victims had been killed on the spot or transported from elsewhere; the failure to respond expeditiously to lines of enquiry or to locate possible suspects and the significant periods of inactivity during the investigation.

The Government rejected the Commission's approach. They argued that the *Susurluk Report*[14] had no evidential or probative value and could not be taken into account in assessing the situation in Southeast Turkey. The Government pointed out that the State had been dealing with a high level of terrorist violence since 1984 which reached its peak between 1993 and 1994. Due to this situation, while the security forces did their utmost to establish law and order, they faced immense obstacles and terrorist attacks in light of which killings could not be prevented. All doctors were at risk, not just Hasan Kaya. They asserted that the investigation into the death of Hasan Kaya was carried out with precision and professionalism, was still continuing and would continue for the prescribed period of twenty years.

The Commission found that it was unable to determine who had killed Hasan Kaya. Accordingly, it was not established beyond reasonable doubt that it was a member of the security forces or contra-guerrilla agents acting on their behalf.

The Commission noted that Article 2 is not exclusively concerned with intentional killing resulting from the use of force by agents of the State, but also imposes a positive obligation on contracting states that the right to life be protected by law. They emphasised that effective investigation procedures and enforcement of criminal law prohibitions in respect of events which have occurred are requirements imposed by Article 2. Furthermore, for Article 2 to be given practical force, it must also be interpreted as requiring preventative steps to be taken to protect life. Where there was a real and imminent risk to life to an identified person or group of persons, a failure by State authorities to take appropriate steps may disclose a violation of Article 2.

The Commission found that during the relevant period (1993) there had been a consistent disregard of and failure to investigate allegations made of involvement of security forces or State agents in unlawful conduct. The result was that assertions by the security forces attributing deaths or 'disappearances' or destruction of property to

[14] See note 8 above

the PKK were accepted without seeking verification or substantiation. The Commission found that the legal structures in Southeast Turkey during this period operated in such a manner that security personnel or others acting on their behalf were often unaccountable for their actions. This situation was incompatible with the rule of law.

Hasan Kaya fell into a category of people who were at risk of unlawful violence from targeting by State officials or those acting on their behalf or with their connivance or acquiescence. In respect of this risk, Hasan Kaya had not enjoyed the guarantees of protection required by the rule of law.

Furthermore, the Commission noted a number of fundamental omissions and defects in the way in which the investigation was carried out. In light of these fundamental defects, the investigation could not be regarded as providing an effective procedural safeguard under Article 2 of the Convention.

The Commission expressed the opinion that on the facts of the case, which disclosed a lack of effective guarantees against unlawful conduct by State agents and defects in the investigative procedures carried out after the killing, the State had failed to comply with its positive obligation to protect Hasan Kaya's right to life. Accordingly they found a violation of Article 2 of the Convention in relation to the death of Hasan Kaya.

The Court accepted the Commission's establishment of the facts and the law. The Court noted that it was not established beyond reasonable doubt that any State agent was involved in the killing of Hasan Kaya. However, strong inferences could be drawn on the facts of this case that the perpetrators of the murder were known to the authorities. It was undisputed that during 1993 there had been a significant number of killings which became known as the "unknown perpetrator killing" phenomenon. The Court was satisfied that Hasan Kaya, as a doctor suspected of aiding and abetting the PKK, was at that time at particular risk of falling victim to an unlawful attack. Moreover, this risk could, in the circumstances, be regarded as real and immediate and one of which the authorities were aware. Furthermore the authorities were aware that this risk derived from the activities of persons acting with the knowledge or acquiescence of elements in the security forces.

The Court observed that the implementation of the criminal law in respect of unlawful acts allegedly carried out with the involvement of the security forces disclosed particular characteristics in the Southeast region in this period. Firstly, investigations were carried out by administrative councils, which were linked to the security forces under investigation. Secondly, in cases examined by the Convention organs concerning this region at the time, a series of findings of failures by the authorities to investigate allegations of wrongdoing by security forces had been made. Thirdly, the Court had found in a series of cases that the State Security Courts did not fulfil the requirement of independence imposed by Article 6 of the Convention due to the presence of a military judge.

The Court found that these defects undermined the effectiveness of criminal law protection in the Southeast region during the period relevant to this case. It considered that this permitted or fostered a lack of accountability of members of the security forces for their actions as found by the Commission. Consequently, these defects removed the protection which Hasan Kaya should have received by law.

The Court concluded that in the circumstances of this case the authorities failed to take reasonable measures available to them to prevent a real and immediate risk to the life of Hasan Kaya. There was, accordingly, a violation of Article 2 of the Convention.

In relation to the failure to investigate, the Court agreed with the findings of the Commission. It was not satisfied that the investigation carried out was adequate or effective. The investigation had failed to establish significant elements of the incident or clarify what happened to the two men and was not conducted with the diligence and determination necessary for there to be any realistic prospect of the identification and apprehension of the perpetrators. It had remained from the early stages within the jurisdiction of the State Security Court prosecutors who investigate primarily terrorist or separatist offences. The Court concluded that there had been a violation of Article 2 of the Convention.

Article 3 : Prohibition of torture

Article 3 of the Convention provides the following :

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment"

Concerning Hasan Kaya

The applicant submitted that his brother was tortured before his death, and that he was a victim of degrading treatment in that he was ill-treated because of his ethnic origin.

The Government made no separate submissions on this point

The Commission, recalling its findings that Hasan Kaya suffered physical injury prior to his death, was satisfied beyond reasonable doubt that he had suffered inhuman and degrading treatment within the meaning of Article 3. Although it had not been established that any State officer was involved or knew of this treatment, the State was responsible as regards a failure to protect Hasan Kaya from this treatment.

The Court found that the authorities knew or ought to have known that Hasan Kaya was at risk of targeting as he was suspected of giving assistance to wounded members of the PKK. The failure to protect his life through specific measures and through the general failings in the criminal law framework placed him in danger not only of extra-judicial execution but also of ill-treatment from persons who were unaccountable for their actions. It follows that the Government was responsible for ill-treatment suffered by Hasan Kaya after his 'disappearance' and prior to his death.

The Court agreed with the Commission that the exact circumstances in which Hasan Kaya was held and received the physical injuries noted in the autopsy were unknown. The medical evidence available also did not establish that the level of suffering could be regarded as very cruel and severe. There was, however, no doubt that the binding of Hasan Kaya's wrists with wire in such a manner as to cut the skin and the prolonged exposure of his feet to water or snow, whether caused intentionally or otherwise, could be regarded as inflicting inhuman and degrading treatment within the meaning of Article 3 of the Convention.

The Court concluded that there had been a breach of Article 3 of the Convention in respect of Hasan Kaya. It did not deem it necessary to make a separate finding under Article 3 of the Convention in respect of the alleged deficiencies in the investigation.

Concerning the applicant

The applicant submitted to the Commission that the anguish he had endured over the six days that his brother was missing, combined with the telephone calls made to the Kaya household which consisted of the sound of someone being tortured, constituted inhuman and degrading treatment. He did not pursue this argument before the Court.

The Government made no separate submissions on this point.

The Commission considered its previous case-law, where the applicants had suffered prolonged periods of anguish and distress lasting a number of years. [15] The period of six days in this case could not be considered as falling within the specific phenomenon of 'involuntary disappearances'. The applicant himself had not received the telephone calls. In the circumstances, the Commission did not find that the uncertainty and anxiety suffered by the applicant reached the threshold of severity necessary for a violation of Article 3.

Article 6 : Right to a fair trial

Article 6(1) of the Convention provides:

"*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*"

The applicant originally complained to the Commission that his lack of access to a court was a violation of Article 6. However, in his observations on the merits the applicant's submissions concerned solely his complaint under Article 13.

Article 13 : Right to an effective remedy

Article 13 of the Convention provides:

"Everyone whose rights and freedoms as set forth in this 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"

The Applicant complained to the Commission and the Court that the lack of effective remedies in respect of his complaints was a violation of Article 13.

The Government argued that in light of the conditions pertaining in the region, the investigation carried out was effective. The investigation would continue until the end of the prescription period of 20 years.

The Commission considered in light of its findings under Article 2 that the investigation into the death of Hasan Kaya was inadequate, and having regard to the fact that the investigation had already lasted more than five years (at the date of the

[15] *Kurt v Turkey* judgment of 25 May 1998 and *Cakici v Turkey* Comm Rep. 12.3.98

hearing) that the applicant had been denied an effective remedy against the authorities in respect of the death of Hasan Kaya, and thereby access to any other available remedies at his disposal, including a claim for compensation.

The Court noted that Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. Given the fundamental importance of the right to protection of life, Article 13 requires, 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 deprivation of life and including effective access for the complainant to the investigation procedure.[16]

Despite the absence of a finding that agents of the State carried out, or were otherwise implicated in, the killing of the applicant's brother, that did not preclude the complaint in relation to Article 2 from being an "arguable" one for the purposes of Article 13.[17] Since it was not in dispute that Hasan Kaya was the victim of an unlawful killing, he had an 'arguable' claim under Article 2. The authorities thus had an obligation to carry out an effective investigation into the circumstances of the killing. As the Court had found that no effective investigation had taken place, no effective criminal investigation could be considered to have been conducted in accordance with Article 13. The Court found that the applicant has been denied an effective remedy in respect of the death of his brother and thereby access to any other available remedies at his disposal, including a claim for compensation. Consequently, there had been a violation of Article 13 of the Convention.

Article 14 : Prohibition on discrimination

Article 14 of the Convention provides:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The applicant submitted that his brother was kidnapped and killed because of his Kurdish origin and his presumed political opinion and that he was thus discriminated against, contrary to the prohibition contained in Article 14.

The Government made no submission on this point beyond denying the factual basis of the complaint.

The Commission considered that in light of its findings under Articles 2, 3 and 13, no separate issue arose under Article 14.

The Court also considered that these complaints arose out of the same facts considered under Articles 2, 3 and 13 of the Convention and did not find it necessary to examine them separately.

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[16] see the *Kaya v. Turkey* judgment cited above, pp. 330-31, § 107).

[17] see the *Boyle and Rice v. the United Kingdom* judgment of 27 April 1988, Series A no. 131, p. 23, § 52, and the *Kaya v Turkey* and *Yaşa v. Turkey* judgments, cited above, pp. 330-31, § 107 and p. 2442, § 113 respectively).

Administrative Practice of Convention Breaches

The applicant maintained that there existed in Turkey an officially tolerated practice of violating Articles 2, 3 and 13 of the Convention, which aggravated the breach of which he and his brother had been victims. Referring to other cases concerning events in Southeast Turkey in which the Commission and the Court had also found breaches of these provisions, the applicant submitted that they revealed a pattern of denial by the authorities of allegations of serious human rights violations as well as a denial of remedies.

The Court found it unnecessary to determine whether the failings identified in this case were part of a practice adopted by the authorities.

Just satisfaction : Compensation under Article 41

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.*"

The applicant claimed before the Court the sum of 42,000 pounds sterling (GBP) in respect of the pecuniary damage (future loss of earnings) suffered by his brother. At the time of his death, Hasan Kaya was working as a doctor and earning £1,102 per month. He also claimed 50,000 GBP in respect of Hasan Kaya and £2,500 in respect of himself for non-pecuniary damage. The applicant also made a total claim of £32,871.74 for fees and costs incurred in bringing the application.

The Government rejected the applicant's claims as exaggerated and likely to lead to unjust enrichment.

The Court held that although an award of pecuniary damages can be made to an applicant who has established that a close member of the family has suffered a violation of the Convention, in this case the applicant was not in any way dependant upon Hasan Kaya and accordingly it was not appropriate to make any award under this head.[18] In respect of the claims for non-pecuniary damages, the Court noted that it had found violations of Articles 2, 3 and 13, and it was therefore appropriate to award £15,000 to be held by the applicant for Hasan Kaya's heirs. The Court also accepted that the applicant himself had suffered non-pecuniary damage which was not compensated solely by the findings of violations. He was awarded £2,500. In relation to the claim for costs the Court, deciding on an equitable basis, awarded the sum of £22,000 less the sum received by way of legal aid from the Council of Europe. Interest was awarded at the statutory rate of interest applicable in the United Kingdom being 7.5% per annum.

[18] See *Aksoy v Turkey* judgment of 18 December 1996, Reports 1996-VI p113 where the pecuniary claims made by the applicant prior to his death for loss of earnings and medical expenses arising out of detention and torture were taken into account by the Court in making an award of damages to the applicant's father who had continued the application.

CEMIL KILIÇ v. TURKEY (No. 22492/93)

SUMMARY OF CASE

The applicant in the case of *Cemil Kiliç v Turkey* was Mr Cemil Kiliç, a Turkish citizen of Kurdish origin resident in Şanliurfa (also known as Urfa) and born in 1960. In August 1993, he made an application to the court on behalf of himself and his brother, Kemal Kiliç who he alleged had been shot and killed by or with the connivance of the security forces in February 1993. The applicant's brother had worked for a newspaper which was described by its owners as a publication 'seeking to reflect Turkish Kurdish opinion'. The applicant claimed before the European Court of Human Rights ('the Court') that the Turkish authorities had violated the right to life (Article 2), the right to freedom of expression (Article 10), the right to an effective remedy (Article 13), and the prohibition of discrimination (Article 14).

THE FACTS

The facts as presented by the applicant

The applicant's brother, Kemal Kiliç, worked for a newspaper known as *Özgür Gündem* in Urfa. He and other journalists had received death threats on account of their work for the newspaper. In December 1992, Kemal Kiliç applied to the Governor for protection for himself and others. His request was rejected without any investigation taking place. In January 1993, an *Özgür Gündem* newspaper shop burned down. Kemal Kiliç issued a press release in which he detailed the threats and criticised the Governor for failing in his duty to ensure protection. On 18 January, Kemal Kiliç was taken briefly into custody in connection with the burning of the shop. At the same time, he told his friends that he was being followed by undercover agents of the National Intelligence Agency. A white Renault van had been noticed in the vicinity of his village.

On 18 February 1993, Kemal Kiliç left work and caught the bus to go home to his village. Three cars overtook the bus on the road, one of which was a white Renault van. Kemal Kiliç got off the bus at the turning for his village. He was the only person to get off. A watchman on a nearby construction sight saw two people get out of the white van and go to meet Kemal Kiliç. Shouts and two shots were heard by the watchman. The white van then drove away leaving Kemal Kiliç's body lying in the road.

When the gendarmes arrived at the scene of the killing no attempt was made to preserve the evidence. They found that the deceased's mouth was taped over, and he had a rope around his neck. Two spent bullet cases and a piece of paper with some writing were left at the scene. The investigation which followed did not include any forensic testing of the evidence. The killing was treated as an ordinary crime. In December 1993 Hüseyin Güney was arrested in connection with another incident and charged, inter alia, with the killing of Kemal Kiliç. The applicant and his family were not informed of the arrest, nor were they called to give evidence for the investigation.

The facts as presented by the Government

The Government did not submit a separate case as to the facts surrounding the killing of Kemal Kiliç. As regards the investigation, the Government denied that the initial investigation had been inadequate and relied upon the criminal proceedings in relation to Hüseyin Güney as indicating that criminal justice was taking a normal and effective course in respect of the killing of Kemal Kiliç.

Proceedings before the domestic authorities

The Government alleged that the Urfa Public Prosecutor began the investigation into the killing immediately. They said that all necessary steps were taken, including the collection of evidence. In December 1999, Hüseyin Güney was arrested in connection with an armed attack on a shop. At the time he was apprehended, it was claimed that he was returning to recover a Czech 9mm pistol located in front of the building that he was in at the time. A ballistics examination was carried out on this gun which the Government claimed revealed that the spent rounds collected from the scene of Kemal Kiliç's murder had been fired from the same gun. The trial of Hüseyin Güney took place between 1994 and 1999. In March 1999, Hüseyin Güney was convicted of being a member of a separatist organisation. However the court also held that the gun found in his possession could have been used by other members of the organisation, and he could not be held responsible in respect of the killing of Kemal Kiliç. Following this decision, the Diyarbakır State Security Court Chief Public Prosecutor opened an investigation file into the killing of Kemal Kılıç. At the time of the Court's judgment, the investigation remained open.

The findings of fact by the European Commission of Human Rights (Article 31 report)

In December 1995, the Commission decided to take oral evidence in respect of the applicant's allegations in accordance with former Article 28(1) of the Convention. Evidence was taken by the delegation of the Commission in Ankara on 4th and 5th February 1997 and in Strasbourg on 4th July 1997. Oral evidence was heard from four witnesses.

The facts as established before the Commission were not substantially in dispute as between the parties. The Government did not deny that Kemal Kiliç was subject to threats before his death or that he was being followed by persons using a white Renault van. The Commission found that on the night of the incident, Kemal Kiliç had left his place of work and caught the bus to his village. Shortly before the bus reached the junction of the main road with the village road, the coach was overtaken by a white Renault van which turned off into the village road, turned round and parked, with its headlights off. Kemal Kiliç was the only passenger to get off the bus at this stop. A watchman at a nearby construction site heard an argument, a cry for help and then two pistol shots. The white van drove off in the direction of Şanliurfa . The watchman found a body lying in the road and ran to the nearby petrol station to report the murder to the gendarmes.

The Commission noted that there was no direct evidence to link any State official with the killing of Kemal Kiliç. Furthermore, the applicant had not provided any evidence to support his allegations that white Renaults were known to be used by plainclothes police officers. Although the Commission was aware that grave allegations about extra-judicial executions had been the subject of United Nations and NGO scrutiny, even if these reports provided the basis for a strong suspicion, they did not provide any basis for the Commission to find that State agents or persons acting on their behalf or with their connivance had killed Kemal Kiliç.

The Commission also considered the report issued by the Turkish Grand National Assembly[19] and the *Susurluk Report*[20]. Whilst the statement in the Susurluk report that journalists had also been killed cast strong suspicion on the case of Kemal Kiliç, there was no evidence arising out of the particular circumstances of his killing that allowed any finding as to the identity of his killers to the requisite standard of proof beyond reasonable doubt.

Concerning the investigation into the killing, the Commission found that the gendarmes arrived at the scene shortly after it was reported to them. There was no significant indication of negligence in the conduct of the investigation at the scene. Forensic examination was only carried out on the spent cartridges. No fingerprint testing or other analysis was done on the other physical evidence that was recovered. Statements were taken from members of the family, and from the night watchman. However, no further investigative steps were taken after 26 February 1993, despite the gendarme captain's letter to the Public Prosecutor that the investigation was continuing. The Commission found that the gendarme captain was aware that various newspapers had been the subject of various forms of harassment, but no investigation of the wider issue of targeting of journalists was undertaken.

With regard to the proceedings against Hüseyin Güney, the Commission was not convinced by the evidence linking him to the gun found. Even if this was proved to the satisfaction of the domestic courts, there was no evidence linking him with the commission of any other crimes in which this gun was used, in particular the killing of Kemal Kiliç.

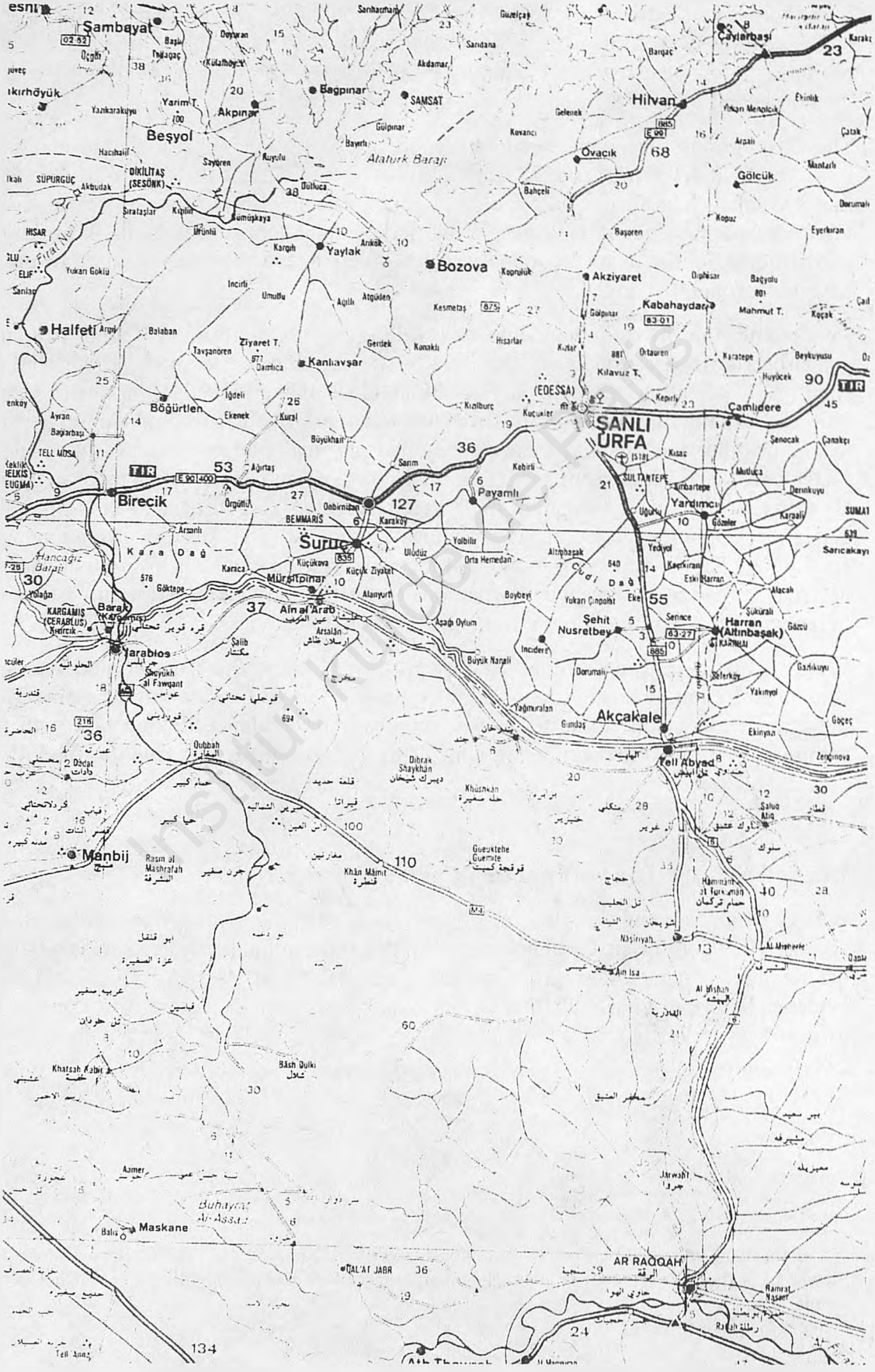
The findings of fact by the European Court of Human Rights

In their memorial, and the pleadings before the Court, the applicant and Government accepted the Commission's conclusions. With regard to the parties' submissions, and the detailed consideration given by the Commission in its task of assessing the evidence before it, the Court found no elements which might require it to exercise its own powers to verify the facts. It accordingly accepted the facts as established by the Commission.

[19] Parliamentary Investigation Commission Report 1993 10/90 Number A.01.1.GEC. Report into extra-judicial or unknown perpetrator killings. The report referred to 908 unsolved killings, of which 9 were journalists.

[20] See previous note 8 above

MAP OF THE AREA WHERE THE INCIDENT OCCURRED



THE LEGAL PROCEEDINGS

Chronology of Events, including legal proceedings

23 December 1992	Kemal Kiliç makes request for protection in writing to the Şanliurfa Governor in respect of death threats to journalists working at the *Özgür Gündem* newspaper.
30 December 1992	Governor refuses Kemal Kiliç's request.
18 February 1993	Kemal Kiliç shot and killed on his way home from work.
18 February 1993	Investigation at the scene of the killing by the gendarmerie.
26 February 1993	End of investigation by the gendarmerie.
13 August 1993	The applicant, assisted by lawyers at the University of Essex, applies to the European Commission of Human Rights alleging violations of Articles 2, 6, 10, 13 and 14 of the Convention.
24 December 1993	Hüseyin Güney arrested in relation to armed attack on a shop. Suspected of being the perpetrator of the killing of Kemal Kiliç.
9 January 1995	Commission declares application admissible.
20 January 1997	Commission delegates hear evidence from applicant and two of his witnesses in Strasbourg.
4-5 February 1997	Commission delegates hear evidence in Ankara.
5 July 1997	Commission delegates hear evidence in Strasbourg.
23 October 1997	Commission adopts Article 31 Report.
8 March 1999	Commission refers case to the European Court of Human Rights.
31 March 1999	Panel of the Grand Chamber of the Court decides, pursuant to Art 5(4) of Protocol No. 11, to assign the case to the First Section of the Court.
18 January 2000	Hearing before the Chamber of the First Section.
28 March 2000	Court delivers judgment and holds Turkey to have breached Articles 2 and 13 of the Convention.

How the case was brought before the European Commission and Court of Human Rights

On 1 November 1998, Protocol 11 of the European Convention on Human Rights came into operation.[21] The Protocol established a full-time single court to replace the former European Commission of Human Rights and the former European Court of Human Rights. Under the new procedure, all applications are to be submitted to the European Court. Each case is registered and assigned to the Judge Rapporteur who may refer the application to a three-judge committee. The committee, by unanimous decision, can declare the application inadmissible. An oral hearing may be held to decide admissibility, although this is rare. If the application is not referred to a Committee, a Chamber of seven judges will examine it in order to determine admissibility and merits of the case.

The examinations of the case may, if necessary involve an investigation. States are obliged to furnish "all necessary facilities" for the investigations (Article 38). In the establishment of the facts, witnesses may be examined and investigations may be conducted, although this is also rare. It should be noted that the role of the Committee of Ministers is reduced to supervising the execution of judgements.

The *Kiliç* case was dealt with under the old system. The procedure involved in lodging a complaint with the former Commission has already been explained in KHRP's previous publications including *Ergi v Turkey* and *Aytekin v Turkey – A Case Report* (London, August 1999).[22]

The investigation under the old procedure

Under the old Pre-protocol 11 procedure, if the Commission considered it necessary, it was able to "undertake ... an investigation for the effective conduct of which the State concerned shall furnish all necessary facilities" pursuant to the former Article 28(1)(a). In the case of individual complaints, where the facts were in dispute and the allegations were amenable to clarification from oral testimony, the Commission's action under Article 28(1)(a) took the form of investigations whereby the applicant's and the Government's witnesses gave oral evidence before a select number of Commission Delegates (usually three). Investigation hearings were held in *camera* with the parties in attendance. For convenience, the hearings were usually conducted in the country whose conduct was in issue.

[21] The new system is described in Appendix E

[22] Further information about this procedure can be obtained from the relevant editions of human rights textbooks such as *The Law of the European Convention of Human Rights* by D.J. Harris, M. O'Boyle and C. Warbrick (Butterworths, London, Dublin and Edinburgh), *Theory and Practice of the European Convention of Human Rights* by P. van Dijk and G.J.H. van Hoof (Kluwer Law and Taxation Publishers, The Netherlands), *A Practitioner's Guide to the European Convention of Human Rights* by Karen Reid (Sweet & Maxwell, London), *European Human Rights: Taking a Case under the Convention* by Luke Clements, Nuala Mole and Alan Simmons (Sweet & Maxwell, London).

In *Kiliç*, the parties submitted documentary evidence to the Commission. This included domestic reports, external reports about Turkey and statements from various people involved in the case. In addition, a delegation from the Commission heard evidence from four witnesses. They were Cemil Kiliç (the applicant), Cengiz Kargili, Cafer Tüfekçi and Mustafa Yaðli. A further three witnesses failed to appear.

Preliminary objections to the Court's jurisdiction

Former Article 26 of the Convention[23] provides as follows:

The Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.

The Government submitted that the applicant had not exhausted domestic remedies and so, had failed to comply with Article 26 of the Convention. There was an ongoing investigation by the Public Prosecutor of Şanliurfa . After the investigation was complete, the applicant could challenge the decision. As the investigation was still continuing, all domestic remedies had not been exhausted.

The applicant maintained that as any remedies would be illusory, inadequate and ineffective. This was because, inter alia, the operation in question was officially organised and executed by agents of the State. The applicant referred to a failure by the State to provide effective domestic remedies. The investigation by the Public Prosecutor of Şanliurfa was being left open and no ongoing inquiries were being made.

The Commission stated that Article 26 only required the exhaustion of remedies which related to breaches of the Convention. The State had the burden of proving the remedies provided effective and sufficient redress. The Commission noted it had been almost two years since the killing and the state investigation was incomplete. Due to the serious nature of the crime and the delays in investigation, the Commission was not satisfied that the inquiry was an effective remedy under Article 26.

The Commission concluded that the applicant had complied with Article 26 of the Convention.

Referral to the Court

The Commission referred the case to the Court on 8th March 1999.

[23] Now Article 35(1)

THE APPLICANT'S COMPLAINTS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Before the Court, the applicant in *Cemil Kiliç v Turkey* complained that Turkey had violated Articles 2, 10, 13, 14 and 18 of the Convention. In his memorial, he did not pursue his complaint under Article 18. In addition, the applicant sought an award of damages pursuant to Article 41 of the Convention. The Court held that there had been a violation of Articles 2 and 13 and awarded damages under Article 41 as set out in Table 1 below.

Table 1

Articles allegedly violated	**Commission's Opinion**	**Court's judgment**
Article 2 (right to life)	Violation (failure to protect the life of Kemal Kiliç) - unanimous	Violation (failure to protect the life of Kemal Kiliç) – 6 votes : 1
Article 2 (right to life)	Violation (failure to conduct an effective investigation into the circumstances of the death of Kemal Kiliç) – unanimous	Violation (failure to conduct an effective investigation into the circumstances of the death of Kemal Kiliç) – unanimous
Article 10 (right to freedom of expression)	No separate issue arose – 25 votes : 3	Decision unnecessary to examine complaint – unanimous
Article 13 (right to an effective remedy)	Violation (failure to provide an effective remedy) – unanimous	Violation (failure to provide an effective remedy) – 6 votes : 1
Article 14 (prohibition of discrimination)	No separate issue arose – unanimous	Decision unnecessary to examine complaint – unanimous
Article 41 (just satisfaction)		Award of damages

Article 2: Right to life

Article 2 of the Convention provides as follows:

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

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

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

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

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

The applicant submitted, agreeing with the Commission's report, and citing the Court's judgment in *Osman v the United Kingdom,*[24] that the authorities had failed to ensure the effective implementation and enforcement of law in the region in or about 1993. He referred to the *Susurluk Report*, and to the defects in investigations into unlawful killings as found by the Convention organs[25]. He also pointed to the lack of independence in the way in which investigations were carried out by administrative councils and the State Security Courts. He alleged that there was a lack of accountability on the part of the security forces which was incompatible with the rule of law.

The applicant submitted that on the facts of the case Kemal Kılıç, as a journalist for *Özgür Gündem,* was at risk of being targeted. By refraining from making any adequate response to his request for protection the authorities had failed to protect his life as required by law.

He further argued that the investigation into Kemal Kiliç's death was fundamentally flawed in that the authorities failed to take steps after the initial investigation to find the perpetrators or to consider the wider context of the killing. Further, although there was no evidence linking Hüseyin Güney to the killing, his arrest and prosecution had had the practical effect of closing the investigation.

The Government rejected the Commission's approach as general and imprecise. They argued that the *Susurluk Report* had no evidential or probative value and could not be taken into account in assessing the situation in Southeast Turkey. The Government pointed out that the State had been dealing with a high level of terrorist violence since 1984 which reached its peak between 1993 and 1994. Due to this situation, while the security forces did their utmost to establish law and order, they faced immense obstacles and terrorist attacks in light of which killings could not be prevented. All journalists could be said to be at risk, not just Kemal Kiliç. They asserted that the investigation into the death of Kemal Kiliç was carried out with precision and professionalism. It had continued while the trial of Hüseyin Güney was going on, and after he was acquitted in respect of this incident, an investigation was opened in the State Security Court which would continue for the prescribed period of twenty years.

The Commission

The Commission found that during the relevant period (1993) there had been a consistent disregard and failure to investigate allegations made of involvement of security forces or State agents in unlawful conduct. The result was that assertions by the security forces attributing deaths or 'disappearances' or destruction of property to the PKK were accepted without seeking verification or substantiation. The Commission found that the legal structures in the Southeast of Turkey during this

[24] *Osman v the United Kingdom* judgment of 28 October 1998, Reports 1998 – VIII p.3124

[25] For example, *Aydin v Turkey*, Comm. Rep. 7.3.96, para.202, European Court of Human Rights, judgment of 25 September 1997, Reports 1997-VI; Eur. Court HR, *Kurt v Turkey* judgment of 25 May 1998, Comm. Rep. 5.12.96, para 228; *Ogur Turkey*, judgment of 20 May 1999, *Cakici v Turkey*, judgment of 8 July 1999 and *Tanrikulu v Turkey*, judgment of 8 July 1999.

period operated in such a manner that security personnel or others acting on their behalf were often unaccountable for their actions. This situation was incompatible with the rule of law.

Kemal Kiliç fell into a category of people who were at risk from unlawful violence from targeting by State officials or those acting on their behalf or with their connivance or acquiescence. He had specifically requested protection for himself and for others working at the newspaper. The State authorities knew of the risk faced by Kemal Kiliç and others, but despite this, they took no steps to investigate the threats that had been received. Consequently, in respect of this risk, Kemal Kiliç had not enjoyed the guarantees of protection required by the rule of law.

Furthermore, the Commission noted a number of fundamental omissions and defects in the way in which the investigation was carried out. In light of these fundamental defects, the investigation could not be regarded as providing an effective procedural safeguard under Article 2 of the convention.

The Commission expressed the opinion that on the facts of the case which disclosed a lack of effective guarantees against unlawful conduct by State agents and defects in the investigative procedures carried out after the killing, the State had failed to comply with its positive obligation to protect Kemal Kiliç's right to life. Accordingly they found a violation of Article 2 of the Convention.

The Court found that it had not been established beyond reasonable doubt that any State agent or person acting on behalf of the State authorities was involved in the killing of Kemal Kiliç. They noted that Article 2 is not exclusively concerned with intentional killing resulting from the use of force by agents of the State, but also imposes a positive obligation on contracting states that the right to life be protected by law. They emphasised that effective investigation procedures and enforcement of criminal law prohibitions in respect of events which have occurred are requirements imposed by Article 2. Furthermore, for Article 2 to be given practical force, it must also be interpreted as requiring preventative steps to be taken to protect life. Where there was a real and imminent risk to life to an identified person or group of persons, a failure by State authorities to take appropriate steps may disclose a violation of Article 2.

The Court relied upon its earlier findings[26] that in early 1993 the authorities were aware that those involved in the publication and distribution of *Özgür Gündem* feared that they were falling victim to a concerted campaign tolerated, if not approved, by State officials. It was undisputed that a significant number of serious incidents had occurred involving killings of journalists, attacks on newspaper kiosks and upon distributors of the newspaper[27]. Accordingly the Court was satisfied that Kemal Kılıç, as a journalist for *Özgür Gündem,* was at the time of the incident at a real and immediate risk of falling victim to an unlawful attack. Furthermore, the Court found that the authorities were aware of this risk, and were either aware, or ought to have been aware, of the possibility that this risk derived from the activities of persons acting with the knowledge or acquiescence of the security forces.

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[26] *Yaşa v. Turkey* judgment of 2 September 1998, *Reports* 1998-VI, p. 2440, § 106

[27] see *Yaşa v. Turkey* judgment, cited above, § 106 and No. 23144/93, Ersöz and others v. Turkey, Comm. Rep. 29.10.98, §§ 28-62, 141-142, pending before the Court at the time of this judgment.

The Court observed that the implementation of the criminal law in respect of unlawful acts allegedly carried out with the involvement of the security forces disclosed particular characteristics in the Southeast region in this period. Firstly, investigations were carried out by administrative councils which were linked to the security forces under investigation. Secondly, in cases examined by the Convention organs concerning this region at the time, a series of findings of failures by the authorities to investigate allegations of wrongdoing by security forces had been made. Thirdly, the Court had found in a series of cases that the State Security Courts did not fulfil the requirement of independence imposed by Article 6 of the Convention due to the presence of a military judge.[28]

The Court found that these defects undermined the effectiveness of criminal law protection in the Southeast region during the period relevant to this case. It considered that this permitted or fostered a lack of accountability of members of the security forces for their actions as found by the Commission. Consequently, these defects removed the protection which Kemal Kılıç should have received by law. There was also a wide range of preventative measures available which would have assisted in minimising the risk to Kemal Kiliç's life. In fact the authorities took no steps in response to his request for protection. The Court concluded that in the circumstances of this case the authorities had failed to take the reasonable measures available to them to prevent a real and immediate risk to the life of Kemal Kılıç. There was accordingly a violation of Article 2 of the Convention.

In respect of the investigation, the Court noted particularly the failure to carry out any investigation after 26 February 1993, the lack of evidence linking Hüseyin Güney to the killing, and the lack of any wider investigation into attacks on journalists. The Court found that the authorities had failed to carry out an effective investigation into the circumstances surrounding Kemal Kiliç's death, and accordingly there had been a violation of Article 2 of the Convention.

Article 10 : Right to freedom of expression

Article 10 of the Convention provides:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or form maintaining the authority and impartiality of the judiciary.

The applicant argued that his brother was killed because he was a journalist. As he was targeted on account of his journalistic activities, this was an unjustified

[28] See *Incal v Turkey* (Eur. Court HR, judgment of 9 June 1998)

interference with his freedom of expression. The killing was therefore an act with a dual character which should give rise to separate violations under Articles 2 and 10 of the Convention.

The Government rejected the applicant's submissions.

The Commission stated that although as part of its reasoning under Article 2 it had found that Kemal Kiliç's role as a journalist placed him within a category of persons at risk of attack in the Southeast, it did not consider that this raised a separate issue under Article 10 of the Convention.

The Court noted that the applicant's complaints arose out of the same facts as those considered under Article 2 of the Convention. It therefore did not consider it necessary to examine this complaint separately.

Article 6 : Right to a fair trial

Article 6(1) of the Convention provides:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law

The applicant originally complained to the Commission that his lack of access to a court was a violation of Article 6. However in his observations on the merits, the applicant's submissions concerned solely his complaint under Article 13.

Article 13 : Right to an effective remedy

Article 13 of the Convention provides :

Everyone whose rights and freedoms as set forth in this 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

The applicant complained to the Commission and the Court that the lack of effective remedies in respect of his complaints was a violation of Article 13.

The Government argued that in light of the conditions pertaining in the region, the investigation carried out was effective. The investigation would continue until the end of the prescription period of 20 years.

The Commission took note of to the defects in the investigation and found that the applicant had been denied an effective remedy against the authorities in respect of the death of his brother, and thereby access to any other available remedies at his disposal, including a claim for compensation. In light of this there had been a violation of Article 13 of the Convention.

The Court noted that Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. Given the fundamental importance of the right to protection of life, Article 13 requires, 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 deprivation of life and including effective access for the complainant to the investigation procedure.[29]

Although the Court found that it was not proved beyond reasonable doubt that agents of the State carried out or were otherwise implicated in the killing of Kemal Kiliç, that did not preclude the complaint in relation to Article 2 from being an "arguable" one for the purposes of Article 13.[30] In light of their findings concerning the investigation into the circumstances of the killing, the Court concluded that no effective criminal investigation could be considered to have been conducted in accordance with Article 13. Consequently, there had been a violation of Article 13.

Article 14 : Prohibition on discrimination

Article 14 of the Convention provides:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The applicant maintained that the killing of his brother disclosed discrimination in the enjoyment of his right to life and freedom of expression, since he was killed because he was a journalist of Kurdish origin working for a pro-Kurdish newspaper. He also submitted that this discrimination amounted to inhuman and degrading treatment in violation of Article 3 of the Convention.

The Government made no submission on this point beyond denying the factual basis of the complaint and claiming that there had been no discrimination.

The Commission considered that in light of its findings under Articles 2 and 13, no separate issue arose under Article 14.

The Court also considered that these complaints arose out of the same facts considered under Articles 2 and 13 of the Convention. and did not find it necessary to examine them separately.

Article 34 (formerly Article 28(1)(a)): Individual Application

Article 34 of the convention provides:

"The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the convention or the protocols thereto. The High Contracting parties undertake not to hinder in any way the effective exercise of this right."

The Commission found that it was hindered in its task of establishing the facts by the failure of Mr Ziyaeddin Akbulut, the Governor of Şanlıurfa at the relevant time, to

[29] see the *Mehmet Kaya v. Turkey* judgment cited above, pp. 330-31, § 107).
[30] *Boyle and Rice v. the United Kingdom* judgment of 27 April 1988, Series A no. 131, p. 23, § 52, and the *Kaya* and *Yaşa* judgments cited above, pp. 330-31, § 107 and p. 2442, § 113 respectively

appear to give evidence. The Government had been twice requested to secure his attendance at the hearings. His evidence would have been important in establishing what steps had been taken by the authorities in regard to the claims that Kemal Kiliç and others were at risk.

The Court considered it of utmost importance that States should furnish all necessary facilities to make possible a proper and effective examination of applications. The Government had failed to provide a satisfactory explanation as to the non-attendance of this witness. Accordingly, it found that the Government fell short of their obligations under former Article 28(1)(a) of the Convention to furnish all necessary facilities to the Commission in its task of establishing the facts.

Just satisfaction : Compensation under Article 41

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

The applicant claimed before the Court the sum of 30,000 pounds sterling (GBP) in respect of the pecuniary damage (future loss of earnings) suffered by his brother. At the time of his death, Kemal Kiliç was working as a journalist and earning 1,000 GBP per month. He also claimed 40,000 GBP in respect of his brother and 2,500 GBP in respect of himself for non pecuniary damage. The applicant made a total claim of 32,327.36 GBP for fees and costs incurred in bringing the application.

The Government rejected the applicant's claims as exaggerated and likely to lead to unjust enrichment.

The Court held that although an award of pecuniary damages can be made to an applicant who has established that a close member of the family has suffered a violation of the Convention,[31] in this case the applicant was not in any way dependant upon Kemal Kiliç and as the loses had not been incurred prior to his death, it was not appropriate to make any award under this head. In respect of the claims for non-pecuniary damages, the Court noted that it had found violations of Articles 2 and 13, and it was therefore appropriate to award £15,000 to be held by the applicant for his brother's heirs. The Court also accepted that the applicant himself had suffered non-pecuniary damage which was not compensated solely by the findings of violations. He was awarded £2,500. In relation to the claim for costs the Court, deciding on an equitable basis, awarded the sum of £20,000 less the sum received by way of legal aid from the Council of Europe. Interest was awarded at the statutory rate of interest applicable in the United Kingdom being 7.5% per annum.

[31] See *Aksoy v Turkey* judgment of 18 December 1996, Reports 1996-VI p113 where the pecuniary claims made by the applicant prior to his death for loss of earnings and medical expenses arising out of detention and torture were taken into account by the Court in making an award of damages to the applicant's father who had continued the application.

Appendix A

Kaya v Turkey: Decision of European Commission of Human Rights

COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

Or. English

EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 22535/93

Mahmut KAYA

against

Turkey

Report of the Commission

(Adopted on 23 October 1998)

Strasbourg

EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 22535/93

Mahmut Kaya

against

Turkey

REPORT OF THE COMMISSION

(adopted on 23 October 1998)

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I. INTRODUCTION

1. The following is an outline of the case as submitted to the European Commission of Human Rights, and of the procedure before the Commission.

A. The application

2. The applicant is a Turkish citizen resident in Elazığ and born in 1958. He is represented before the Commission by Professor K. Boyle and Professor F. Hampson, both teachers at the University of Essex.

3. The application is directed against Turkey. The respondent Government were represented by their Agents, Mr. A. Gündüz and Mr. Ş. Alpaslan.

4. The applicant alleges that his brother Dr. Hasan Kaya was kidnapped, tortured and killed by or with the connivance of State agents and that there was no effective investigation, redress or remedy for his complaints. He invokes Articles 2, 3, 6, 13 and 14 of the Convention.

B. The proceedings

5. The application was introduced on 20 August 1993 and registered on 26 August 1993.

6. On 29 November 1993, the Commission decided to communicate the application to the Turkish Government

7. On 10 March 1994, the Government submitted their observations, after two extensions in the time-limit and the applicant's observations in reply and further information were submitted on 5 and 7 July and 2 August 1994.

8. On 9 January 1995, the Commission declared the application admissible.

9. The text of the Commission's decision on admissibility was sent to the parties on 19 January 1995 and they were invited to submit such further information or observations on the merits as they wished. They were also invited to indicate the oral evidence which they might wish to put before Delegates.

10. On 3 April 1995, the Government submitted supplementary information. On 22 May 1995, after two extensions in the time-limit for that purpose, the Government submitted their observations on the merits.

11. On 7 July 1995, the Commission examined the state of proceedings in the application and decided that it should proceed to take oral evidence. It invited the parties to propose any witnesses whom they wished to be heard.

12. On 5 September 1995, the Government identified the public prosecutors relevant to the domestic investigation.

13. On 8 September 1995, the Government provided documents from the investigation file.

14. By letter dated 7 September 1995, the applicant proposed certain witnesses.

15. On 8 December 1995, the Commission granted the applicant legal aid.

16. On 20 December 1996, the Secretariat of the Commission requested the Government to assist in locating five witnesses for the purposes of serving summonses.

17. By letter dated 14 January 1997, the Government stated that it would not assist the Commission to transmit summonses in respect of witnesses who were not public officials or who were not proposed by the Government.

18. By letter dated 17 January 1997, the Delegates of the Commission repeated their request for assistance in serving summonses on five witnesses.

19. On 20 January 1997, at Strasbourg, three Delegates, Mr. G. Jörundsson, Mr B. Conforti and Mr N. Bratza, heard oral evidence from the applicant and two of his witnesses. The Government were represented by their Agent, Mr. A. Gündüz, assisted by Mr. A. Akay, Mr. M. Özmen, Ms M. Gülşen, Ms. A. Emüler, Mr A. Kaya, Mr A. Kurudal and Mr O. Sever. The applicants were represented by Ms. Françoise Hampson as counsel, assisted by Ms A. Reidy, Mr M. Şakar, Mr O. Baydemir and Mr K. Yıldız.

20. By letter dated 28 January 1997, the Government stated that they would do their best to transmit the summons to one of the five witnesses identified by the Commission; that the Commission should transmit the summons to a journalist witness itself and that it was not possible to transmit summonses to the three other witnesses since they were not known to the administration and their addresses had not been provided.

21. Evidence was heard by the delegation of the Commission in Ankara on 4-5 February 1997. Before the Delegates, the Government were represented by Mr S. Alpaslan and Mr D. Tezcan, as co-Agents, assisted by Mr M. Özmen, Mr F. Polat, Ms. M. Gülşen, Ms. N. Erdim, Mr A. Kaya, Mr A. Kurudal and Mr O. Sever. The applicants were represented by Ms F. Hampson, and Mr O. Baydemir, counsel, assisted by Ms A. Reidy and Ms D. Deniz and Mr M. Kaya, as interpreters. Further documentary material was submitted by the Government during the hearings. During the hearings, and later confirmed by letter of 19 February 1997, the Delegates requested the Government to provide certain documents and information concerning matters arising out of the hearings, in particular the recent documents in the investigation file dated after May 1995 and providing explanations for the absence of certain witnesses.

22. On 1 March 1997, the Commission decided to take further oral evidence in the case and proposed recalling four witnesses.

23. By letter dated 17 March 1997, the Government provided information concerning witnesses who had not appeared.

24. By letter dated 28 May 1997, the Secretariat reminded the Government that they had not provided documents from the investigation file dating after May 1995.

25. By letter dated 3 June 1997, the Government declined to assist the Commission in serving summonses on two witnesses who were not public officers nor proposed by the Government.

26. By letter dated 9 June 1997, the Delegates drew the attention of the Government to Article 28 para. 1(a) of the Convention and repeated their request for assistance, drawing to the attention of the Government the fact that the two witnesses had given statements to a public prosecutor.

27. By letter dated 1 July 1997, the Government stated that the two witnesses would not be present at the hearing.

28. Evidence was heard by the delegation of the Commission in Strasbourg on 5 July 1997. Before the Delegates, the Government were represented by Mr A. Gündüz, Agent, assisted by Mr S. Alpaslan, Ms. M. Gülşen, Mr A. Kaya, Mr D. Karaca and Dr Mustafa Bağrıaçık. The applicants were represented by Ms F. Hampson and Ms A. Reidy, counsel, assisted by Mr M. Kaya (interpreter).

29. On 10 July 1997, the Commission decided to invite the parties to present their written conclusions on the merits of the case, following transmission to the parties of the verbatim record. The time-limit was fixed at 4 December 1997, after the verbatim record was corrected and finalised on 17 October 1997. By letters dated 16 July and 22 October 1997, the Commission reminded the Government that the investigation file documents from May 1995 had not been provided.

30. Following two extensions of the time-limit until 3 February 1998, the Government submitted their final observations on the merits on 16 February 1998. This included proposals of friendly settlement.

31. By letter dated 10 April 1998, which reached the Commission on 19 May 1998, the applicant submitted his final observations.

32. On 20 October 1998, the Commission decided that there was no basis on which to apply Article 29 of the Convention.

33. After declaring the case admissible, the Commission, acting in accordance with Article 28 para. 1 (b) of the Convention, also placed itself at the disposal of the parties with a view to securing a friendly settlement. An exchange of correspondence took place between 12 February 1998 and 29 July 1998. In the light of the parties' reaction, the Commission now finds that there is no basis on which such a settlement can be effected.

C. The present Report

34. The present Report has been drawn up by the Commission in pursuance of Article 31 of the Convention and after deliberations and votes, the following members being present:

MM S. TRECHSEL, President
J.-C. GEUS
M.P. PELLONPÄÄ
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H. DANELIUS
Mrs G.H. THUNE
F. MARTINEZ
C.L. ROZAKIS
Mrs J. LIDDY
MM L. LOUCAIDES
M.A. NOWICKI
I. CABRAL BARRETO
N. BRATZA
I. BÉKÉS
D. ŠVÁBY
G. RESS
A. PERENIČ
C. BÎRSAN
E. BIELIŪNAS
E.A. ALKEMA
M. VILA AMIGÓ
Mrs M. HION
MM R. NICOLINI
A. ARABADJIEV

35. The text of this Report was adopted on 23 October 1998 by the Commission and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with Article 31 para. 2 of the Convention.

36. The purpose of the Report, pursuant to Article 31 of the Convention, is:

(i) to establish the facts, and

(ii) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.

37. The Commission's decision on the admissibility of the application is attached hereto as Appendix I, the summary of the Susurluk Report as Appendix II and extracts of Soner Yalçın's book, "The secrets of Major Cem Ersever", as Appendix III.

38. The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the Commission.

II. ESTABLISHMENT OF THE FACTS

39. The facts of the case, particularly concerning events in or about February 1993, are disputed by the parties. For this reason, pursuant to Article 28 para. 1 (a) of the Convention, the Commission has conducted an investigation, with the assistance of the parties, and has accepted written material, as well as oral testimony, which has been submitted. The Commission first presents a brief outline of the events, as claimed by the parties, and then a summary of the evidence submitted to it.

A. The particular circumstances of the case

a. Facts as presented by the applicant

40. The various accounts of events as submitted in written and oral statements by the applicant are summarised in Section B below. The version as presented in the applicant's final observations on the merits is summarised here.

41. The applicant's younger brother Dr. Hasan Kaya worked in south-east Turkey, including Şırnak and Elazığ, where he was killed. He was a member of the Human Rights Association (HRA) and long-time friend of Metin Can, a lawyer who was president of the Elazığ Human Rights Association (HRA). Both his brother and Metin Can as educated, professional, intellectual Kurds were under surveillance by the authorities. His brother was considered as an enemy of the State as it was believed that he treated wounded members of the PKK. For this he was targeted and killed by agents of the State. Both he and Metin Can had received specific threats prior to their deaths. While Hasan Kaya was in Şırnak, his friend, Halit Güngen, a journalist, was killed by the contra-guerillas and at the funeral, the head of Şırnak security told him that he would end up like his friend. He was also detained and threatened following his attempts to treat victims during the Nevroz celebrations which had been broken up by the firing of the security forces. In July 1992, in Elazığ, his door had been broken down by the police and his house searched. Metin Can, as well as being president of the HRA, was a lawyer who defended Kurdish political prisoners. He had applied for a passport to go to Germany to attend a human rights conference shortly before his death. The Elazığ HRA branch had been the subject of attacks and harassment from the security forces and was later closed by the State.

42. On the evening of 20 February 1993, Metin Can received a telephone call at home from two unknown persons who wished to meet him. He refused to see them due to the lateness of the hour and told them to come to his office. Two persons had already come looking for him during the day but did not know where his flat was. On 21 February 1993, he received another call from the two men. He arranged to meet them at a coffee house. Şerafettin Özcan, Secretary of the HRA, and a former client of Metin Can's were present during the meeting at the coffee house. One of the men was blonde, did not speak good Turkish and claimed to be Syrian. He appears to be a person identified as İdris Ahmet. The other man, slightly taller with dark curly hair, fits the description of a person called Orhan or Erhan Öztürk.

43. After discussion, Metin Can and the darkhaired man went to Metin Can's house, where Metin Can phoned Hasan Kaya. Şerafettin Özcan and the blondhaired man came to the house later. Hasan Kaya was needed because the two men claimed that they had need of medical assistance for a wounded person. They did not want to bring the wounded person into town but stated that they could bring him to a house in Yazıkonak village, not far from Elazığ. The two men left the house. At about 19.00 hours, Metin Can received a call from the two men, saying that they were ready. Metin Can and Hasan Kaya left in the red Doğan car (no. 23 EC 219) belonging to the latter's brother. They did not return.

44. On 22 February 1993, at about noon, Fatma Can, Metin Can's wife, received a phone call. The caller said "I'm Vedat. We killed both of them, my condolences..." He appeared to be the blond man who had visited the house the previous day. Fatma Can called the police immediately. She and Şerafettin Özcan, as well as Şenol, a colleague from the HRA, went to the public prosecutor to make a statement. Neither Fatma Can nor Şerafettin Özcan mentioned the encounter of Metin Can with the two men in the coffee shop since the authorities would be able publicly to conclude that this was the work of the PKK and any protection which the kidnapped men might have would be lost.

45. At about 18.00 hours that day, the red Doğan car driven by Metin Can and Hasan Kaya was found abandoned in front of Çağsan Marine Vehicles Ltd in Yazıkonak village.

46. On 23 February 1993, there was another phone call, from a person claiming to be Dr Savur Baran. The caller said that Can and Dr. Kaya were in their hands, that Can would be released but would not go abroad and would continue the struggle. On the same day, four calls were made to the house of Hasan Kaya, consisting of sounds of persons being tortured in the background and Kurdish music. The police were informed and a request made that the calls be traced. Ahmet Kaya, the father of the applicant and Hasan Kaya, submitted petitions to the Governor of Elazığ and to the police in Elazığ.

47. On the night of 23 February 1993, Fatma Can and Şerafettin Özcan went to Ankara to try to find out more information and bring pressure on the investigation. The same night a watchman on duty near the SHP (Social Democratic People's Party) building, İhsan Denizhan, found a bag with two pairs of shoes, which he reported to the security forces. On 24 February 1993, one of the pairs of shoes was identified as belonging to Metin Can.

48. On 26 February 1993, news was heard that two people had been killed at Tunceli Security Headquarters. This information was passed onto the police who said that it was groundless. On 27 February 1993, the bodies of Metin Can and Hasan Kaya were found under Dinar bridge, 15 kilometres from Tunceli. The bodies were found with their hands bound behind their back and a single bullet wound to the head. Hasan Kaya had bruising on his forehead above the right eyebrow and bruising under the fingernails of both hands. There were marks from the wire which had bound their hands and wrists; he also had grazes on his knees and ankles. His feet showed signs of long exposure to water or snow. Metin Can had been subjected to strangulation. He had bruising to his forehead, nose, right eyelid and temple which could have been caused by a blow from a blunt object.

49. The applicant submits that the killing of his brother was executed and planned by agents of the State, pointing in particular, to the operation of undercover teams of security forces, "contra-guerillas", who implement a policy of identifying and eliminating those persons who are considered to be a threat to the State. Knowledge of these contra-guerilla teams has always been widespread throughout Turkey, especially in the south-east, although often denied by State officials. The existence of "contra-guerillas" was confirmed in the revelations of the former state of emergency gendarme intelligence officer, Major Cem Ersever, who gave interviews to journalist Soner Yalçın and, shortly afterwards, was killed. According to Ersever, a police chief, known variously as Ahmet Demir, Mahmut Yıldırım and "Yeşil", was the chief contra-guerilla in the Diyarbakır region. Erhan Öztürk was part of this group, with İdris Ahmet and Mehmet Mehmetoğlu. Öztürk confessed later that Yeşil gave instructions for Can and Kaya to be taken and that he received his orders from the Minister of the Interior. İdris Ahmet and Mehmet Mehmetoğlu interrogated and tortured Can and Hasan Kaya. Öztürk executed them. When the applicant's father on 14 February 1994 gave information to the authorities about what they read in the newspapers about "Yeşil", including his address, the state prosecutor told him that "this investigation is beyond our powers".

50. Further evidence concerning the contra-guerillas has since come to light in the Susurluk report, made public by the Prime Minister in January 1998. This report reveals that rightist gunmen, "confessors", contra-guerillas and undercover organisations, acting on the direction, or with the knowledge of the security agencies (including the Special War Department), the security forces themselves, including the intelligence agencies (MİT - Military Intelligence - and JİTEM - gendarme intelligence organisation), the gendarmerie and the village guards, were implicated in planning or arranging for the deliberate killing of citizens of Kurdish origin, particularly in the south-east, as well as being responsible for other crimes and human rights abuses. On page 74, the report refers to Metin Can as being one of the victims of this practice of targeting and killing but also appears to condone the policy of elimination of prominent Kurds who were subversive or dissident. The report mentions, inter alia, Ahmet Demir and Mesut Mehmetoğlu as involved in various killings.

b. Facts as presented by the Government

51. The Government state that the facts collected by the authorities clearly point to the fact that Hasan Kaya and Metin Can were called to a meeting point by unknown persons who most probably were recognised by the deceased. It may be deduced from the circumstances that the reason for their departure was to assist in treating a wounded or sick PKK member. The ballistic report conducted immediately after the incident pointed to the fact that the weapon used in the killing of Can and Kaya had been used in other terrorist incidents. Allegations that a person by the name of Yusuf Geyik at a beer house in Pertek claimed responsibility for the killings and was taken away by gendarmes were not clarified by the testimony given by witnesses. Nor is there any evidence that the two men were taken into custody by State officials or taken to Tunceli police headquarters. The Government dispute that the autopsy reports disclose any signs of torture. They also point out

that unidentified killings were continuously carried out by the militants of the PKK terrorist organisation for the purpose of intimidation.

52. The preliminary investigation into the killings which began immediately after the bodies were found is still pending and will continue until the end of the statutory period, namely, twenty years.

53. The Government also refer to recent developments leading to progress in the investigation of killings by unidentified perpetrators. They emphasise that official investigations are being carried out nationwide regardless of the status of the persons incriminated in the illegal acts and that they are struggling to clarify the deaths of each and every of its citizens.

B. The evidence before the Commission

1) Documentary evidence

54. The parties submitted various documents to the Commission. The documents included reports about Turkey (eg. report by the UN Special Rapporteur on Extrajudicial, summary or arbitrary executions dated 14 December 1994 E/CN.4/1995/61 and dated 23 December 1996 E/CN.4/1997/60/Add.1), domestic case-law, statements from the applicant and other persons, and documents from the pending domestic investigation.

55. The Commission had particular regard to the following documents:

a) Statements by the applicant

Statement dated 17 April 1993 taken by Kerim Yıldız

56. The applicant's brother, Hasan Kaya, born in Elazığ in 1966, had been practising medicine in Şırnak from November 1990 to May 1992, where he had been threatened for treating demonstrators wounded during the Nevroz celebrations in 1992. In February 1992 while attending the funeral of Halit Güngen, a journalist who had been killed, he was threatened by the Şırnak chief of security that his end would be the same. For eight months before the incident, he was working in a health clinic in Elazığ. He was not a member of any political organisation but has a file in the Elazığ security headquarters labelling him as "undesirable". He had been friends with Metin Can for 10 years.

57. Metin Can, born in Tunceli in 1966, was a Kurd and director of the Elazığ Human Rights Association. He had been practising law in Elazığ for two years and had conducted the defence of Kurdish political prisoners in Elazığ prison. He had publicised the poor conditions and ill-treatment in the prison. One week before the incident, he had applied to Elazığ Security Headquarters for a passport in order to attend a human rights meeting in Germany. About a month before the incident, he had been threatened by unknown persons. He was married with a child.

58. Events occurred as follows. On 21 February 1993, at 12.00 hours, while he was at home with his wife, Metin Can received a call from two persons who asked to meet him. They came to the house and asked for help with the treatment of an injured person. Can called Hasan Kaya and

Şerafettin Özcan by telephone. Together, they talked to the two men. The two men left the house having arranged a meeting for later in the day at 19.00 hours. At 19.00 hours, Can and Kaya left the house to treat the wounded person. Fatma Can and Şerafettin Özcan waited in the house. Can and Kaya did not return.

59. On 22 February 1993, at about midday, Fatma Can received a phone call from an unknown person who said, "We have killed them both. Commiserations." Fatma Can called the police immediately. At about 15.00 hours, the car that Kaya had used was found. The applicant's father, Ahmet Kaya, presented a petition to the Elazığ Governor requesting that the missing men be found.

60. On 23 February 1993, Fatma Can received another call at midday. The caller said, "They are both in our hands. Metin Can will not go to Europe." Fatma Can went to Ankara to meet with various authorities. On the same day, at about 15.00 hours, sounds of torture and music were played over the phone four times at half hourly intervals at the home of Hasan Kaya. An application was made to Elazığ public prosecutor for the calls to be intercepted. In the evening, the shoes of Metin Can were found and handed over to the police.

61. On 24 February 1993, the applicant met the Elazığ Governor and requested that his brother be found. On 25 February 1993. Fatma Can met the Minister of the Interior, who told her that the missing persons would be found. On 26 February 1993, she met the Prime Minister.

62. On 26 February 1993, it was heard that two persons had died at Tunceli Security Headquarters. The information was passed onto the Elazığ police who said it was groundless. On 27 February 1993 at 13.00 hours, Can and Hasan Kaya were found dead under Dinar bridge, 15 kilometres from Tunceli and one kilometre from a gendarme station. Their hands were bound behind their backs with copper wire. The autopsy established that they had died on 26 February 1993 at about 22.00 hours. The applicant identified the body of his brother. His brother and Can had been subjected to torture.

63. The Governor ordered the funeral to take place on 28 February 1993, before the date intended by the families. The bodies were buried in a ceremony at which 6000 people attended within police cordons and under police harassment.

64. The authorities had given no explanation for the murder, which the Prime Minister said that they were unable to solve. The applicant considers that his brother was killed by the Turkish secret police. He refers, inter alia, to the following information:

- Can and Kaya were seen on the evening of 21 February in Yazıkonak village by persons who did not wish their identities revealed. His brother and Can were forced, resisting, into another vehicle, by persons with walkie-talkies.
- the vehicle stopped for petrol outside the village and one of the garage attendants who knew Can asked him where he was going to which Can replied, "We're going somewhere with the officers."
- the bodies were found in Tunceli, a neighbouring district. Other victims of murders, such as Vedat Aydın, a HEP leader, and Cemal Akar, an ÖZDEP leader, had also been kidnapped and their bodies found at some distance. Since the investigations are

conducted not where the incident occurs but where the bodies are found, this serves to confuse and draw out the investigations.
- a uniformed policeman had stated in the presence of a lawyer, İsmail, and a judge at Hozat, that two persons had been killed in Tunceli Security Headquarters but no interest was shown by Elazığ police.
- it is 140 km from Elazığ to Tunceli, with 8 police control points constantly in operation along the route the car carrying Can and Kaya must have travelled.
- the Elazığ police showed no interest in the fate of Can and Kaya, who were held alive and interrogated for five days. When Can's shoes were found, they joked that his trousers would arrive the next day. When a strange call was received at Can's house on 25 February 1993, the police denied that they were able to record the calls, despite the request that had been made for the interception of calls.
- according to information passed on by a security officer who did not wish to reveal his name, the State used secret forces, known as contra-guerillas, including people from the army, police and civilians. This source allegedly said that intelligence was gathered on particular persons, that contra-guerillas trapped and kidnapped them, and that they were interrogated with torture and then executed by the civilians in the group.
- some time after the murder, in a Pertek beerhouse, when a television programme was being shown in which the killing of Can and Kaya was being discussed and Erdal İnönü stated that there were no contra-guerillas, a man Yusuf Geyik, known as Bozo, said, "You're lying, we killed Metin and Hasan." At this some people reacted and jumped up. Geyik pulled out a pistol and called the Pertek district gendarme commander on his walkie talkie, giving him mobile team number and asking for urgent assistance. The district gendarme commander arrived a few minutes later and took Geyik away.

Statement dated 20 July 1994 addressed to the Commission

65. The applicant lists the complaints about the murder made to the authorities: on 18 March 1993 by his father Ahmet Kaya to Tunceli-Pertek State Prosecutor and to the Tunceli Chief State prosecutor; on 13 April 1993 by his father to the Tunceli Chief State prosecutor; in February 1994 by the journalist Soner Yalçın to the Erzincan State Security Court; on 14 April 1994 to the Elazığ Chief State prosecutor by his father and by Anik Can.

66. The applicant states that information about the murder was brought to light by the media which commonly reported that it was committed with the knowledge and under the orders of the Government. He pointed out that although a year had passed from the murder no statements had been taken from his father, Soner Yalçın or other relatives. A State prosecutor in Elazığ told his father that "this investigation is above our powers".

67. As regarded any denial by İsmail Keleş about a conversation overheard by him between a policeman and a prosecutor concerning two persons held in Tunceli, the applicant stated that this was because of fear.

b) Documents relating to the investigation into the killing of Hasan Kaya and Metin Can

Statement of Fatma Can dated 22 February 1993 taken by Elazığ public prosecutor Süleyman Tutal

68. The previous night, she had been home with her husband Metin Can and their friend Hasan Kaya. At 19.00 hours the telephone rang. Her husband said, "OK. We are coming." Her husband told her they would be back in two hours. They did not come back. That day, at about 13.00 hours, a person calling himself Vedat rang their house and said, "Accept my condolences. We killed Metin and his doctor friend." She wanted her husband to be found.

Statement of Fatma Can dated 14.30 hours 22 February 1993 taken by the police

69. She confirmed her statement to the public prosecutor. She wanted her husband to be found as soon as possible. If her husband was murdered, she wanted the perpetrators to be brought to justice.

Statement of Şerafettin Özcan dated 19.00 hours 22 February 1993 taken by the police

70. On 21 February 1993, he had gone with Hasan Kaya to his friend Metin Can's house. At about 19.00 hours, Metin Can received a phone call. Afterwards, he said to Hasan Kaya that they would go out together. Metin Can told him to stay and look after the children and that he would be back in a short while. They left in Mevlut Kaya's red Doğan car. They did not say where they were going and left in a calm manner. They did not return and he stayed the night. The next day at the office, at about 12.00 to 12.30 hours, Fatma Can rang, crying. When he went to her house, she said that someone had rung, saying that they had killed Metin Can and Hasan Kaya. He took Fatma Can to the public prosecutor's office.

Statement of Hakkı Özdemir dated 19.15 hours 22 February 1993 taken by the police

71. At about 11.30 hours that day on arrival at his office in Yazıkonak, he noticed a red Doğan car 23EC219 parked opposite. At 18.00 hours, when it had not been taken away, he became suspicious and told the muhtar to inform the authorities. The traffic police arrived soon afterwards. They searched the car. He had not seen anyone and did not know when it was left there.

Police minutes, sketch, report and delivery protocol dated 22 February 1993

72. The minutes describe the location of the red Doğan car reported as abandoned in Yazıkonak. It was locked. The police photographed the scene and had it towed to the Security Directorate for examination. The sketch shows the position of the car. The report indicates that no evidence was found in the car and a lack of fingerprints established. The delivery protocol states that the car owner and relatives were present when the car was examined at the Directorate.

Statement of Ahmet Oygen dated 22.30 hours 22 February 1993 taken by the police

73. Metin Can lived in the same apartment block on the third floor. At about 21.00-22.00 hours, two people rang his doorbell. They addressed him as brother Metin. He told them that Metin lived upstairs. They went upstairs and he heard them ring the bell. He did not know if the door was answered or when they left. He gave a description of the men and said that he would be able to recognise them again.

Statement dated 22 February 1993 of Süleyman Tursum taken by the police

74. About two to three days earlier, their doorbell rang. He was asked by two persons where Metin Can was. He told them that he did not know.

Police note dated 13.30 hours 23 February 1993

75. This recorded that at 13.30 hours Şerafettin Özcan had rung the police, informing them that someone claiming to be Dr Savur Baran called Metin Can's house saying that Metin Can was going to be released but would not go abroad and would continue the struggle. He had then hung up.

Petition dated 23 February 1993 of Ahmet Kaya to Elazığ Governor

76. The applicant's father referred to the disappearance of Hasan Kaya and requested that necessary enquiries be made and every possible step taken to find his son.

Statement of İhsan Denizhan dated 24.00 hours 23 February 1993 taken by the police

77. He was a night watchman at the Social Democratic People's Party ("SHP") building in Elazığ. At about 22.00 hours that day, he observed a bag lying horizontally inside the electric pylon 8 metres from the building. It was a shopping bag, containing two pairs of old shoes. He waited for a while, wondering if they would be picked up by customers at a nearby shoe repair shop. When no-one did, he picked the bag up. About then, a passer by said, "Those shoes look like my brother's" and tried to take them. He refused and reported to the station. Officials came and took the shoes.

Police minutes and sketch map dated 24 February 1993

78. Minutes record the handing over to the police of the bag and two pairs of shoes and describe the items. The sketch map indicates the location at which they were found.

Police minutes dated 12.30 hours 24 February 1993

79. Tekin Can, brother of Metin Can, identified one of the pairs of shoes found outside the SHP building as belonging to his brother. Hüseyin Kaya, brother of Hasan Kaya, stated that the second pair of shoes were not his brother's.

Discovery and autopsy report dated 27 February 1993, 16.25 hours

80. Following a telephone message at about 13.30 hours on 27 February 1993 to Tunceli central gendarme command that two male bodies had been found, Tunceli public prosecutor Hayati Erarslan, Dr İsmet Ünal and Dr. Cem Gören went to the location, 12 kilometres outside Tunceli on the road to Elazığ, under the bridge over the Dinar stream. The exact position of the bodies was described. Both men had been shot in the head and had their hands tied. Two cartridges were discovered. The bodies were taken to Tunceli State Hospital morgue for examination. One body was identified as Hasan Kaya by the applicant. There was a bullet entry hole at the back of the head and an exit hole in front of the right ear. The left hand side of the face and mouth was subsided and the facial construction disfigured. A total absence of any trace of violence or blow was observed. Cause of death was cerebral haemorrhage due to firearm wound.

81. Hüseyin Can identified the second body as Metin Can. His face was collapsed on the right hand side. The nose was haemorrhaging. His lip had a three cm long, two cm wide wound, some teeth were missing and his ears were filled with dried blood. There were ecchymoses all round the neck, on both knees and in various places on the torso and abdomen. Maceration was completely developed in the victim's feet. A total absence of any trace of violence or blow was observed. The doctors added to the public prosecutor's findings that the ecchymosis on the right eyebrow might have been caused by a blow.

82. Death was estimated as occurring within the last 14-16 hours.

Additional autopsy report dated 28 February 1993, 1.05 hours

83. The report states that during the first autopsy the bullet projectiles were not taken out and considering the evidential value a second autopsy was decided upon.

84. The applicant identified the body of his brother, Hasan Kaya. The bullet entry and exit holes were described. The right ear and adjacent area were marked with ecchymoses which could be explained by pressure on the body. There were ecchymoses around the nailbases on the upper side of the left hand; circular marks round both wrists, which might have been caused by the hands being bound by wire; a 1 x 0.5 cm ecchymosis on the right knee, 2 x 1 cm light yellow ecchymosis on the inner lower frontal region of the right knee; 0.7 cm wide ecchymosis on the left ankle outer upper region and 1 cm below that 0.5 cm wide epidermal scratches; cyanosis in toe bases on both feet and athlete's foot on both feet, especially in soles and left regions, which was probably caused by remaining in water and snow for lengthy periods. The torso of the body was free from any blow, wound, burn, firearm injury save those noted above. Cause of death was brain damage and haemorrhage of the brain tissues due to the bullet wound. A classical autopsy was not necessary.

85. Hüseyin Can identified the body of his nephew Metin Can. The bullet entry and exit holes in the head were described. There were areas of red ecchymosis, 1.5 x 1-2 cm, on the right hand side above the right eyebrow; a 3 x 2 cm red ecchymotic scratch beneath the right eye; a red 3 x 2 cm ecchymotic scratch between the right eye and ear; a haemorrhage in the right eye; a peri-orbital purple ecchymosis round

the left eye; a 3 cm superficial scratch on the nasal bone; red coloured ecchymosis in the right ear; blood was observed in the inferior nasal cochna; on the neck thyroid region, a 8 x 1cm perpendicular ecchymosis; a 3 cm long ecchymosis on the left lower jawbone, with a 2 cm ecchymosis beneath; palpation and fragmentation of the lower jawbone; a 1.5 cm tear and ecchymosis on right lip; lower right 3rd and 4th and upper right 3rd, 4th and 6th teeth were missing; a 4 cm cut and ecchymosis on the outer right edge of the tongue; a hole in the upper palate right hand side, large enough to insert the middle finger; superficial scratches, with 0.5 cm ecchymosis surrounding them, on medial inter-falangial joints of 3rd, 4th and 5th fingers, with a lesion on the right 3rd proximal joint; cyanosis on the nailbases of both hands; marks on wrists indicative of being bound; a 3 cm purple ecchymosis on 7th and 8th ribs right hand side; a 7 x 6 cm ecchymosis on the lower inner right knee; an ecchymosis 3 cm in diameter on the left kneecap; cyanosis on both feet and toes (document text illegible at this point). The bruises and scratches on the forehead, nose and under the right eye were thought to have been caused by blunt instruments (eg. stone, stick etc) and the lesions on the neck by string, rope or cable. This might have occurred immediately before the death and from application of force for short periods. These wounds would not have caused death. Death resulted from brain damage and brain haemorrhage.

86. Death was estimated as occurring within the last 24 hours.

Gendarme reports on the scene of the crime

87. By letter dated 1 March 1993, the central provincial gendarme commander sent to the Tunceli public prosecutor an incident report dated 27 February 1993 in which the location and position of the bodies and two cartridges were described and also a sketch map of the scene drawn up on 27 February 1993. The report stated that the gendarmes had received a report that two bodies had been found at about 11.45 hours.

Request dated 2 March 1993 for ballistics examination

88. The request addressed by Tunceli public prosecutor to the Diyarbakır regional police forensic laboratory concerned examination of the two cartridges found at the scene.

Statement dated 8 March 1993 of Fatma Can taken by Elazığ public prosecutor Süleyman Tutal

89. On 20 February 1993, she and her husband came home between 22.30-23.00 hours. At about 24.00 hours, the phone rang. Her husband answered. As far as she could gather, the caller was reluctant to give his name, Metin got angry and hung up. He told her that some unknown people had come round to the house earlier looking for them while they were out. They wanted to come to the house now. He told them to see him in his office and refused when they asked him to come out. Metin did not recognise their voices.

90. On 21 February 1993, Hasan Kaya, a very close friend of her husband was at the house, as well as Şerafettin Özcan and her husband. They came and went a few times. At 19.00 hours when they were all in the house, the phone rang. She heard Metin say, "We are coming." It was a short conversation. They prepared to go out. Şerafettin offered to

go with them but she told him to stay and help her with the children. Metin and Hasan left saying that they would come back in a few hours. They did not come back. At about 13.00 hours the next day, some-one rang, saying "I am Vedat. Accept my condolences. We killed them both." She screamed and dropped the phone. She went to file a complaint.

91. On 23 February 1993, when she was not at home, Metin's nephew answered a call. The caller, who said that he was Doctor Mehmet or Doctor Savur Baran, said, "Both of them are alive. We will not let the doctor go. We will release Metin. He will not go to Europe. He will continue the struggle." Metin was President of the Human Rights Association and had been invited to Germany. He had said that the police had raided the Association and were going to close it down. She had kept asking him to resign and he said he would. She did not know who he might see in Yazıkonak about Association matters. She did not hear that he was being threatened though he said that since he became President, the police followed him. Once when she came back to the house, she smelled perfume and thought that a stranger had entered the house. She was suspicious that the house might have been bugged.

Statement dated 9 March 1993 of Ahmet Kaya to Elazığ public prosecutor Süleyman Tutal

92. Ahmet Kaya had not himself received threatening calls after the disappearance. He had gone himself to investigate at Yazıkonak where the car had been found. There the elder Süleyman said that they had seen Metin Can in the village once in a while. There was a rumour going round but no-one said anything definite. According to rumour, Metin and Hasan had gone together to Yazıkonak. They were taken out of their car by people who argued amongst themselves. Then they left.

Magistrates' court order of 23 February 1993

93. In response to the request of the Elazığ public prosecutor of the same day, which requested monitoring in order to capture the perpetrators of the kidnapping and identify the persons making threatening calls, the court decided that the residential number of Metin Can should be monitored for one month.

Letter dated 10 March 1993 from Elazığ prosecutor Süleyman Tutal to the PTT

94. The letter referring to the magistrates' court order for monitoring of the telephone of Metin Can's home for one month requested details of calls to be sent.

Letter undated from PTT to Elazığ public prosecutor

95. While a recording device had been attached to the line, no recordings had been made since no request had been received that recordings should be made.

Decision of withdrawal of jurisdiction dated 11 March 1993 by Elazığ public prosecutor Süleyman Tutal

96. This decision refers to the offences of the kidnapping, detention and murder of Metin Can and Hasan Kaya by suspects unknown. Since the offence took place within the boundaries of Tunceli province, they

ceded jurisdiction and sent the investigation file to Tunceli public prosecutor.

Ballistics report dated 15 March 1993

97. This reported that the two 9mm parabellum type cartridges were fired from the same gun. This gun had also been used in the murder incident on 8 February 1993 involving Seyfettin Zengi and Abdullah Gencer at Kocaman petrol station on the Bitlis-Muş provincial border and in the murder and arson incident of 6 February 1993 involving lorry driver Mehmet Turan 8 km from Maden district, Elazığ province.

Decision of association dated 16 March 1993 by Tunceli public prosecutor

98. This referred to the decision of withdrawal of jurisdiction by Elazığ public prosecutor in respect of their investigation and decided to associate the existing investigations under one number.

Petition stamped 18 March 1993 of Ahmet Kaya

99. This petition, forwarded from Elazığ to Tunceli public prosecutor, stated that on the date of the incident his son was taken into custody in Yazıkonak district by police officers carrying radios and wearing civilian clothes. Along their route, the officers bought petrol from a station and said that they were taking the lawyer and doctor for interrogation. Also, during a conversation in Hozat district which involved a district judge and a lawyer called İsmail, a police officer told them that Can and his son were taken into custody at Tunceli Security Directorate. This meant that they were killed there or deliberately delivered to the persons who killed them. He requested that enquiries be made of the Hozat judge and the lawyer called İsmail and at Pertek, referring to his complaints made to the Pertek chief public prosecutor and that all procedures be carried out to catch the perpetrators of the murder.

Petition dated 19 March 1993 of Ahmet Kaya to Pertek public prosecutor

100. The applicant's father referred to an incident which occurred on 15 February 1993 in Pertek beerhouse. At about 20.00 hours, while a news programme discussed contra-guerillas, Yusuf Geyik, nicknamed Bozo, said, "You're lying. We killed Hasan Kaya and lawyer Metin Can." When people in the beerhouse attacked him, he pulled a pistol, called for help on a walkie-talkie and was taken away by the district gendarme first sergeant. Those present at the time and the owner of the beerhouse had information on this and he requested that the necessary enquiries be conducted.

Instruction dated 30 March 1993 from Pertek public prosecutor to Pertek Security Directorate

101. This requested an investigation into Yusuf Geyik, known as Bozo, and that he be summoned to their office.

Decision of withdrawal of jurisdiction dated 31 March 1993 of Tunceli public prosecutor

102. This decision set out the outline of the disappearance and finding of the bodies of Metin Can and Hasan Kaya and referred to the identities of the perpetrators being unknown. It was stated that the crime fell within the declaration of the state of emergency and was under the jurisdiction of the State Security Courts; the file was to be transferred to the Kayseri State Security Court prosecutor.

Report dated 6 April 1993 from Mustafa Özkan, Chief of Security, to the Pertek prosecutor

103. Their investigation proved that there was no such person as Yusuf Geyik in their district.

Letter dated 8 April 1993 from Tunceli public prosecutor to Hozat public prosecutor

104. This referred to the petition of Ahmet Kaya and requested that statements be taken from the Hozat district judge and the lawyer named İsmail who practised at Hozat and from the police officer, when his identity had been established.

Statement dated 12 April 1993 of İsmail Keleş taken by the Hozat public prosecutor

105. İsmail Keleş, an advocate practising freelance in Hozat district, stated that the claims in Ahmet Kaya's petition were groundless. No police officer or other member of the security forces or judge told him anything about the murder of Hasan Kaya and Metin Can. He could not confirm if they had been taken to Tunceli Security Directorate.

Petition dated 13 April 1993 of Ahmet Kaya to the Tunceli public prosecutor

106. The applicant's father referred to the circumstances in which Hasan Kaya and Metin Can were seen being taken by plainclothes police officers at Yazıkonak despite the objection of Metin Can, "You cannot take us into custody" and to the report that the vehicles stopped to take petrol at a garage where an attendant recognised Metin Can, who told him that they were being taken somewhere by the officers. He referred to a report that a judge and police officer in a conversation with a lawyer referred to two persons being in custody at Tunceli and that at Pertek a man, who was drunk, claimed to have killed them. It was pointed out that the two men were taken 138 km through at least 8 official checkpoints and the opinion was expressed that the circumstances in which two young men were held for a week and the confidence displayed by the perpetrators indicated that the Government was involved.

107. The applicant's father stated that while in Elazığ the Minister of the Interior had told him that his son was a criminal. He requested that necessary enquiries and investigations be carried out to uncover the perpetrators of the murder. The petition named the Governor of Tunceli, the Tunceli chief of police and the Minister of the Interior as those against whom complaint was being made.

Hozat police report dated 14 April 1993

108. In answer to the Hozat public prosecutor's request of 12 April 1993, the police had investigated the complaint of Ahmet Kaya that a police officer had informed the Hozat district judge that Metin Can and Hasan Kaya had been held at Tunceli Security Directorate. Although every effort had been made to locate such police officer, the investigation proved that no police officer at Hozat had made such a statement.

Letter dated 16 April 1993 from Hozat public prosecutor to Tunceli public prosecutor

109. In answer to the instruction of 8 April 1993, it was stated that İsmail Keleş (presumably Keleş as above), a practising lawyer in Hozat, was called to give his statement. According to the Hozat chief of security's report of 14 April 1993, it was understood that no conversation had taken place concerning the murders of Metin Can and Hasan Kaya. Accordingly, the statement of the Hozat district judge was not taken.

Instructions dated 29 April 1993 from Pertek public prosecutor to Pertek Security Directorate

110. The first instruction requested that enquiries be made as to whether Yusuf Geyik, codenamed Bozo, lived within the municipal boundaries and if so, for him to be summoned. The second requested that the managers of the Pertek beerhouse opposite the PTT be summoned.

Letter dated 29 April 1993 from Pertek public prosecutor to Pertek district gendarme command

111. This outlined the alleged incident in the Pertek beerhouse involving Yusuf Geyik and requested information as to whether he had asked for help by radio from the district gendarmes on 15 March 1993, whether an NCO went to the public house and took him away and if so, the name of the NCO.

Letter dated 4 May 1993 from Mustafa Özkan, Pertek chief of security for referral to Pertek public prosecutor

112. Their investigation proved that there was no-one named Yusuf Geyik within their jurisdiction. He had been reported as being seen in the district and as having stayed at the district gendarmerie a month before but his whereabouts were unknown. (This sentence is obscurely and ambiguously phrased and has posed difficulties in translation.)

Statement dated 4 May 1993 by Hüseyin Kaykaç taken by Pertek public prosecutor

113. Hüseyin Kaykaç ran a beerhouse in Pertek. On 15 March 1993, a man about 30 years old, whom he knew as Bozo (he did not know his real name) was sitting at a table by himself. When the news was on about the killing of Hasan Kaya and lawyer Metin Can, he made statements to the effect that "we killed him". He talked on the radio and after a

while an NCO in civilian clothes from the gendarme station came and picked him up. He did not see other people in the beerhouse attacking him or Bozo drawing a gun.

Statement dated 4 May 1993 by Ali Kurt taken by the Pertek public prosecutor

114. Ali Kurt, who was employed as a waiter at the beerhouse, agreed with the statement made by Hüseyin Kaykaç. He did not wish to add anything.

Letter dated 5 May 1993 from Pertek district gendarme commander to the Pertek prosecutor

115. The commander was not aware of the incident involving Yusuf Geyik. There was no instance of assistance being requested by radio from the beerhouse. It was not an NCO who took him away and it was not known where he went.

Decision of non-jurisdiction dated 22 July 1993 given by Kayseri State Security Court prosecutor

116. By this document, it is explained that the file had been transferred to Kayseri due to an earthquake but that since Erzincan State Security Court public prosecutors' office had resumed their work, the file was now returned to Erzincan.

Letter dated 3 September 1993 from Ali Demir and Mehmet Gülmez to the Elazığ public prosecutor's office

117. The letter from Ali Demir, a lawyer, and Mehmet Gülmez, President of the Tunceli Human Rights Association, enclosed for the prosecutor's information an extract from the Aydınlık newspaper[1] which referred, inter alia, to the murders of Metin Can and Hasan Kaya. It requested an investigation into the matter and that the persons named in the report be punished.

Statement dated 12 October 1993 by Ali Demir taken by a public prosecutor

118. Ali Demir stated that he had sent a copy of the Aydınlık newspaper of 26 August 1993 to shed light on the events. He did not personally know Ahmet Demir, known as Yeşil. However, between 1988 and 1991 when he was chairman of SHP in Tunceli he received complaints that an individual known as "the Beard" (Sakallı) was carrying out attacks on villages in the Ovacık-Nazımiye districts. He was constantly associating with the state security forces. They informed the Tunceli member of Parliament, Kamer Genç, and the then Chairman of SHP, Erdal İnönü. He did not know Yazıcıoğulları or the special warfare officer mentioned in the article.

Instruction dated 14 October 1993 from the Tunceli public prosecutor to the Tunceli Security Directorate

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[1] This appears to refer to articles by Soner Yalçın in editions of 25-26 August 1993 in which he referred to Ahmet Demir and Mehmet Yazıcıoğulları's involvement in the murder. See para. ***, Press reports.

119. This instructed that Mehmet Yazıcıoğulları, Ahmet Demir and Mehmet Gülmez be brought to their office for investigation.

Police report dated 18 October 1993

120. This stated that Mehmet Gülmez had been located but that no-one knew Mehmet Yazıcıoğulları and Ahmet Demir.

Statement dated 18 October 1993 of Mehmet Gülmez taken by the Tunceli public prosecutor.

121. Mehmet Gülmez did not know Ahmet Demir. He had heard that a man called "the Beard" was around 3-4 years before. He knew nothing of Yazıcıoğulları or the special warfare officer.

Instruction dated 8 November 1993 from the Erzincan State Security Court prosecutor to the Pertek prosecutor

122. This requested that Hüseyin Kaykaç and Ali Kurt be summoned to give detailed statements, that a description of "Bozo" be taken and a secret investigation made to identify him and that Hüseyin Kaykaç clarify whether or not he could identify the NCO mentioned in his statement. This request was later directed to Elazığ public prosecutor on 25 November 1993 and 2 February 1994 in respect of Hüseyin Kaykaç.

Instruction dated 11 November 1993 from the Tunceli public prosecutor to the Tunceli Security Directorate

123. This again instructed that Mehmet Yazıcıoğulları and Ahmet Demir be brought to their office for investigation.

Instruction dated 12 November 1993 from Pertek public prosecutor to Pertek Security Directorate

124. This required Ali Kurt and Hüseyin Kaykaç to be summoned to their office.

Statement of Ali Kurt dated 17 November 1993 taken by Pertek public prosecutor

125. Ali Kurt worked as a waiter at the Pertek beerhouse. That year in the month of Ramadan, a person whom he had not seen before sat at one of the tables. He described the person. The news was on the television, concerning the kidnapping and murder of a doctor and lawyer from Elazığ. Erdal İnönü was saying that the killers would be caught soon. The person stood up, saying "I am Bozo. I shot them. I used to be Bozo of the mountains. Now I am here. Come and get me." He had been drinking. He spoke into a radio, saying that he wanted to talk to the regiment commander. Ali Kurt did not hear the rest as he was serving tables. Three people he did not know came to take Bozo away. He did not know if they were military or police. He never saw Bozo again. The beerhouse had been crowded that day. Hüseyin Kaykaç now worked in Elazığ.

Internal police report dated 6 December 1993

126. Following the Tunceli public prosecutor's request for Yazıcıoğulları and Demir to be summoned, the investigation and the village and district muhtars revealed that they did not reside and were not known within their jurisdiction.

Petition dated 31 January 1994 by Hale Soysu, Aydınlık editor, forwarded from İstanbul State Security Court prosecutor to Erzincan State Security Court prosecutor

127. The petition accused Mahmut Yıldırım as one of the active perpetrators of the murders of Hasan Kaya and Metin Can, the murder of Ayten Öztürk on 27 July 1992, the murders of five persons found after they had been taken into custody at Muratgören in Muş province and the murder of the journalist Halit Güngen on 18 February 1992. This complaint was based on information received by, and investigations of, the newspaper Aydınlık. It enclosed 12 pages from the series of articles, "The Secrets that brought death to Major Cem Ersever" that appeared in the newspaper from 19 to 30 January 1994.

Letter dated 2 February 1994 from Elazığ State Security Court prosecutor to Elazığ public prosecutor

128. This letter referred to Ahmet Kaya as being a witness who knew of Yusuf Geyik ("Bozo") and requested information about his address.

Letter dated 2 February 1994 from Erzincan State Security Court prosecutor to the Pertek prosecutor

129. This stated that there was a discrepancy between the documents from Pertek gendarmerie station and the police department. It requested a new investigation to be conducted by the prosecutor personally, in particular to clear up the contradiction in the documents, taking into account the police information and that the gendarmerie might be a party and to gather information about the identity of Yusuf Geyik, also known as Bozo, whom the police department claimed was staying at the gendarmerie station. This was labelled an urgent request.

Letter dated 2 February 1994 from Erzincan State Security Court prosecutor to the İstanbul State Security Court prosecutor

130. This requested the tape and transcript of a programme on Show TV in or about December 1993-January 1994 in which an Aydınlık correspondent talked about Major Cem Ersever.

Petition dated 14 February 1994 by Ahmet Kaya to Elazığ public prosecutor

131. This letter referred to Aydınlık, Özgür Gündem, Soner Yalçın's book "Confessions of Major Cem Ersever" and Show TV having named Mahmut Yıldırım as the planner and perpetrator of the murders of Hasan Kaya and Metin Can. It stated that Yıldırım had been a state employee for 30 years, that he came from nearby in Elazığ, that he was described as a murderous individual by people at Aksaray and requested that action be taken against him.

Statement dated 14 February 1994 by Ahmet Kaya taken by Elazığ public prosecutor Süleyman Tutal

132. Ahmet Kaya stated that his son and friend had been killed a year ago and the perpetrators not found. Recently the press and TV were suggesting that an individual named Mahmut Yıldırım was involved. He did not know the man personally but in their district he was talked about as being involved in such incidents.

Instruction dated 14 February 1994 from Elazığ public prosecutor to Elazığ Security Directorate

133. This requested that Hüseyin Kaykaç, address specified, be brought to give a statement. An urgent reminder was sent on 21 March 1994.

Instruction dated 15 February 1994 from Elazığ public prosecutor Süleyman Tutal to Elazığ Security Directorate

134. This enclosed Ahmet Kaya's petition and statement (above paras. 131-132) and requested that a very confidential investigation be carried out and that upon identification and apprehension the suspect/suspects be delivered to their office.

Letter dated 17 February 1994 from Pertek prosecutor to the Erzincan State Security Court prosecutor

135. This listed information gathered on Yusuf Geyik. His description was given and it was stated that he was a member of an organisation "Partizan (TKP-ML)" with codenames "Çerkez Ethem" and "Bozo". He was identified as the perpetrator of an incident on 22 January 1990, when a van was strafed killing one person and injuring several others, and a robbery incident in 1990[2]. An arrest warrant had been issued against him dated 28 March 1990 but the Erzincan State Security Court prosecutor had withdrawn it on 4 November 1991.[3]

Statement dated 21 February 1994 by Ahmet Kaya taken by Elazığ public prosecutor Süleyman Tutal

136. He was asked about Yusuf Geyik on instructions from the Erzincan chief public prosecutor's office. He had learned of Geyik's involvement in the killing from a magazine called "Gerçek" published in Tunceli, which had been given to him by police officers from the Elazığ anti-terrorist branch. The article recounted how, during a TV discussion programme with Erdal İnönü and Akin Birdal, Geyik nicknamed "Bozo" said "You're lying. We killed doctor Hasan Kaya and lawyer Metin Can." He did not know Geyik but by word of mouth he had learned that Geyik was registered in Solhan district of Bingöl but was later registered in Tunceli.

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[2] The enclosed non-jurisdiction decision reports the robbery incident (armed raid on a coffee shop in the Pınarlar district of Pertek) as taking place on 31 December 1989.

[3] Another document in the investigation file is an indictment 1989/190 of Erzincan State Security Court naming Yusuf Geyik as a member of the TKP.ML-Partizan group, an armed ring aimed at forcibly overthrowing the Turkish constitution. He is stated as having been part of the group which entered the village of Çığırlı, kidnapping and killing Ali Haydar Öncü in August 1989. By decision dated 28 December 1990, the proceedings were discontinued since he and other accused persons were still at large. According to the police, they were continuing their activities and roaming the countryside.

Petition dated 21 February 1994 from Anik Can to Elazığ public prosecutor

137. The letter stated that he had been informed by the press, TV and books that his son Metin Can had been killed by Mahmut Yıldırım who worked at Elazığ Ferrakrom and lived at No. 13 Pancarlı Sokak, Aksaray Mah., Elazığ province. He filed a complaint against this individual.

Police report dated 14.00 hours 25 February 1994

138. Their team had investigated the information provided by Ahmet Kaya and Anik Can and concluded that Mahmut Yıldırım had left No. 13 Pancarlı Sokak, Bahçeler Mevkii, Aksaray Mah., 15-20 days prior to the investigation for an unknown destination. His present location was beyond establishment.

Statement of Hüseyin Kaykaç dated 6 April 1994 taken by Elazığ public prosecutor Süleyman Tutal

139. Hüseyin Kaykaç was resident in Elazığ. In reply to instructions from the Erzincan State Security Court, he was asked about an incident in Pertek. He owned a beerhouse at that time. There was a man who came there several times. He did not know him but people said he came from a rural district. He later heard that his real name was Yusuf Geyik and that he came from Geyiksu village. A lot of people knew that he was nicknamed Bozo. One evening, Bozo was shouting in the beerhouse and calling on the radio, asking to be put through to the Tunceli regiment gendarme commander. When he could not get through, he called the Pertek district gendarme headquarters, saying "I am in the beerhouse in Pertek. The situation is calm. Come and get me." He described Bozo. Two NCOs and a civilian came to take him away. The NCOs were called Mehmet and Ali. The man in plainclothes he also knew to be an NCO but did not know his name. After making his statement to the Pertek chief public prosecutor, he asked several people if they knew him and they told him that he was called Hüseyin and that he was still employed at Pertek district gendarme station.

Police report dated 11 April 1994 to Elazığ public prosecutor

140. This reported that an investigation had been carried out into Mahmut Yıldırım's whereabouts but had concluded that he had left the indicated address. No-one had been found who knew his new address or whereabouts. Investigation of his whereabouts was ongoing and in the event of establishing an address a statement would be taken. This was forwarded to the Tunceli public prosecutor.

Letter dated 11 May 1994 from İstanbul Security Directorate forwarded to Erzincan State Security Court prosecutor

141. This enclosed a transcript and tape of the "32. Gun Programme" containing a live interview with an Aydınlık reporter.

142. The programme included taped excerpts of Major Cem Ersever talking in the Aydınlık office before his death. Soner Yalçın recounted various of his interviews with Cem Ersever. He said that Ahmet Demir, known as Yeşil, was in the Nationalist Action Party (MHP) in the 1970's, had been the bodyguard of Türkeş and employed by the public

administration in Elazığ. He was responsible for the murder of Can and Kaya. Yeşil was a codename known throughout the police and gendarmes. The programme presenter mentioned that Yalçın had been due to meet Ersever on 25 October 1993 but nothing was heard from him after that.

Decision of withdrawal of duty dated 25 May 1994 by Erzincan State Security Court prosecutor

143. By this document, the Erzincan prosecutor referred the ongoing investigation of the murder of Metin Can and Hasan Kaya to the Malatya State Security Court following the re-organisation of jurisdiction for the Tunceli and Elazığ areas.

Instruction dated 13 March 1995 from Malatya State Security Court prosecutor to Bingöl, Tunceli, Elazığ and Diyarbakır prosecutors' offices

144. This requests:
- the location and arrest of Mahmut Yıldırım, known as Yeşil, Sakallı and superintendent Ahmet Demir, by Elazığ public prosecutor;
- that the Diyarbakır public prosecutor establish if Orhan (Ayhan) Öztürk, İdris Ahmet and Mesut Mehmetoğlu, were or had been in Diyarbakır prison and to provide their dates of arrest and release and their addresses;
- that the Bingöl public prosecutor establish the address of Mehmet (Mahmut) Yazıcıoğulları and continue the search for his apprehension;
- that the Tunceli public prosecutor establish the identity and address of Yusuf Geyik and continue the search for his apprehension.

Letter dated 15 March 1995 from Bingöl prosecutor to Malatya State Security Court prosecutor

145. This letter enclosed the address of Mehmet Yazıcıoğulları, who ran a petrol station on the Muş-Bingöl intercity road.

Letter dated 17 March 1995 from Diyarbakır prosecutor to Malatya State Security Court prosecutor

146. This enclosed information from Diyarbakır E-type prison. In the letter dated 14 March 1995 from the prison director, it was stated that:
- confessor Erhan Öztürk was arrested on 18 October 1991 for membership of the PKK. He was released from prison on 18 February 1993;
- confessor İdris Ahmet, a Syrian citizen, was arrested on 14 September 1990 for PKK membership, transferred to the prison on 24 September 1990 and released on 16 December 1992;
- confessor Mesut Mehmetoğlu was arrested on 5 February 1992 for PKK membership, transferred to prison on the same date and released on 8 January 1993. He was arrested on 10 May 1994, inter alia, for aiding homicide, and transferred to the prison on 26 September 1994, where he was still detained.

Letter dated 17 March 1995 from Malatya State Security Court prosecutor to Solhan/Bingöl public prosecutors' office

147. This requests that a statement be taken from Mehmet Yazıcıoğulları in regard to allegations in the Aydınlık newspaper of 23 January 1994 that he and Ahmet Demir (Yeşil, Sakallı) were responsible for the killing of Metin Can and Hasan Kaya.

Letter dated 22 March from Malatya State Security Court prosecutor to Diyarbakır public prosecutors' office

148. This requests that a statement be taken from Mehmet Mehmetoğlu in regard to allegations in the Aydınlık newspaper of 23 January 1994 that he and two others released from prison killed Metin Can and Hasan Kaya.

Statement dated 28 March 1995 of Mehmet Yacızıoğulları taken by Solhan public prosecutor

149. The witness was told of the alleged offence. He stated that he had no connection with the killings of Metin Can or Hasan Kaya. He did not know Mahmut Yıldırım, İdris Ahmet, Orhan Öztürk or Mehmet Mehmetoğlu. His lawyer in Ankara had sent a denial of the Aydınlık article of 23 January 1994 and others.

Statement dated 6 April 1995 of Mehmet Mehmetoğlu taken by a public prosecutor in Diyarbakır E-type prison

150. The witness was told of the alleged offence. He stated that he did not carry out any such act. He was formerly a PKK group commander but had become a confessor. Press organs like Aydınlık, Ülke and Gerçek which were known to support the PKK, published biased articles, targeting him and saying that he was excluded from society. He was in Antalya around 21 February 1993. When he had heard his grandfather had died, he went to Hazro and stayed there for two months. He knew İdris Ahmet and Erhan Öztürk, since they served prison sentences together from January 1992 to January 1993. He only knew them in prison.

Elazığ police report dated 7 April 1995 to Elazığ public prosecutor

151. This stated that, in response to a request (in March 1995) that the identity of Mahmut Yıldırım, known as Sakallı, Yeşil or superintendent Ahmet Demir, be established and that he be apprehended, superintendent Ahmet Demir did not exist in their Directorate and that according to the district's muhtar the address No. 13 Panarlı Sok., Aksaray Mah., Elazığ, did not exist and the individual could not be apprehended. The employment address, Ferrokrom Tesisleri, was within the jurisdiction of the gendarmes and outside their own jurisdiction.

Gendarme report dated 3 April 1995

152. The report by the local station commander, counter-signed by the muhtar of Geyiksu, stated that the investigation into the address of Yusuf Geyik registered at Geyiksu village concluded that he did not live there or at Atadoğdu village. He did not have any relative and had moved to İstanbul 8-10 years before. His present address was unknown.

Gendarme report dated 28 April 1995 to Elazığ public prosecutor

153. This report, from the Elazığ provincial gendarme command, referred to correspondence from the Malatya State Security Court prosecutor on 13 March 1995 and from the Elazığ public prosecutor of 6 April 1995 requesting the location and apprehension of Mahmut Yıldırım. It stated that his address within their jurisdiction had been investigated and it was concluded that his identity and address were beyond establishment.

c) Concerning published reports of State involvement or responsibility for unknown perpetrator killings

Newspaper reports

Aydınlık, 26 August 1993

154. In the article headed, "Here is the killer in the unidentified perpetrator cases", it was reported that a special warfare officer had revealed the killers of Halit Güngen, Metin Can and Hasan Kaya as being Ahmet Demir, known in Tunceli as Sakallı (the Beard), and DYP Parliamentary candidate Mehmet Yazıcıoğulları. He said both were responsible for most of the killings in the Diyarbakır, Tunceli, Elazığ, Bingöl and Bitlis areas. It was concluded that they were the underground civilian extension of the contra-guerillas, armed and paid by the State.

Özgür Gündem, 4 March 1994

155. In an article entitled "Killers are protected", Erol Anar outlined the killing of Metin Can and Hasan Kaya. He stated that Major Cem Ersever, who had been involved with contra-guerillas and who had given information to the Aydınlık newspaper, had named Ahmet Demir (Yeşil), the chief of the contra-guerillas, and Mahmut Yazıcıoğulları as their murderers. The Kurdistan news agency (Kurd-HA) in its bulletin of 14 October 1993 had announced that Ayhan Öztürk, the trigger man of the murders, had been captured in Malazgirt and his confessions later published in the Özgür Gündem. In an inset report, entitled "Contra's confession" accompanied by a photograph of Ayhan Öztürk, details were given of Öztürk's statements as told by the Kurdistan news agency. Öztürk said that confessor Alaattin Kanat and İdris Ahmet trained him as a contra in Diyarbakır prison. When released, he was taken to one of the important contras codenamed Yeşil. Yeşil received orders from the Minister of the Interior. He, Öztürk, carried out the murder of Can and Kaya along with İdris Ahmet and Mesut Mehmetoğlu. Yeşil took their address and telephone numbers from the Elazığ Security Directorate. They introduced themselves to Can and Kaya as being from the PKK and asked them to treat a wounded person. Can and Kaya's interrogations were carried out in Elazığ Security Directorate. Yeşil, the Syrian İdris Ahmet and two or three interrogation officers applied torture. He, Öztürk, executed them at a bridge between Tunceli and Mazgirt. These confessions were stated as having been confirmed by witnesses of the incident and Major Ersever.

Aydınlık, January 1994 (exact date not indicated)

156. In an article entitled "The killer of Can and Kaya is Yeşil", Soner Yalçın cited Major Cem Ersever as implicating Yeşil in the killings of Ayten Öztürk and Can and Kaya. Ersever was cited as explaining how Yeşil committed all the murders in the Elazığ-Tunceli-Bingöl area. The name of Ahmet Demir (Yeşil) and Mehmet Yazıcıoğulları would crop up if the unknown perpetrator murders were investigated. They worked together. Yazıcıoğulları was the financier and received his money from the State, one way or another. He described Yeşil as about 42 years old and alleged that he was known to a member of Parliament. Incidents were carried out by teams of 4-5, all of them from Bingöl, except for Yeşil. They spoke a Kurdish dialect. Yalçın referred to his earlier articles of 25-26 August 1993 where part of Ersever's revelations were revealed but his name not disclosed.

157. The article referred to the Kurdish news agency bulletin of 14 October 1993, concerning Orhan Öztürk. Öztürk was described as having been trained in the PKK camps and becoming a confessor after his apprehension. His confessions on being captured by the PKK were published in the Özgür Gündem on 18 November 1993. An alleged link between Yeşil and Elazığ Security Directorate was repeated.

Aydınlık, 23 January 1994

158. In the article "Official document: Yeşil is a state intelligence agent", a text from Mehmet Kocademir, mayor of Tunceli, was set out. This stated that in Tunceli, in particular in the Nazımiye and Ovacık districts, an individual known as "Sakallı" and "Yeşil" carried out threats, tortures and pressures with the aid of military teams. The council brought this to the attention of the Governor and brigadier general who said the individual was not connected with them. Then they contacted the Human Rights Committee of the Turkish Grand National Assembly who sent a delegation. The delegation met in the council and over three days met victims of Sakallı's torture. A report was taken back to the assembly. Later, the chairman of the Committee sent a letter to him dated 10 September 1991 which letter was reproduced in the article. The letter stated that, following research and investigation, the bearded man ("Sakallı") and his friends who were alleged to be the source of persecution, were people who worked as intelligence operatives. This team was removed from office on 25 April 1991 as a result of complaints arising from their working methods.

Radikal, 9, 10 and 11 February 1997

159. In a series of articles under the heading "The killing squad of the gang talked to Radikal, two journalists related a conversation with two self-confessed PKK confessors, Murat Demir and Murat İpek. In the first article, entitled "Two confessors from Ahmet Demir's squad: we met Çiller and Ağar", the confessors allegedly stated that they were members of the team of the mysterious "Yeşil" uncovered after the Susurluk incident. It was stated that a large part of the 3000 murders in the South-East region were conducted by JİTEM and the squad of Ersever and "Yeşil".

160. In the second article, Demir was cited as saying that the unattributed killings began with the murder of HEP leader Vedat Aydın.

Yeşil carried out this killing with the involvement of JİTEM and an officer from the Special Operations Force. Cem Ersever gave the order to kidnap him. Yeşil, Alaattin Kanat and Hayrettin Toka were involved in the killing of Mehmet Sincar (DEP) in Batman. After the shooting, they came to the district gendarmerie to change their clothes. The order came directly from Ankara. All the police, soldiers and MİT knew about them. They used to stay in the police guest house in Diyarbakır and special places were prepared when they stayed with soldiers. They got as much money as they needed. They were called contra-guerillas. İpek said he used to work with the police, gendarmerie and MİT while Demir worked with JİTEM. İpek described how Musa Anter was killed, stating that the State of Emergency Governor knew about it. Demir stated that he was in the PKK for five years and when he surrendered he was told that his case would be closed if he worked in the struggle against terrorism. It was claimed that they were in prison but they came in and out as they liked. He served only five months of his 22 month sentence. Demir stated that there were two "Yeşils". One had the rank of colonel in the gendarmerie general headquarters, was from Muş and came to Ankara in 1992. The other was from the youth group of the right wing nationalists. Yeşil used to give Demir orders. He directed the organisation. Another confessor planned the unattributed killings. Özer Çiller and Mehmet Eymür were at the very top. Demir stated that Ersever was killed because he had asked for money, a share from the heroin business and was going to talk. His adopted son from Syria, Mete, killed him; Yeşil was also involved.

161. In the third article, Demir stated that at the beginning there was no Hizbullah organisation. They used the name "Hizbullah" until the end of 1992. Many operations were conducted by using the name "Hizbullah". But after a while, the Hizbullah organisation went out of the control of Yeşil and Adil, and Hizbullah started operations on their own behalf. Later on, they provoked fighting between Hizbullah and the PKK. This was Yeşil's idea. Yeşil did not have a particular region for which he was responsible but he made Elazığ his base. He recounted making a rocket attack on the lodgings office of a public prosecutor in Cizre/Şırnak who had been talking against them. The rocket was obtained from the district gendarmerie. After the killing of Ersever, the Yeşil who had military rank took over his responsibilities and wanted to get rid of the other Yeşil, Ahmet Demir from Bingöl. Yeşil gave the order to kidnap and kill Can and Kaya. Çatlı was said to be involved in this - he came to Elazığ to interrogate two people and then left again. Yazıcıoğulları did not get much involved in the unattributed killings. He was largely interested in the financial aspect of the business and was a friend of Yeşil.

Özgür Politika, 1 February 1997

162. In a cover page article entitled, "The triggerman of one out of a thousand operations is uncovered", there was a report on the confessor Murat Demir who was said to have worked for JİTEM. He said that they gave regular reports to the public security commander in Diyarbakır and that the JİTEM commander prepared lists of those to be killed. A photograph accompanied the article which was alleged to be that of Mahmut Yıldırım, codenamed "Yeşil".

163. In an article on page 11, entitled "The murderer of Işık and Karaağar is JİTEM", the confessor Murat Demir was cited as having said that the dirty war run by the State against the Kurds was supported by

drugs money. He carried an ID card as a lieutenant as well as a JİTEM ID card. He was introduced to Ersever in 1990 and worked for him for many years. He joined in operations with Yeşil in villages, wearing guerilla uniforms. Details were given of alleged involvement of Demir and JİTEM in a number of incidents including the unattributed killings of Işık and Karaağar, both of whom were distributors of Özgür Gündem. The General Secretary of CHP (Republican People's Party) Sinan Yerlikaya said that the photo published earlier by newspapers was the real "Green", whose name was Mahmut Yıldırım, registered in Bingöl, Solhan and that the photograph was probably from a state archive. He gave the opinion that there was one Yeşil, not two. When he was working in Dersim, Yeşil was referred to as Ahmet by the Tunceli police headquarters and the brigade commander. He was using at that time the ID card of Ahmet Demir and thereby hiding behind the Ahmet Demir who was the chief of police headquarters. He pointed out that in order to distort the target the number of Yeşils mentioned were two or three.

"The secrets of Major Cem Ersever", by Soner Yalçın

164. This book, first published in January 1994, contained passages dealing with the killing of Metin Can and Hasan Kaya. It recounted the author's meetings with Major Cem Ersever, and what Ersever said about this incident. This implicated Yeşil, Mehmet Yazıcıoğulları, Orhan Öztürk, İdris Ahmet and Mehmet Mehmetoğlu. See Appendix III (pp. 98-100).

Parliamentary Investigation Commission Report 1993 10/90 Number A.01.1.GEC

165. The applicant has provided extracts from the 1993 report into extra-judicial or unknown perpetrator killings by a Parliamentary Investigation Commission of the Turkish Grand National Assembly.

166. The report referred to statistics of 908 unsolved killings. It described an attitude of officials coming to the region (south-east) as seeing themselves as the final authority. A majority of positions in administration were identified as being filled by inexperienced people, including in the judicial system newly graduated judges and prosecutors. Comment was made that this blocked avenues of redress for citizens. Inexperienced officials had difficulties in using their authority, while certain people sought to prevent the few experienced judges and prosecutors from fulfilling their duties. Reference was made, with quoted statements from the judge concerned, to an incident in which a judge was attacked by members of the police and to other attacks on judicial personnel in the Diyarbakır courts of justice having occurred without any action being taken.

167. Reference was made also to the unsurprising lack of confidence in the authorities on the part of citizens and to a situation of confusion and chaos in which persons armed with guns by the State authorities or left to operate unhindered walked openly in the streets and carried out illegal activities. The report cited information derived from the Deputy Governor and police chief of Batman to the effect that the Hizbullah had a camp in the area, where they received political and military training and assistance from the military units there. It was noted that despite the further request for information by the Parliamentarians, no further enquiry into this allegation was made by the authorities in Batman.

168. The report concluded that on the whole the State was not responsible for unknown perpetrator killings though there was a lack of accountability or control of officials by democratically elected representatives and that some groups with official roles might be implicated. It concluded with 29 recommendations, including, inter alia, the launching of investigations into allegations of official involvement in the killings.

The Susurluk report

169. This report was drawn up by Mr. Kutlu Savaş, vice president of the Committee for Co-ordination and Control, attached to the Prime Minister's Office, at the request of the Turkish Grand National Assembly committee dealing with the Susurluk incident. The report was issued in January 1998. The Prime Minister made the bulk of the report public, though certain pages and annexes were omitted.

170. The report relates to concerns arising out of the so-called Susurluk incident, when in November 1996, there was a crash between a lorry and a Mercedes car at the town of Susurluk, and it was discovered that in the Mercedes car there were Sedat Bucak, member of Parliament and Kurdish clan chief from Urfa, Siverek district; Hüseyin Kocadağ, a senior police officer who was director of the İstanbul police college, founder of the special forces operating in the south-east who had once been the senior police officer in Siverek; and Abdullah Çatlı, an former extreme right wing militant accused of killing seven students, who was at one time arrested by the French authorities for drug smuggling, extradited to and imprisoned in Switzerland from where he escaped and who was allegedly both a secret service agent and a member of an organised crime group.

171. In the preface of the report, it is stated that it is not an investigation report and that the authors had no technical or legal authority in that respect. It is stated that the report was prepared for the purposes of providing the Prime Minister's Office with information and suggestions and that its veracity, accuracy and defects were to be evaluated by the Prime Minister's Office.

172. The report is summarised in Annex II to the present Report. In brief, it analyses a series of events, such as murders carried out under orders, the killings of well-known figures or supporters of Kurds and deliberate acts by a group of "informants" supposedly serving the State and concludes that there was a connection between the fight to eradicate terrorism in the region and the underground relations that had been formed as a result, particularly in the drug trafficking sphere. References are made to unlawful activities having been carried out with the knowledge of the authorities and express mention is made of the blowing up of the Özgür Gündem and the killing of Behçet Cantürk (one of the financiers of that newspaper), Musa Anter and other journalists. The page which followed (page 75) was not made public nor Appendix 9 which set out information about these matters.

173. On 23 April 1998, the Commission requested the Government to provide the pages (4, 68-71, 75, 77-80, 99, 103-104) and annexes of the Susurluk report which had not been made public. By letter dated 5 June 1998, the Government declined to provide copies of the missing pages and annexes of the Susurluk report, stating that the report, which concerned an internal investigation, was still confidential and

the inquiry by the competent authorities into the allegations was in progress. It stated that giving the Commission a copy of the report at this stage might impede the investigations from progressing properly. Following a further request, the Government declined to make the missing extracts available subject to any necessary precautions to avoid prejudicing domestic enquiries.

174. The applicants have referred to the Turkish newspapers, Milliyet, Hürriyet and Ülkede Gündem, published on 22 February 1998, which listed the journalists who were named in the missing page 75 of the Susurluk report. These stated that the journalists named in the Susurluk report were Cengiz Altun, Hafiz Akdemir, Yahya Orhan, İzzet Kezer, Mecit Akgün, Çetin Abubay and Burhan Karadeniz. The Government have not denied the accuracy of these reports.

Ülkede Gündem newspaper article dated 29 January 1998

175. The applicant has submitted an article which reported on the Susurluk report as vindicating the newspapers such as Özgür Gündem, Özgür Ülke, Yeni Politika and Demokrasi, which had reported killings by contra-guerillas, confessors, village guards and special forces. The article alleged that, according to the report, journalists, reporters and distributors of newspapers reporting on these matters were systematically killed. Minister of State Eyüp Aşık is also quoted as confessing publicly that journalists in the Kurdish provinces had been killed by State officials. The article concludes that 29 named writers, reporters and distributors, including Kemal Kılıç, were killed or kidnapped by the State. The Government have denied that the Minister made any such statement.

2) Oral evidence

176. The evidence of eleven witnesses heard by the Commission's Delegates may be summarised as follows:

The applicant

177. The applicant was born in 1958 and was living in Switzerland. Before the disappearance of his brother, he was living in Antalya. He did not see his brother often but spoke to him frequently on the telephone. His brother was a Kurdish intellectual, but not involved to his knowledge with any political party. The applicant had also known Metin Can for 10 years. His brother was in close contact with the Human Rights Association ("HRA") and went there frequently. When asked whether his brother treated persons wounded in clashes, he stated that his brother treated wounded persons giving priority to the medical needs in accordance with the Hippocratic oath.

178. Between 1990 and 1992, his brother worked in Şırnak. His journalist friend Halit Güngen was killed and at his funeral, the Şırnak chief of security threatened his brother, saying that he would end up like that. On a second occasion, when people wounded during the Nevroz celebrations were left outside the hospital, the hospital staff having closed the doors, his brother broke the door down and took the patients into a treatment room. A nurse, the wife of a policeman, tried to stop him whereupon his brother slapped her. She telephoned her husband who came to the hospital, threatened his brother and took him into custody. While in custody, he was told by the Governor of Şırnak

personally to give up these activities. He was released on the order of Selim Sadak, a former member of Parliament and HEP party member. He obtained a medical report to request leave for emotional and financial reasons but was dismissed from his post by the office of the Governor. He was then transferred to Elazığ to work in a public health care centre at Poyraz. In Elazığ, in July 1992, the door of his house was broken down by the police and a search carried out. In November or December 1992, he was again harassed by the police when he was in the hospital donating blood for Şurzan Demirkapı, the son of Rodi Demirkapı who had been killed by contra-guerillas. When the applicant had seen his brother at Christmas, his brother said that he was under constant surveillance, that the police made reports on him and that his life was in danger.

179. The applicant spoke to his brother on 20 February 1993. He again said that he did not feel safe but did not mention any specific threats. On 22 February, towards the evening, he was informed that his brother had disappeared. He left for Elazığ immediately. On 23 February, en route to Elazığ, he telephoned for news when his bus stopped. He talked to his brother, Hüseyin Kaya, who had mentioned receiving one or two telephone calls at the house in which Kurdish music was played, accompanied by sounds of torture (moaning and difficult breathing). They did not tell the applicant's father about this. On the same day, shoes and a handbag were found next to the place where persons were protesting about the missing persons. Metin Can's brother identified one pair of shoes as belonging to Metin Can but Hüseyin Kaya said that the other pair of shoes did not belong to their brother. A police officer who was present said mockingly, "And tomorrow their trousers will arrive."

180. The applicant sought to gather all the information he could. He was granted an interview with the Governor of Elazığ and asked him to make efforts to find the missing persons as soon as possible. The Governor said that it was impossible to carry out a search in such a large region. Rumours were spread that his brother had gone to tend PKK members. This was said to Şerafettin Özcan. While the applicant stayed in Elazığ, a "beggar" turned up near the entrance of the family's apartment building and stayed during 10-15 days, monitoring who was going in and out. He himself was followed while he was in Elazığ.

181. When the car his brother was travelling in was discovered in Yazıkonak, the applicant went there to investigate. Some of the villagers in Yazıkonak had seen his brother on the night when he disappeared. They said that two persons were forced into a car (a white military Landrover) by people who had radios. From other sources, he heard that, when the car stopped to get petrol, the attendant recognised Metin Can and asked where he was going to which Metin answered "I'm going somewhere with the officers." He did not know where the petrol station was.

182. The day before the two bodies were found, the applicant heard that two people had been interrogated and died at Tunceli security headquarters and that the subject was discussed in the presence of a lawyer. He seemed to recall that this information came from a newspaper correspondent for "Cumhuriyet" or "Milliyet" but referred to many speculations, gossip, falsifications and manipulations occurring at that time. He referred to information being passed to the police from

officials amongst the people gathered in the Social Democratic People's Party (SHP) building, from which information was being relayed to Ankara and other places.

183. The news of the finding of the body reached him in Elazığ at about 10.00 hours on 27 February 1993. It was a rumour, the source of which was Ali Demir, a lawyer in the Tunceli HRA. The President of the HRA in Tunceli passed on the news to the Elazığ HRA and the SHP party building. Children fishing in the creek found the bodies and told the police. There was a police station about two to three kilometres away. As soon as they heard that two unidentified bodies had been found, they went to the scene. They were not invited or informed by the authorities. When he came to Tunceli to the location of the bodies, they passed through 8-10 military checkpoints. Vehicles were usually stopped at these checkpoints. First, the identity cards were checked, and then the boot and interior of the vehicles were searched. He referred to the alleged existence of vehicles with special number plates, used by contra-guerillas or narcotics dealers, which were never searched. This was uncovered by the Susurluk incident which also revealed the use of special identity cards, the holders of which could not be searched, checked or interrogated.

184. He arrived at the scene at about 14-15.00 hours. The bodies were on the ground, face down, hands bound behind them with copper wire. The left side of his brother's face was on the ground. He saw a red cord mark round Metin Can's neck as if he had been strangled. His brother was wearing only a shirt and trousers, socks and shoes while Metin Can was wearing a sweater, trousers and socks. The socks of both were dry. He did not notice much blood. The ground was frozen with patches of ice. When they arrived, the police and gendarmes were preventing the public from approaching the bodies. After the applicant identified the body, he was pulled away. The Tunceli public prosecutor arrived later. On the way from the scene to Tunceli State hospital, the applicant's car was stopped and checked once or twice and searched.

185. The applicant was present at the autopsies. The first took place at Tunceli State hospital. His brother was unrecognisable and looked so awful that he left several times. He noticed signs of minor blows and injuries on various parts of his body. There were purple, circular bruises on his fingertips and bluish marks between the nails and the skin. There were marks on the extremities of his toes. There were also small scratches on his knees, small bruises on his arms, marks on his forehead and marks cut into his wrists. His feet were swollen and all white, as if he had been a long time in the cold or in cold water. They requested a second autopsy from the Elazığ public prosecutor as they thought the hospital was inadequate and the staff hasty and untrained. At the second autopsy, the marks were still there. The public prosecutor said that the two men had been tortured. He did not think that the second autopsy was adequate either since there was only an external examination and no blood, urine, or muscle fibre analysis done or X-rays carried out to establish if there was any internal bleeding.

186. The family wanted to have the funeral later but the Governor's office ordered it to take place on 28 February. 6000 people attended. He was at the head of the procession and the special team police tried to provoke him. The regular police were present to direct traffic and for crowd control while the special teams policemen were hostile and

looked ready to attack. There were "panzers" in the sidestreets. When they returned to the house, a plain clothes police officer came to present his condolences, saying that an injustice had been done. He talked to the police officer in the kitchen, asking what had happened. The police officer said that this was a typical crime committed by the State, describing operations where intelligence was gathered, traps set, and persons abducted. The police officer said that the perpetrators were protected by the police and that once a month certain police and military authorities were informed of the place, manner and perpetrators of killings. The police officer asked that his name be kept secret.

187. He recalled hearing about the incident in Pertek involving Yusuf Geyik from villagers from Pertek who came into town frequently and talked to people who passed on the news to the applicant. According to information which he received from close friends, Mahmut Yıldırım, codename Yeşil, had been living in Elazığ and been involved in a neo-fascist movement. He was well-known in Elazığ and was real. Later, he had been employed by the police in crimes, intelligence matters and as a hitman. Because of his experience, JİTEM appointed him to command the contra-guerilla forces trained in that region. His address at Elazığ was known and the fact that he was working in the sales office of the mine in town (described as the Ferrokrom factory elsewhere), though the police said he worked at the mine 70-80 km away. He used different names, Yeşil, Sakallı and more recently was called Abdurrahman Buğday. He and his family were protected by the authorities. When Aydınlık published his telephone number, the applicant rang it but the woman who answered it refused to say who she was and hung up. In the 1990's, the name "Yeşil" began to be used however by a number of people, which succeeded in confusing the identity and the issues and was part of a policy of obscurity.

188. The police paid lipservice to making enquiries about the information passed onto them. Though they were given two addresses, No. 13 Pancarlı Street, and Mezarlık Mevkii Grup Everli, the police changed the first from Pancarlı to Pınarlı and said that it did not exist. Another enquiry however indicated that he had left his neighbourhood 10-15 days earlier.

189. About 20 newspapers and magazines of various leanings wrote about the incident. All shared the view that the crime had been committed by the State or did not deny that it had been committed by the State. They read in the newspapers and other published newspapers that it was Mehmet Mehmetoğlu and İdris Ahmet who summoned his brother and Metin Can to treat someone and that the third person, Erhan Öztürk, was the actual hitman. Their leader was Mahmut Yıldırım, who was responsible for the implementation of the operation. The person who planned it was Alaattin Kanat, who was responsible to the office of the State of Emergency Governor. This was part of the systematic killings which occurred from 1993 onwards. He had been shown a document by a friend in Ankara, a decision of the National Security Council dated December 1992 or January 1993, which stated that individuals, families, tribes, villages, neighbourhoods and towns who sympathised or adhered to the Kurdish movement had to be made to turn away from it and be eliminated. The centre directing the operations was within the military.

Şerafettin Özcan

190. The witness was born in 1953 and was resident in Germany. In February 1993, he lived in Elazığ, where he was secretary of the HRA and worked as a journalist for "Cumhuriyet". Metin Can was his colleague in the HRA and Hasan Kaya was a close friend. They were all subject to threats before the incident. Also Metin Can complained that he was being constantly followed by plain clothes policemen and on one occasion claimed that people had been inside his house. He himself was taken into custody in 1992 about the time the HRA was founded. He was told by the police to leave the area or he would be found dead one night. The HRA was frequently searched and the identities of people there checked. Before the HRA was founded, they had taken the Elazığ prison administration to court, alleging torture by 72-74 prison officers. Metin was threatened by the prison officers and said that they wanted to have him killed. There were many attacks and threats made against the HRA in the south-east. The officers in Cizre and Hakkari were forced to close down.

191. On 21 February 1993, in the morning, (later he stated the time as being noon) he met Metin Can in the street in front of the coffee house. Metin Can told him that two people had telephoned him the evening before, wanting to meet and saying that they needed help. He had refused due to the lateness of the hour. They had called him in the morning and he had told the men to meet him at the coffee house. They had said that they were unable to meet him at the HRA. He asked Şerafettin Özcan to stay with him. A third man joined them at the coffee house, one of Metin's clients. The two men came to the coffee house, one tall with dark, curly hair, the other a few centimetres shorter with blond hair. He had had sketches drawn up of their faces. in Germany in about May 1993. He had never seen either before. Neither had Metin. Metin went to his house with one of the men, while the others remained in the coffee house. The one who stayed with Şerafettin Özcan spoke in Kurdish, saying in bad Turkish that he knew little Turkish and that he was Syrian. He was called Vedat. At around noon, when Metin called him by telephone from his house, Şerafettin went to Metin's house leaving the Syrian in the coffee house. Metin, his wife Fatma and the darkhaired man were there. Metin went to fetch the Syrian from the coffee house. The darkhaired man said that he was a Turkish Kurd.

192. The two men had told Metin that there was wounded person that they wanted him to see. He was hidden out of town. When they were told that medical treatment could not be given at such a place, they said that they could find people in Yazıkonak village who could help them and that the wounded person would be taken to a house there. It was arranged that, after the wounded person was taken to the house, they would call Metin by phone and they would come to meet the men at the entrance of the village. Metin called Hasan Kaya by phone and he came to the house. The two men left after that. At about seven, the two men rang to say that they were ready. Metin asked Şerafettin Özcan to look after Fatma and his child, saying that it would not take long and that they would be back early. Metin Can and Hasan Kaya looked calm as they left. Hasan Kaya carried medical equipment.

193. Şerafettin Özcan had guessed that they were heading for trouble. He did not know if Metin had similar suspicions.

194. Şerafettin Özcan stayed the night at Metin Can's house. In the morning, at his office, he checked whether any accidents or incidents had occurred. He frequently called Can's home and office to see if he had returned. Around noon, Metin's brother Hakan arrived, distraught, saying that Fatma had been crying on the phone. He went to the Can house. Fatma said that one of the men from the day before had called, saying, "We killed both of them." She recognised his voice and he gave his name as Vedat. Şerafettin, Şenol (from the HRA) and Fatma went to the public prosecutor to say that her husband and Hasan Kaya had disappeared. The prosecutor seemed slow to grasp the situation. He took Fatma's statement and told her to take it to the Security Directorate. She went there with Şenol. Şerafettin went to his office to notify the press and the HRA.

195. During that day, at a time unspecified, Şerafettin Özcan went to the SHP party building where there were 200 people, some of whom started a hunger strike in protest at the incident. Fatma received another call at home at about 13.30 hours from some-one calling himself Dr Savur Baran. The caller wanted to make it appear that Metin Can and Hasan Kaya were in the hands of the PKK. Şerafettin called the director of the Anti-terror department and requested that incoming calls be traced. He was told that Fatma Can should go to the prosecutor to make the request and that the Kaya family had already made a request.

196. Later, between 16.00 and 18.00 hours, the police came to his office and asked him to come with them to make a statement. Before he went with them, he made sure his people knew where he was going. When he was at the Security Directorate, the questions put to him implied that Can and Kaya were to be considered as being in the hands of the PKK. He did not tell the police all the details he had recounted above, since he was afraid. In particular, he did not want the police to know that he had seen the two men who had contacted Can. One police officer, the assistant to the director, threatened him with torture and said that Can and Kaya had gone to help the PKK. Another suggested that the doctor had gone to treat patients in Şırnak. The police asked him several times where and with whom Can and Kaya had gone and when he said that he did not know, they said that they were sure he knew. He replied that it was for Can and Kaya to answer such questions. He thought from the questions that the police were well aware of the meetings of the previous day. While he was there, news came that the car driven by Can and Kaya had been found at Yazıkonak. Şerafettin insisted on going with the police to see for himself. There were cigarette butts on the ground near the car, from which he deduced that Can and Kaya had waited for a while. The boot was locked but the doors were open. In his view, the police did not examine the car thoroughly. They made a joke when opening the boot about whether a bomb might be inside. They did not take enough fingerprints. The villagers had gathered. They told him that they had heard an argument. He did not hear directly that they had seen two men forced into a vehicle by two men with walkie-talkies. He later identified a photograph in a newspaper of Ayhan/Orhan Öztürk as resembling the brownhaired man but he could not be sure.

197. On or about the evening of 23 February 1993, he went to Ankara with Fatma Can and others. He did not return to Elazığ as he felt his life was in danger. He referred to a press release issued by the Elazığ security director on 27 February 1993 on the day the bodies were found which stated that Metin Can's wife was hiding something and

stating that the PKK was frustrated because it could not take over Elazığ and was punishing people who were not successful. His own view was that the Elazığ security director, the director of the Anti-terror department, the governor and the Minister of the Interior knew about the incident. The reason that Can and Kaya were held so long before they were killed was to allow them to prepare an ambience in which they could hold someone else responsible. It served a number of purposes to blame the PKK for killing their own people and showing how ruthless they were and also by the way in which Can and Kaya were held for a long time, their shoes found, sounds of torture being played over the telephone, it pursued the aim of terrorising their opponents.

198. There were no less than four checkpoints between Elazığ and Tunceli. He recalled that on a bus journey to Ovacık the passengers had to show their identity cards. He also saw that they noted down the numbers of all the cars going in and out of Tunceli on one occasion. It would have been possible to pass the checkpoints if one had a state employee's card or a police identity card, otherwise one would have been searched.

199. He knew Bira Zordağ. Zordağ had been in custody and interrogated. On leaving prison, he had visited them and said that they had asked questions about Metin Can and Şerafettin Özcan. He had warned Metin Can that he had received the impression that his life was in danger.

200. In reply to the Government Agent, Şerafettin Özcan confirmed that he had been convicted of membership of the Dev-Yol organisation. Originally sentenced to death by hanging, his sentence was commuted to a sentence of imprisonment. He was released after eight years.

Bira Zordağ

201. The witness was born in 1960 and lived in Switzerland with refugee status. He lived for about eight years in Elazığ until October 1992 and then worked in Adana. He had lived also for a year in Tunceli. He had only met Hasan Kaya once. He knew Metin Can well, as he had been a member of the Tunceli HRA.

202. On 15 December 1992, the witness was taken from his work in Adana to the Adana-Kozan Security Headquarters, where he was kept two days. He was not asked any questions. On the third day, he was transferred to Elazığ Security Headquarters. Three to five kilometres from the place known in Elazığ as "1 800 Evler", the torture place, he was blindfolded and told to put his head down on the seat. At the torture place, he was put in a cell. After a few hours, still blindfolded, he was taken to a room, where several people questioned him. They told him that they knew of his ties to the PKK (four of his nephews had joined). They questioned him about doctors in Elazığ, wanting to know about Hasan Kaya and Dr Bektaş Yıldız in particular, saying that they treated wounded guerillas and supported the PKK. They said that Kaya had treated a wounded guerilla called Şahin brought from Hozat and that he would be punished. Zordağ said that he had no information. He was also asked about jurists and lawyers, in particular about Metin Can who they said was in contact with the PKK. He had said that he did not know anything about his political activities.

203. Shortly afterwards, he was taken to another room, stripped and hung from the ceiling for about an hour and a half. He was hit in the

face. He was hosed down and taken to his cell, still naked. This went on for twelve days. He was always tortured at night. He was told at one point that the contras were there and if he did not talk he would be handed over to them to be killed. The name of Yeşil was mentioned on several occasions as a threat of this kind. They also told him that they would inform PKK sympathisers that he had confessed and that the PKK would kill him but that if he made a statement containing the information they wanted the State would protect him. On the twelfth day, he was taken to court. But when he refused to sign the prepared documents, he was taken back to the torture room and suspended again. They took his hand, put it on the paper and told him to sign. When he was taken to court again, there were sixteen detainees present and they were passed in front of a civilian sitting in the hall, who was supposed to be a doctor signing reports that they had not been tortured. When it was his turn, he placed his hands, on which the fingers were all black, on the table but a police officer from the special action team removed them. The doctor wrote that they had not been tortured. They were taken before the judge or prosecutor one at a time. On their way to the court, the special teams had threatened to torture and kill them if they denied what was in their statements. The police entered the room with them also. He told the judge and prosecutor that he had not made a statement and that the statement prepared by the police was a fabrication. The judge told him that he fitted the profile of a terrorist and he was arrested. On 3 February 1993, he was released. He was acquitted in November 1993.

204. On the day after his transfer to Elazığ prison, lawyers, including Metin Can, came to the prison to obtain powers of attorney. He told Metin Can that the police had said that they would kill him. After his release, sometime between 5 and 10 February 1993, he met Can in Elazığ and told him in detail about what he was asked under torture.

205. Later, after the bodies of Can and Kaya were discovered, he was threatened on three-four occasions by police officers in Mersin, who told him that he would suffer the same fate if he did not give information. He also received phone calls at night at home in which sounds of weapons and shouting were heard and threats were made.

Fatma Can

206. The witness was born in 1965. Before coming to live in Elazığ with her husband Metin Can, they had lived for several years in Kars (1990-1991). Her husband was one of the founders of the People's Labour Party there. Since he had come under tremendous pressure from the police, they had moved to Elazığ. While they were in Kars, the police searched their house and her husband used to receive threatening phone calls. At Elazığ, nothing happened for a while. Her husband founded the Human Rights Association and became the President. Then the threats began again. There were even more threats after her husband uncovered the torture occurring at Elazığ prison and the guards were disciplined.

207. A few months before her husband's death, a state official told him that a letter had arrived from the Ministry with a confidential file and that a conspiracy was being planned against him and warned him to be careful. Her husband was followed by plain clothes policemen. Her husband was not a member of an illegal organisation. He did take cases of PKK people. He had told her that the police asked detainees about him. She knew Hasan Kaya who had been a friend of her husband's since

their school days. Their families were friends. Hasan Kaya was attending English classes with her and her husband, and used to visit them often. About six months before the incident, Hasan Kaya told them that he was under great pressure at Şırnak and that he was being threatened. He told them there had been incidents during the Nevroz festival. In particular, the hospital doors had been closed on the injured people and he had taken them in for treatment. He had slapped the wife or girlfriend of a MİT official who would not open the door of the operating theatre. She had not heard that he was threatened in Elazığ. Afterwards she heard that he had gone to help PKK supporters, or guerillas. When she first went to the Security Directorate, she saw they had a file on him.

208. On the evening of 20 February 1993, after they came home, there was a phone call. The callers said that they had come to the house earlier and wanted to come to the house immediately. Her husband refused to allow them to come at such a late hour and said they should come to his office the next morning. They were rather nervous after this call, not knowing what it was about. The next day, 21 February 1993, was a Sunday. Her husband went out. He came back about midday. She was talking to her brother on the telephone and her call was cut off. Immediately, the phone rang. Her husband answered it and when he said, "I was waiting for you. Why didn't you come?" she realised it was the people who had called before. Her husband had waited in his office and they had not come. They would not give their names on the phone and arranged to meet her husband in a coffee house. They said that they were in trouble and needed help. She was terribly worried. She went to the coffee house, carrying their 18 month old baby. Her husband saw her and was angry, telling her to go home. When she asked what was happening, he said that the men had not yet arrived but his friends in the coffee house warned him that it could be a conspiracy against him by the police. She walked around, for 15 minutes to half an hour. Her husband came out again, told her that the men had come, that he knew them and that she should go home. On the way home, her husband passed her in his car and there was another person in the car. They arrived at the house after her. The man with her husband was dark. They went into a bedroom and closed the door. Her husband came out and said, "Someone's been injured. I have to help him." At his request, she telephoned Hasan Kaya to come. They also called Şerafettin Özcan to come. Her husband wanted to ask Şerafettin to verify whether they had been sent by someone in Diyarbakır as they claimed. When Şerafettin arrived, the situation was explained and as their phones were tapped, he went out to the Post Office to phone Diyarbakır. However he was unable to speak to the person concerned who was not available. Hasan Kaya arrived in his brother's car. She was not sure who arrived first. Either Özcan or her husband went to get the second man from the coffee house. When he arrived, he went straight into the bedroom. Hasan and Şerafettin went in and out of the room. They talked a long time. When the baby woke up, she had to go in. She thought from their reaction to the child that the two men were bad people. She was worried and wanted to warn her husband. She called Hasan Kaya out of the room and told him what she thought and that they should not believe what the two men said. He was angry with her.

209. Neither her husband nor Hasan Kaya had seen the two men before. The dark one looked very worried. His eyes were bright red and when she asked he said that he had not slept for a week. The fairhaired one had hazel eyes and red cheeks. He said that he had been in the PKK for

eight years and that he was Syrian. He was not at all hesitant. Both were cleanshaven and very tidy. She heard them discuss how the injured person could be helped. They said that there had been a clash three days ago, one person had been killed and one injured and that they had lost contact. They said that they had phoned Diyarbakır and had been told that the President of the Human Rights Association, Metin Can, would help them. They said that they did not know the area. They wanted her husband to go to the place where the injured person was. She tried to dissuade them from going. She mentioned the name of a surgeon, saying that after three days the wounded person would need treatment by a surgeon in hospital conditions. That surgeon was later threatened. From the description given, her husband worked out that the injured person was in the Yazıkonak area. It was arranged that the two men would leave first and that after collecting the necessary medical equipment, her husband and Hasan Kaya would go. The men asked for directions to a taxi rank when they left. She left the house to go to a grocer's store and followed them. From her observation, they knew Elazığ very well but when she told her husband this, he was furious, stating that there was an injured person to consider and that she should not do such things without telling him. Hasan Kaya and her husband went out to get antibiotics, local antiseptics, material for sewing wounds etc. As soon as they returned in the evening, the phone rang. Her husband said, "We're on our way." He told her that they would be back in a couple of hours. He told Şerafettin to stay and help her with the baby. He apologised to her for bringing the men to the house.

210. Her husband did not come back that night. She was worried and thought there might have been clashes. A man telephoned the house the next day at about noon. He did not speak fluently and, though she could not be definite, she thought that he was one of the men from the day before. He said "This is Vedat" and that "We've punished Metin and his friend." She guessed from that that he was a policeman but he denied it. She was one hundred per cent sure that her husband was in the hands of the police. She was angry with the State but wanted to protect her husband. Later, when she knew her husband was dead, she gave up hope. That was why she did not tell the police all the details of what they knew already. Later, when she talked to the police, the public prosecutor and the Prime Minister, they all asked her to tell what she knew, insisting that she was not telling them everything, and she knew that they must already know. She thought that if she spoke it would be easier for them to blame the PKK and they would kill her husband at once. She thought that they would accuse her too. She did not lie in her statements but there were things which were missing. She did not want to talk to the public prosecutor or police at all but did so when her friends insisted and when she was summoned.

211. There were two further phone calls to the house, one from a man who said that he was Dr Baran. She was not there at that time. The day after the phone call, probably on the Tuesday evening, she went with Şerafettin Özcan and four others by bus to Ankara, arriving on the Wednesday, 23 February. They spoke to İsmet Sezgin, Minister of the Interior but did not get an appointment with the Prime Minister. Many groups made tremendous efforts, appealing for her husband to be released. Sezgin told her that her husband was alive, that he had talked to the anti-terror squads and that he would return home, but also kept asking her to tell what she knew. While she was in Ankara, her husband's shoes were found near the SHP headquarters. Her husband's brother had identified them.

212. After three days, she returned to Elazığ. That morning she read in Cumhuriyet that the police had made a statement about internal fighting in the PKK. When she heard this, she guessed that they had already killed her husband or were about to. When she reached Elazığ, she was told that two bodies had been found and that she should go to Tunceli to identify them. They drove there immediately, with Dr Mahmut Kaya and his sister. They drove through eight checkpoints on the way. When she saw the body of her husband under the bridge, wearing the pullover which she had knitted, she fainted. The police were laughing at the scene.

213. She went to see his body in the morgue the next day. She could not bear to look at his entire body but she saw that he had been tortured and this upset her more than his death. There were marks of cigarette burns, his eyes were pierced, his lip burst and his neck marked with an open cut.

214. When shown the sketches of the two men, she stated that she had seen them before in the newspaper. She did not remember the dark one very well but the second sketch looked very like the fairhaired Syrian.

215. After her husband's death, many of her medical colleagues received threatening calls. One of them received a call from "Vedat" who told her colleague to leave Elazığ or he would come to a bad end. Many of her husband's colleagues left Elazığ. She was followed by the police in Elazığ. Once they called her to come to the police station, stating that there were two persons to identify but she did not go until her husband's brother said that they should go together. They went to a place known as "1,800 Evler" but the two persons were not the men involved in the killing. When she complained to the public prosecutor about the police around her, he said that it was for her own protection. She was summoned often to the Security Headquarters through the public prosecutor's office, through lawyers but she did not go.

216. As regarded any discrepancies between what she said and Şerafettin Özcan's account, she pointed out that Şerafettin was with the two men longer and probably knew more than she did. She was not long in the room with the men. Even though the two men had said that they came from the mountains, she instinctively knew that they were working for the State. For example, they said they had been in clashes three days ago but were cleanshaven. She did not believe that the PKK were powerful enough to kidnap two men in the middle of the city, torture them, take them through eight checkpoints and execute them. When asked what she knew about the Hizbullah, she recalled that Hasan Kaya had asked the two men what they knew about the Hizbullah and the contra-guerillas. The men had replied that the contra-guerillas were an organisation within the State but Hizbullah were an separate organisation, which the State supported and turned a blind eye towards.

Süleyman Tutal

217. The witness was born in 1953. He has been a public prosecutor in Elazığ since December 1992. His career began in 1982. When he arrived in Elazığ, there were nine prosecutors.

218. The witness had met Metin Can once or twice. He had not met Hasan Kaya. He was not aware of any information or complaints that they had been involved in terrorist activities. He was not aware of any other

previous incidents in which doctors or human rights lawyers were kidnapped or killed. He had not heard anything about contra-guerillas, civilians or confessors hired to eliminate persons regarded as enemies of the State. He then stated that he had read about them in the press but did not know if it was true.

219. The first he knew about the disappearance was about noon the day after it happened when the lawyer's wife came to report that he was kidnapped. He sent her to the police so that an investigation could begin. At the beginning, he did not suspect an abduction. From what Fatma Can said about the phone call to which Metin Can said "We are coming", he thought Metin Can knew the caller and had gone with them willingly. There was no indication of a fight or abduction, even when the car was found a day later. He recalled that Fatma Can came to see him several times and on one occasion told him of receiving a telephone call where the caller told her that her husband had been killed.

220. When the car was found, he went to the scene. Police officers were there. They examined for fingerprints. Nobody had seen the car arrive or who had been in the car. People had seen it parked as they passed in the morning. He was informed that shoes had been found which were recognised by relatives. When the bodies were found, he did not go to the scene since they were in Tunceli, 130-140 km away. There was only one road between Elazığ and Tunceli. There were roadblocks on the road. He did not know how many. He did not know if all the cars would have been stopped at the roadblocks but did not think that all would be. The normal procedure was for an identity control to be carried out and for the contents of the car to be checked. It would have been very difficult for terrorists to move bodies from Elazığ to Tunceli without being stopped. It would have been possible, if they did not arouse any suspicion, for them to have been taken alive through the roadblocks. But he agreed that if they had been in the car against their will it would have been possible for them to inform the security forces at the checkpoint of their situation. Fatma Can had only come to the authorities because of the phone call. They thought that she knew where her husband was but was not telling them. Fatma Can and Şerafettin Özcan gave them no information about who the men were or whether Metin Can and Hasan Kaya had met them earlier. Fatma Can simply said that her husband had been kidnapped by the security forces, by the police, and asked them to find him. The public prosecutors have a complete list of the persons in custody so this was not possible.

221. A second autopsy was carried out as the relatives said that the men had been tortured. Later, in answer to questions by the Government Agent however, he stated that there was a second autopsy due to the condition of the bodies and that the relatives were not insisting that they had been tortured. There were however no marks of torture apart from a trauma mark on the forehead of Metin Can. When referred to the autopsy report, he agreed that there were bruises also on the nail bases of Hasan Kaya's hands, marks on the wrists, bruises on the knee etc but described these as minor. He thought that it was not possible to tell whether the blow to Can's head occurred when he was alive, or by being thrown over the bridge when he had died. He did not tell anyone that they had been tortured. Everyone reached the conclusion that they had not been tortured.

222. A month later, he relinquished jurisdiction since the bodies had been found in Tunceli. The file was sent to Tunceli. Afterwards, they

would have complied with requests for information from Tunceli and passed on any information which they had received. He remembered that Ahmet Can made many petitions and came to see him often. He sent the petitions on. It was not for him to investigate the allegations that he made about incidents in Hozat, Tunceli or Pertek. He failed to give a reply to the question whether it was his responsibility to investigate the information that the two men had been seen in a petrol station in Yazıkonak. He later stated that these things about Yazıkonak were only allegations but that they must have investigated them. However there was no-one to ask about the allegations since there were no names in the petition. If the gendarmerie and Security Directorate had been informed, they would have done what was necessary. If he had been told that the two men had been detained in Elazığ, he would have asked to see the custody record.

223. When asked if he had at any stage in the investigation suspected that contra-guerillas were involved, he said that they did not know who had done it since they had no information but that he thought that there were no such thing as contra-guerillas. He had not heard of contra-guerillas in connection with Elazığ or that the Elazığ Security Directorate was dealing with such things. He had not heard of Mahmut Yıldırım or Yeşil. He was not aware of allegations in the press that Yeşil or Ahmet Demir was involved in the killings. He did not remember receiving petitions including Yıldırım's home address. Perhaps his colleagues received them. He did not recall what steps were taken to locate him. He was not aware of a newspaper interview in which Orhan Öztürk said the two men had been taken to Elazığ Security Directorate before being taken to Tunceli.

. **Hayati Eraslan**

224. The witness was born in 1961. He was a public prosecutor in Tunceli from 1990 to July 1993. There were three prosecutors at Tunceli at that time. He knew neither Metin Can nor Hasan Kaya. He did not know if they were suspected of terrorist involvement. He first learned about their disappearance when their bodies were found. He went to the scene himself. The two bodies were near the creek at the Dinar bridge ten kilometres from Tunceli on the Elazığ side. He thought they had possibly been thrown off the bridge as their faces were crushed. There was also not much blood. The bodies had been there 7-8 hours. He could not tell whether they had been killed at the scene or dumped there but he thought the latter. Even though there were cartridges at the scene, these could have been thrown there. They did not find the bullets which killed the men at the scene.

225. There were permanent checkpoints on the Tunceli-Elazığ road at which all the vehicles were stopped and the occupants had to produce their identity cards. The cars were not always searched. This was the only road. There was a path in the hills which the PKK could use on foot. He did not think it was feasible that if the two men had been killed near Elazığ their bodies could have been brought to Tunceli without discovery at a roadblock. It might have been possible for them to go through the checkpoints alive since they might have escaped drawing attention. The police could have taken them through the roadblocks without problem. If there had been nothing to alert the security forces in their identity cards, no weapons or anything suspicious, they could have gone through easily. The PKK used to kidnap and kill people. Sometimes they set up roadblocks to ambush people.

226. He carried out the investigation in Tunceli since the bodies were discovered there. Later, this investigation was joined to that from Elazığ and sent to the State Security Court, which moved from Erzincan to Kayseri due to the earthquake. There was nothing else to do when they sent the file to Kayseri. On receiving the petition alleging involvement of the Tunceli police, they asked the Security Directorate on the phone if there had been any detention. They said no. He recalled asking for the custody records but did not know if they received them. Tunceli was a small town and he was close to the Security Directorate. He would have known if they had been detained. There would have been a written request for the custody records but no note of the enquiries with the Security Directorate. There were also rumours at the time that the two men had betrayed the PKK who had kidnapped and killed them.

227. He did not remember hearing about the allegations concerning the incident in Pertek. The information might have been sent directly from Pertek to the State Security Court. Only if there had been clear evidence that security forces had been involved would he have sent the file to the Administrative Council rather than the State Security Court. Since the case involved elements of terrorism, he sent the file to the State Security Court. This conclusion was based on the evidence and on the fact that the perpetrator was unknown, the persons being abducted and dumped in Tunceli. He had no involvement in the case after it went to the State Security Court.

228. He did not see any sign of torture on their bodies. He attributed the depressions on their faces and cheeks to their having been thrown off the bridge. When they carried out the first autopsy, a big crowd had gathered to find out what had happened but they were under no pressure. However, one of the doctors refused to assist in the autopsy apparently as some people in the crowd had pressured him to state in his report that they had been tortured. The witness told the doctor that he would be charged with omission of duty if he did not. This doctor was called İsmet. He did not remember his surname.

229. He had heard rumours in the press of contra-guerillas but there was no such activity in his area. He had heard in the press of Mahmut Yıldırım, also known as Ahmet Demir, Yeşil and Sakallı, who was said to be involved in incidents around Elazığ and Tunceli. He had not himself received any complaints about this or heard that he carried out incidents on behalf of the State. He did not recall any visit to Tunceli in 1991 of a delegation of the Turkish Grand National Assembly to investigate claims that Yeşil had been torturing people. He did not hear anything about Yeşil being involved in killing Can and Kaya nor whether any steps were taken by his office after he left to investigate this. During his time in Tunceli, he did not receive any complaints about the police or security forces.

230. They forwarded the petition about Geyik to Pertek asking them to verify the allegations. Pertek replied that they were not true. There was no concrete evidence warranting a broader investigation. The allegations against the security forces were all groundless. When referred to the statements taken from witnesses which appeared to support some of the allegations, he stated that he had not seen them. The statements might have gone directly to the State Security Court.

Judge Major Ahmet Bulut

231. The witness was born in 1954. He had been a public prosecutor at the Malatya State Security Court since 13 July 1992. On 25 May 1994, the case-file concerning the killing of Can and Kaya was transferred to Malatya from the Erzincan State Security Court. He had previously heard on the television and from the press about the case. He had been responsible for the case since its transfer. The case was sent to the State Security Court as the killings were politically motivated and occurred in the state of emergency region. It was not possible to say from the file whether it was a killing by the PKK or other people or organisations. It was the reason for the crime which determined the jurisdiction. A common crime by a PKK terrorist was prosecuted in the ordinary courts while a politically motivated crime by a state employee would be prosecuted in the State Security Court.

232. Three persons accused of the crime were found and their statements taken by the local public prosecutors. These were Mehmet Yazıcıoğulları, Mesut Mehmetoğulları and Ayhan Öztürk. They denied the accusations. When asked about Ayhan Öztürk, he checked his file in front of him and unable to find the statement, stated that perhaps his memory of taking the statement was wrong.

233. The witness was aware that allegations had been made of involvement of State officials but there was no evidence supporting them. He did not take steps to enquire from the Tunceli Security Directorate as to whether they had detained the two men nor ask the Tunceli prosecutors if they had made enquiries. However, it was not necessary to do so. He stated that the letter from the Pertek police of 4 May 1993 was phrased ambiguously so that it was not clear whether Geyik had stayed in the gendarmerie or not. In context with the letter from the gendarmerie, it could be interpreted that Geyik did not stay there. However to eliminate doubt, the writer of the letter should be asked. The person receiving the two replies must have judged that no further enquiries were necessary. He agreed that it would be appropriate to make further enquiries to eliminate the slightest doubt. He did not remember if enquiries were made to discover if gendarmes called Mehmet, Ali and NCO Hüseyin worked at Pertek.

234. The witness recalled the allegations of involvement of Mahmut Yıldırım. He did not recall that his attention was drawn to the contradictory replies given by the police on 25 February 1994 and 7 April 1995 concerning their enquiries at Yıldırım's reported address. He explained the delay of ten months in seeking information on the increased workload of the State Security Court. He in fact received the file on 22 June 1994 and on 22 July 1994 requested the authorities to make enquiries with a view to identifying the perpetrators. He had about 500 files to deal with. Based on the news which appeared on 30 December 1996 in the Milliyet newspaper, they changed their tactic in the search for the person named Yeşil. They wrote to the Tunceli provincial regiment command to ask if Yeşil worked for them. The reply was negative. They enquired from the general gendarme headquarters (Ankara) about Yeşil, his identity and address. An answer was received from Tunceli on 30 January 1997. They sent another letter to the provincial regiment command the same day. Another pending line of enquiry derived from information from Mevlut Kaya, a lawyer and brother of Hasan Kaya, who had told him that a suspect Kahraman Bilgiç had been apprehended in Yüksekova, and his confessions contained information

about the killing of Hasan Kaya. He had instructed the Diyarbakır State Security Court to send the statements of this suspect. However there was nothing to support Mevlut Kaya's allegations. He sent written instructions for Bilgiç's statement to be taken on this.

235. The investigation had only lasted 4 years and could continue for another 16. The passage of time however adversely affected the prospects of success. He had no experience of a perpetrator being caught a long time after the crime. He had frequently heard the security forces accused of crimes. He did not know personally of any prosecution being brought against a member of the security forces for activities in Tunceli at the State Security Court

Hüseyin Soner Yalçın

236. The witness was born in 1966. He was currently editor of a private television channel in Ankara. In 1993-1994, he was employed at the Aydınlık daily newspaper office in Ankara. The office used to receive a lot of information about unknown perpetrator killings in south-east Anatolia. The name of Major Ahmet Cem Ersever always cropped up in that connection. Ersever was the head of the Diyarbakır unit of the gendarmerie anti-terrorism branch known as JITEM. He was becoming an almost legendary figure in the region, where he had been for 13 years. He had been promoted rapidly and was virtually like a colonel or general. The witness had first heard of Ersever when working for the "2000 Doğru" magazine as news editor in Ankara. Reports of events and murders in the region landed on his desk. Contra-guerillas or "gladios" were reported as involved. Ersever's name was always mentioned particularly after 1990-1991. These reports, from close relatives or friends of the murdered persons, were biased of course and there was no way for him to check the information.

237. The witness explained contra-guerillas as follows. In 1953, Turkey, as a member of NATO, set up the Allied Mobile Force, paid for by the Americans, which had the mission of organising contra-guerilla action against the enemy in the event of occupation. It was later re-named the Special Military Department. In his view, this Department viewed socialist and left wing movements as occupying forces and carried out numerous actions against them. It was possible that it also carried out actions against the PKK and its supporters on the same basis.

238. The Aydınlık newspaper wanted to get in touch with Ersever but the opportunity never arose. Later, by accident, the witness met Major Ersever in retirement. In 1993, he met Ersever five or six times in secret. They came to an agreement that Ersever would give information but that he would not publish it. The information concerned murders by unknown perpetrators and at one meeting he gave information about Hasan Kaya and Metin Can. Ersever explained that they had divided the region into three areas. In the Diyarbakır area, which included Elazığ and Tunceli, assassinations were carried out by a person known as Ahmet Demir with the assumed name of Yeşil. Ersever did not think that Ahmet Demir was his real name though. He was the ring leader in that area. People were also killed by a gang of confessors formed under the leadership of Mehmet Yazıcıoğulları, who was a True Path Party candidate in the 1991 general elections. Confessors were persons who had been members of the PKK but had either left or been caught and felt remorse. They were then used against the PKK.

239. Ersever said that they could only fight the PKK by using the PKK's methods. He set up teams of PKK confessors, who wore typical PKK style dress and spoke Kurdish. Initially, the teams went round the villages to pick up intelligence but later they began to commit unknown perpetrator killings. If the information they obtained contained information about PKK sympathisers, they passed it on to the State and also began to carry out actions to eliminate them. They also interrogated people whom they kidnapped. Later they did not bother with interrogation. This pattern was illustrated by the Can and Kaya killings. Two PKK confessors went to Can's house. They regarded him as a PKK sympathiser. They told him that there had been a clash and that several comrades had been injured. They suggested meeting outside town. The witness did not know if Can and Kaya agreed for humanitarian reasons or because they were PKK sympathisers. They were taken and interrogated by the PKK confessors for about six days. Afterwards they were killed. Even though the Minister of the Interior and the Deputy Prime Minister made appeals, the people holding them were powerful enough to ignore them.

240. Ersever did not mention Can or Kaya by name but talked about a doctor and a lawyer and on investigation they were the only doctor and lawyer from Elazığ who were killed. The witness was not sure of the details of what Ersever said, since he did not take notes during the interviews, but afterwards. Ersever gave examples of how people were kidnapped and killed around Elazığ and Tunceli by teams of confessors acting and speaking like the PKK. If Ersever was to be believed, the authorities knew about the teams and gave them protection. When asked by the Government Agent however, he felt unable to say specifically whether the State knew about the actions which were being carried out. However having regard to the way in which confessors shoot people and come in and out of prison, he thought that the authorities turned a blind eye. He did not know if Ersever took his own decisions or received instructions from a higher level.

241. Ersever did not share the Government's views on how to combat the PKK and did not agree with their policy in Northern Iraq. As a result, he asked to retire. The witness received the impression that he was irked because he had not been given the opportunity to set up an organisation like the PKK to fight the PKK. There had been talk of appointing him to a new State intelligence unit, the Public Security Unit, but the Unit was not set up in 1994 and Ersever felt excluded. Ersever never admitted killing anyone himself. The witness thought that he organised the killings though through the gang he set up and that he gave it the mission to kill PKK militia and significant people in the area. Or he turned a blind eye to it. He never mentioned the names of any members of the security forces as involved in the killings. Ersever also had the idea of waging psychological warfare to counter the misleading views on the Kurdish question in the media. He had called a press conference to which no-one came and sent statements to the press none of which were published.

242. The witness stated that the Susurluk incident had shown that certificates had been issued to "outlaws". These had no legal value but might have served at checkpoints to give the impression that the holders were State officials. Possibly in the south-east there were unofficial ID cards which had the same function. Ersever named

Alaattin Kanat as involved in planning the killings, as a kind of brain in the organisation. He did not recall the name of Geyik or Erhan Öztürk. He remembered that Mesut Mehmetoğlu and İdris Ahmet were PKK confessors.

243. The Aydınlık newspaper published a feature report about the Kurdish question, quoting statements of Ersever which he had given openly in an interview at the newspaper office. Because of what he had said, Ersever was sued by the Turkish armed forces, possibly in relation to the disclosure of State secrets. He asked the witness to testify for him, though not to mention the information given off the record. Ersever had arranged to ring the day before the court case but did not do so. On the evening the case started, someone rang the newspaper office saying that they had killed Ersever and that it was now Soner's turn. Two or three days later, Ersever's ID card was sent to the witness in a white envelope. Afterwards, Ersever was found shot in the head with one bullet, with his hands tied behind his back. The body was found 40 km outside Ankara. One day after that, the body of Ersever's right-hand man, a confessor was found. Then the body of a girl, Neval Boz. The three bodies were found at three different points around the capital Ankara. This must have involved persons who were able to get through checkpoints without fear of being caught. He did not consider the PKK powerful enough to do that. At one of their meetings, Ersever told him that they were being followed and observed. He said at one point that Yeşil was after him.

244. After Ersever's death, the witness published the information that he had been given in articles and in a book called "The Secrets of Cem Ersever." He appeared on a television programme on Show TV but could not remember what he had said. No action had been brought against him by Ersever's family or anyone else concerning the contents of his book. He had no knowledge of any statement made by Mehmet Yazıcıoğulları on 28 March 1995 in which he referred to denying allegations made in the Aydınlık newspaper.

Mesut Mehmetoğlu

245. The witness was born in 1974. He had been detained in prison from 5 May 1994 to date. His trial was still pending on offences related to the killing of Mehmet Şerif Avşar. He had been in prison previously from 7 January 1992 to 7 January 1993 when he took advantage of the Remorse Act. He had been sentenced to 15 years' imprisonment for PKK offences. Following his release under the Act, the Supreme Court of Appeals acquitted him. One of the conditions of release was that the confessors told the authorities who they had talked to and been involved with for the PKK. Confessors also assisted by helping with information about PKK shelters and depots. He gave information about an action that he had been involved in and named persons who aided the PKK. He later stated that this information was given at the stage when the person was taken into custody. When he was released, he was unable to give any service to the State and went to work in Antalya, after staying one night in the Security Directorate, which was the usual practice. When he heard that his grandfather was ill, he went to Hazro in Diyarbakır province. When he arrived, his grandfather had already died, on 13 February 1993. He stayed there for a month or so. He denied that he was involved with the security forces after his release.

246. While in prison, he met Erhan Öztürk who was in his dormitory for about 12 months. He was released before Öztürk. İdris Ahmet was in his dormitory also for 10-11 months. He said that he was from Syria and had fought for the PKK for years before giving himself up near Siirt. He was released before the witness near the end of 1992. He knew neither man before this.

247. He confirmed his statements given to the public prosecutor. He was not involved in the incident with Can and Kaya. He was, and could prove that he was, in his district at the time, mourning for his grandfather. He read that Erhan Öztürk had named him as involved in the newspaper about the middle of 1993. The only time that the authorities contacted him about this was when he gave his statement to the public prosecutor. According to what he heard, Erhan Öztürk fell into the hands of the PKK one month previously due to a trap set by his brother in Malazgirt in Muş province. The PKK sent him to a rural area in Serhat province and from there to a rural area in Bingöl. The witness had talked to a man who had seen Öztürk being tortured in Bingöl and knew that he had been executed, apparently by the PKK women. He had been killed after he had been interrogated and statements made by him had been sent to the press. His statements were taken down in writing and recorded on video. The witness did not know why the PKK would have wanted Öztürk to make statements against him. The PKK tried to stamp out confessors and he lived in fear of their retaliation. He had never seen a person called Yeşil, assuming he existed.

Mustafa Özkan

248. The witness was born in 1946. From 1990 until June-July 1993, he was in charge of Pertek police station. Pertek was a small town, population of 5000. The police station had on average 20-25 staff. There were many terrorist incidents in the vicinity of Pertek, though none under his jurisdiction during his stay. When he arrived in 1990, he heard about a terrorist called Yusuf Geyik, also called Bozo or Çerkez Ethem, who had been involved in several wounding incidents and worked for a faction of the "Partizan" organisation. He was a wanted person, who apparently was from the area and was frequently seen in the villages where he was sheltered by the people. The gendarmes looked for him constantly but unsuccessfully in the rural areas under their jurisdiction. He had no knowledge about Geyik being detained.

249. There was a beerhouse opposite the post office about 100 metres from the police station, though the buildings were not physically in sight of each other. The beerhouse was about 200 metres from the district gendarmerie. From time to time, the police made general inspections when they would visit the beerhouse. The place was rather against the police. There was anti-police feeling in the region generally. He could not comment on whether the statements made by the beerhouse owner were reliable or not. At another point, he expressed the opinion that an owner of a beerhouse could not be a totally reliable person. The owner had made no report to the police at the time. If there was an incident in the beerhouse, it was the responsibility of the police, not the gendarmerie to deal with it. If the gendarmerie were involved in the incident, they should have reported to the police.

250. Shortly before he was transferred, he received a request from the public prosecutor asking about Yusuf Geyik and there was also a summons

for the owners of the beerhouse. His assistant, who dealt with the correspondence, summoned the persons concerned and took them to the public prosecutor. It was reported that a person called Yusuf Geyik, nicknamed Bozo, had sworn and cursed in the beerhouse, causing some kind of scene, about one month before and had been taken away by the gendarmes and stayed at the gendarmerie. This might have come from the owners of the beerhouse or from other people. His assistant had said that he had heard something like that. He remembered that they sent a reply to the public prosecutor's enquiry about Geyik, including the hearsay that he had been with the gendarmerie. In relation to what steps had been taken to investigate the whereabouts of Geyik, he said that there was no need to investigate as Pertek was a small place. They would have heard if he was there or caught him in an identity check.

251. When the public prosecutor sent a second request for information, he informed the prosecutor of the information which his colleagues had passed on to him, when they went out to summon the owners of the beerhouse and also to conduct the enquiry, namely, the information that Geyik had stayed at the gendarmerie but where he went, whether he was really at the gendarmerie, or whether he was taken to the regiment, they did not know precisely. This was what his colleagues reported that they had heard. When he stated in his letter that Geyik had stayed in the gendarmerie and had left the district, this was not to be read as indicating any certainty, but related to rumour or an assumption. The police themselves did not take any statements. It was not possible for the police to go to the district gendarmerie to enquire if Geyik had been there. The police communicated with the gendarmerie through the channel of the public prosecutor's office or the governor's office.

Bülent Ekren

252. The witness was born in 1960. From 1991 to 3 August 1993, he was district gendarme commander in Pertek. There were approximately 17 NCOs, 20 specialist sergeants and 190 men under his command. This included the men at the Pertek district gendarmerie headquarters and the five rural stations. There was also a commando company headquarters building about 7 km from the district headquarters. It was commanded by a first lieutenant under his command. There was no NCO or specialist sergeant called Hüseyin at the district headquarters, nor any commando of that name. There were men by the names of Mehmet and Ali, such names being common in Turkey. No non-military personnel stayed at the headquarters. There was no confessor assisting the gendarmes at Pertek. There was a custody room in the district gendarmerie headquarters.

253. Yusuf Geyik was a terrorist who was responsible for many incidents in the area before his time. He did not recall any action by him occurring while he was in Pertek. He was wanted for his activities before 1991. He never heard that he had been taken into custody. Geyik did not stay at his gendarmerie. The police would have been unable to make enquiries at the gendarmerie about him. Only the public prosecutor and district governor could do so.

254. He had not heard of the alleged incident in the Pertek beerhouse until the public prosecutor wrote on 29 April 1993 to enquire. When he received the letter, he asked his personnel, including the commando unit, who replied that no such incident had occurred. He did not know the beerhouse, spending most of his time in the areas under his jurisdiction outside the town. There was no question of his gendarmes

intervening in an incident in the town, which was in police jurisdiction. About 70% of the people in the area tended to be left wing and to dislike the security forces. Stories may have been told to discredit the security forces.

Other witnesses

255. The following witnesses were summoned but did not appear:

- Dr Ergin Toy, a doctor involved in the autopsy carried out on Hasan Kaya and Metin Can;
- Dr Ergin Dülger, as above;
- Fevzi Elmas, public prosecutor at Elazığ at the time of events
- Hasan Coşkul Çetinbinici, public prosecutor at Erzincan State Security Court
- Hüseyin Kaykaç, eyewitness at Pertek beerhouse
- Ali Kurt, eyewitness at Pertek beerhouse

256. The Government stated that the summonses for Hüseyin Kaykaç and Ali Kurt were delivered to their addresses but that they had not made any response and would not appear.

257. The Government were also requested to locate and serve summonses on Yusuf Geyik, Orhan Öztürk and Mahmut Yıldırım but stated that these persons were not known to the authorities.

258. Letters were received in which Dr Toy and Dr Dülger, Fevzi Elmas and Hasan Coşkul Çetinbinici explained their absence, due either to work or leave commitments and, save in the case of Dr. Dülger, gave their opinion that they would have no useful information to provide.

C. Relevant domestic law and practice

259. The Commission has referred to submissions made by the parties in this and previous cases and to the statements of domestic law and practice recited by the Court (see eg. Eur. Court HR, Kurt v. Turkey judgment of 25 May 1998, paras. 56-62 and Tekin v. Turkey judgment of 9 June 1998, paras. 25-30, to be cited in Reports 1998).

1. State of Emergency

260. Since approximately 1985, serious disturbances have raged in the south-east of Turkey between security forces and members of the PKK (Workers' Party of Kurdistan). This confrontation has, according to the Government, claimed the lives of thousands of civilians and members of the security forces.

261. Two principal decrees relating to the south-eastern region have been made under the Law on the State of Emergency (Law No. 2935, 25 October 1983). The first, Decree No. 285 (10 July 1987), established a State of Emergency Regional Governorate in ten of the eleven provinces of south-eastern Turkey. Under Article 4(b) and (d) of the Decree, all private and public security forces and the Gendarme Public Peace Command are at the disposal of the Regional Governor.

262. The second, Decree No. 430 (16 December 1990), reinforced the powers of the Regional Governor, for example to order transfers out of

the region of public officials and employees, including judges and prosecutors, and provided in Article 8:

> "No criminal, financial or legal responsibility may be claimed against the State of Emergency Regional Governor or a Provincial Governor within a state of emergency region in respect of their decisions or acts connected with the exercise of the powers entrusted to them by this decree, and no application shall be made to any judicial authority to this end. This is without prejudice to the rights of an individual to claim indemnity from the State for damage suffered by them without justification."

2. Criminal law and procedure

263. The Turkish Criminal Code contains provisions dealing with unintentional homicide (sections 452, 459), intentional homicide (section 448) and murder (section 450).

264. For all these offences complaints may be lodged, pursuant to Articles 151 and 153 of the Code of Criminal Procedure, with the public prosecutor or the local administrative authorities. The public prosecutor and the police have a duty to investigate crimes reported to them, the former deciding whether a prosecution should be initiated, pursuant to Article 148 of the Code of Criminal Procedure. A complainant may appeal against the decision of the public prosecutor not to institute criminal proceedings.

3. Prosecutor for terrorist offences and offences allegedly committed by members of the security forces

265. In the case of alleged terrorist offences, the public prosecutor is deprived of jurisdiction in favour of a separate system of State Security prosecutors and courts established throughout Turkey.

266. The public prosecutor is also deprived of jurisdiction with regard to offences alleged against members of the security forces in the State of Emergency Region. Decree No. 285, Article 4 § 1, provides that all security forces under the command of the Regional Governor (see paragraph 261 above) shall be subject, in respect of acts performed in the course of their duties, to the Law on the Prosecutor of Civil Servants. Thus, any prosecutor who receives a complaint alleging a criminal act by a member of the security forces must make a decision of non-jurisdiction and transfer the file to the Administrative Council. These councils are made up of civil servants and have been criticised for their lack of legal knowledge, as well as for being easily influenced by the Regional Governor or Provincial Governors, who also head the security forces. A decision by the Council not to prosecute is subject to an automatic appeal to the Council of State.

4. Constitutional provisions on administrative liability

267. Article 125 of the Turkish Constitution provides as follows:

> "All acts or decisions of the Administration are subject to judicial review ...
> The Administration shall be liable for damage caused by its own acts and measures."

268. This provision is not subject to any restrictions even in a state of emergency or war. The latter requirement of the provision does not necessarily require proof of the existence of any fault on the part of the Administration, whose liability is of an absolute, objective nature, based on the theory of "social risk". Thus, the Administration may indemnify people who have suffered damage from acts committed by unknown or terrorist authors when the State may be said to have failed in its duty to maintain public order and safety, or in its duty to safeguard individual life and property.

269. Proceedings against the Administration may be brought before the administrative courts, whose proceedings are in writing.

5. Civil law provisions

270. Any illegal act by civil servants, be it a crime or a tort, which causes material or moral damage may be the subject of a claim for compensation before the ordinary civil courts. Pursuant to Article 41 of the Civil Code, an injured person may file a claim for compensation against an alleged perpetrator who has caused damage in an unlawful manner whether wilfully, negligently or imprudently. Pecuniary loss may be compensated by the civil courts pursuant to Article 46 of the Civil Code and non-pecuniary or moral damages awarded under Article 47.

III. OPINION OF THE COMMISSION

A. Complaints declared admissible

271. The Commission has declared admissible the applicant's complaints:

- that the applicant's brother Dr Hasan Kaya was killed by or with the connivance of State agents;

- that his brother was tortured and subject to degrading treatment in that he was discriminated against on grounds of race;

- that the applicant suffered inhuman and degrading treatment as a result of the disappearance of his brother;

- that there was no effective investigation, access to court, redress or remedy provided in respect of these matters; and

- that the applicant's brother has been subject to discrimination in respect of the above matters.

B. Points at issue

272. The points at issue in the present case are as follows:

- whether there has been a violation of Article 2 of the Convention in respect of the applicant's brother Hasan Kaya;

- whether there has been a violation of Article 3 of the Convention in respect of the applicant's brother;

- whether there has been a violation of Article 3 of the Convention in respect of the applicant;

- whether there has been a violation of Article 6 and/or Article 13 of the Convention;

- whether there has been a violation of Article 14 of the Convention in conjunction with the above provisions.

C. The evaluation of the evidence

273. Before dealing with the applicant's allegations under specific Articles of the Convention, the Commission considers it appropriate first to assess the evidence and attempt to establish the facts, pursuant to Article 28 para. 1 (a) of the Convention. It would make a number of preliminary observations in this respect.

i. There has been no judicial finding of facts on the domestic level as regards the kidnapping and killing of Hasan Kaya in February 1993. While there is a pending investigation, this has been pending for more than five years. The Commission has accordingly based its findings on the evidence given orally before its Delegates or submitted in writing in the course of the proceedings; in this assessment the co-existence of sufficiently strong, clear and concordant inferences or of similar unrebutted

presumptions of fact and in addition the conduct of the parties when evidence is being obtained may be taken into account (mutatis mutandis, Eur. Court HR, Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 65, para. 161).

ii. In relation to the oral evidence, the Commission has been aware of the difficulties attached to assessing evidence obtained orally through interpreters: it has therefore paid careful and cautious attention to the meaning and significance which should be attributed to the statements made by witnesses appearing before its Delegates.

iii. In a case where there are contradictory and conflicting factual accounts of events, the Commission particularly regrets the absence of a thorough domestic judicial examination or other independent investigation of the events in question. It is aware of its own limitations as a first instance tribunal of fact. The problems of language are adverted to above; there is also an inevitable lack of detailed and direct familiarity with the conditions pertaining in the region. In addition, the Commission has no compelling powers as regards witnesses. In the present case, while twenty witnesses were summoned to appear, only eleven in fact gave evidence before the Commission's Delegates. Nor has the Commission been provided by the Government with all the documentary materials that it has requested. The Commission has therefore been faced with the difficult task of determining events in the absence of potentially significant testimony and evidence. It acknowledges the unsatisfactory nature of these elements which highlights forcefully the importance of Contracting States' primary undertaking in Article 1 to secure the rights guaranteed under the Convention, including the provision of effective remedies as under Article 13.

1. General background

274. Since approximately 1985, a violent conflict has been conducted in the south-eastern region of Turkey, between the security forces and sections of the Kurdish population in favour of Kurdish autonomy, in particular members of the PKK (Kurdish Workers' Party). According to the Government, the conflict by 1996 had claimed the lives of 4,036 civilians and 3,884 members of the security forces.

275. At the time of the events in issue in this case, ten of the eleven provinces of south-eastern Turkey had been under emergency rule since 1987.

276. Hasan Kaya worked in south-east Turkey. He had practised medicine in Şırnak from November 1990 to May 1992. During this time, it is not contested by the Government that he had treated demonstrators injured in the Nevroz celebrations in 1992 and that he was transferred from Şırnak to a post in a health centre in Elazığ following difficulties which he was experiencing. The applicant's evidence was supported on this by Fatma Can's recollections of what Hasan Kaya had told her.

277. The applicant gave evidence to the Delegates that, prior to his brother's disappearance with Metin Can on 20 February 1993, his brother had told him that his house had been searched by the police, that he was under constant surveillance and that he felt his life was in

danger. Evidence was also given by Bira Zordağ, who had been taken into custody in December 1992, that the Elazığ Security Directorate questioned him as to whether Elazığ doctors, in particular Hasan Kaya, treated wounded PKK members and supported the PKK. They had also asked questions about lawyers, including Metin Can. He was able to recall that the questions had been specific and referred, inter alia, to their suspicion that Hasan Kaya had treated a wounded PKK member from Hozat. Fatma Can, the wife of Metin Can, also gave evidence that when she was in the Elazığ Security Directorate she saw that they referred to a file on Hasan Kaya. She explained how her husband had come under pressure in Kars where he had founded the People's Labour Party and how threats began against him again when in Elazığ he founded, and became President of, the Human Rights Association. He had taken cases for persons suspected of being members of the PKK and had told her that he had received warning from an official that steps were being planned against him. Şerafettin Özcan mentioned generally that he, Metin Can and Hasan Kaya were subject to threats at that time, but had more specific information about the position of Metin Can, with whom he worked in the Human Rights Association. He referred to Can's work as a lawyer taking a case to improve conditions in Elazığ prison which brought threats against him from prison officers. He said that the Human Rights Association in Elazığ had been searched and other branches in the south-eastern region were under pressure.

278. The Commission's Delegates found these four witnesses on the whole to be sincere and credible. Their comportment and the detail of their evidence generally gave a convincing impression. Their evidence was also consistent on essential points. However the Delegates noted that the applicant, understandably, felt very strongly about the death of his brother but also about events in south-east Turkey generally, and the Commission has approached his testimony with caution, perceiving a tendency perhaps to overstate his case in an effort to persuade. Fatma Can was also observed to be defensive at times, both on behalf of her husband and herself. This was perhaps a natural reaction to the allegations which had been made against her husband but also due to the position which she found herself in, since she revealed facts to the Delegates which she had not disclosed to the authorities at the time. The Commission has also borne this factor in mind in assessing her evidence.

279. The Commission is satisfied from the evidence above that Metin Can and Hasan Kaya, and their families and friends, had reasonable grounds to consider that they were subjects of interest to the authorities - Metin Can, as President of the Elazığ Human Rights Association and lawyer involved in defending PKK suspects, and Hasan Kaya, as a doctor suspected of treating wounded members of the PKK. It finds no reason not to accept the evidence that this involved a search of the Human Rights Association in Elazığ and the questioning of other suspected PKK sympathisers seeking information about them. There is no direct evidence as to whether they were under surveillance or followed or received threats from State officials and the Commission makes no findings on these points.

2. Events related to the kidnapping and killing of Hasan Kaya in February 1993

The disappearance of Hasan Kaya and Metin Can

280. Shortly before the disappearance of Metin Can and Hasan Kaya, two men were seen in the apartment building where Metin Can lived. The police took statements from two persons living there who stated that the two men were looking for Metin Can (see paras. 73-74).

281. The evidence as to what happened immediately before and on the day of the disappearance differs between the brief version which was given by Şerafettin Özcan and Fatma Can to the public prosecutor and police and the fuller, detailed version given by them to the Commission's Delegates. The Commission notes that both were asked why they did not assist the police by giving the fuller version. Şerafettin Özcan explained that he was frightened and did not want to disclose to the police that he had seen the two men. Fatma Can stated that her main anxiety was for the safety of her husband. She thought that if she kept quiet about what she knew there was a possibility that he would return alive. She was sure that it was the police who had taken her husband and that if she gave details it would make it easier for them to kill him. The Commission observes that the Government have not disputed that the account given to the Delegates is truthful in regard to the factual detail as to what occurred, although they reject the assertion of both Fatma Can and Şerafettin Özcan that the two men were acting for the State. It finds the explanations of Fatma Can and Şerafettin Özcan for being economical in their stories to the authorities to be genuine and that the account that they now give is credible and convincing in the explanation which it provides for the disappearance.

282. There are discrepancies between the two accounts. For example, Fatma Can recalled that she called Hasan Kaya while Şerafettin Özcan recalled that Metin Can did. Fatma Can remembered that Şerafettin Özcan went out to the Post Office to make a call to Diyarbakır to check on the two men but Şerafettin Özcan made no reference to this. The Government Agent pointed out to Fatma Can that her account differed from Şerafettin Özcan's as concerned the recollections of what the two men said. Her answer was that Şerafettin Özcan probably remembered more correctly than she did since she did not stay in the room talking with the men but came and went looking after the baby. The Commission considers however that after a lapse of about four years since the events occurred it is not surprising if recollections became confused as to details. It also notes that Şerafettin Özcan may have considered that it was preferable not to mention in front of the Government Agent and his team that he had rung a number in Diyarbakır in order to check the bona fides of two alleged PKK members. It finds therefore that the discrepancies are not of such a nature as to undermine the credibility of the two witnesses as regards the main outline of events on the day of the disappearance, which it finds as follows.

283. On 20 February 1993, after Fatma and Metin Can came home late in the evening, there was a telephone call which her husband answered. He later told her that the callers had come to the house earlier and wanted to see him. He refused, telling them that it was too late and that they should come to his office the next day.

284. On 21 February 1993, Metin Can waited for them at his office but they did not come. He returned home at midday. He answered a call from the same people. It was arranged that they should meet in a coffee house. Metin Can met Şerafettin Özcan near the coffee house and invited him to the meeting. Two men arrived, one darkhaired and one fairhaired. The fairhaired man, who gave his name as Vedat, spoke Turkish badly and said that he was from Syria. Metin Can went home with the darkhaired man. Şerafettin joined him there. Metin Can returned to the coffee house and brought the fairhaired man back also. The two men told Metin that there was a wounded person hidden out of town who needed medical treatment. A telephone call was made to Hasan Kaya who came to the house. It was arranged that the two men would bring the wounded person to Yazıkonak where Metin Can and Hasan Kaya would meet them. The two men left. At about 19.00 hours, they rang the house. Metin told them, "We are coming." He and Hasan Kaya left, in the car of Hasan's brother. Hasan Kaya took his medical bag. They did not return.

285. The Commission recalls that the Government have submitted that the evidence clearly points to the fact that Metin Can and Hasan Kaya were called to a meeting point by persons who most probably were recognised by them. They do not indicate the basis of this assertion. The Commission recalls that the public prosecutor Süleyman Tutal did not consider initially that the case necessarily concerned a kidnapping since there were no forensic signs of a struggle at the scene of the car in Elazığ (para. 219). In his oral evidence, Şerafettin Özcan said that neither he nor Metin knew the two men. Fatma Can also insisted on this, although she did at one point describe her husband as seeking to re-assure her outside the coffee house by telling her that they knew the men. The Commission considers that the whole tenor of the evidence of Fatma Can and Şerafettin Özcan implied anxiety and concern which included the element that they were dealing with two men who were unknown and doubts as to whether they could be trusted. It does not find that an absence of signs of a struggle is decisive of whether or not there was lack of coercion. Given the immediate concerns of their families at their failure to return, it would appear highly improbable that the two men voluntarily stayed away from home without contacting their relatives to inform them of their safety. It does not find that it can be established from the facts that Metin Can or Hasan Kaya knew the men who took them away or later killed them.

Events following the disappearance

286. At about 12.00-13.00 hours, on 21 February 1993, Fatma Can received a call. The caller, who Fatma Can thought she recognised as one of the men from the day before, said words to the effect that, "This is Vedat. We have killed Metin and his friend." She was horrified and after informing Şerafettin Özcan, they went to report to the prosecutor that her husband and Hasan Kaya were missing. The accounts which both gave omitted all details of the two men meeting with Metin Can and Hasan Kaya and referred only to Can and Kaya leaving for an unknown destination after receiving a telephone call at 19.00 hours.

287. More telephone calls were allegedly received by the families of both men. In one call to the Can house on about 23 February 1993, the caller claimed to be Dr Savur Baran and made references to Metin continuing the struggle. This was reported to the police by Şerafettin Özcan immediately after it occurred at about 13.30 hours. The applicant told the Delegates that on 23 February 1993 he was

informed by his brother Hüseyin that one or two calls had been made to Hasan Kaya's house in which Kurdish music was played, accompanied by apparent sounds of torture. Şerafettin Özcan also had heard that this had occurred. In his petition of 13 April 1993, the applicant's father referred to disturbing telephone calls being received but it is unclear to what this refers as in his petition of 9 March 1993 he stated that he had received threatening calls. The applicant informed the Delegates that they did not inform his father of the calls. In any event, steps were taken by the authorities to monitor calls only to the Can house. The Commission finds that some strange calls were made to the Can house. There is no direct evidence before it that such calls were received at the Kaya house.

The discovery of the bodies of Hasan Kaya and Metin Can

288. It is undisputed that at about 11.45 hours on 27 February 1993 it was reported that two bodies had been found under the Dinar bridge, about 12 km outside Tunceli. These bodies were identified as being those of Hasan Kaya and Metin Can and the cause of death was brain damage due a single shot to the back of the head. The arms of both were tied behind their backs.

289. The applicant and other members of the families of both men claimed, and still claim, that they were tortured before they died. The applicant and Fatma Can saw the bodies themselves. According however to the public prosecutors of Tunceli and Elazığ who attended the scene and the autopsies, they were not tortured. Marks on their faces were attributed to an assumption that the bodies had been thrown off the bridge and occurred after death. Though Süleyman Tutal when referred to the autopsy reports accepted that there were various marks and bruises on the body of Metin Can he discounted them as minor.

290. There are two autopsy reports which detail the condition of the bodies. The first, less detailed, included the phrase that there was a total absence of any trace of violence or blows on either body, with the addendum from the doctors that the ecchymosis on Metin Can's right eyebrow might have been caused by a blow. The second autopsy, which is more thorough, more correctly states that there are no traces of violence or blows other than those previously noted. In the case of Metin Can, there is a catalogue of ecchymoses, scratches and wounds, including a tear in his lip and a wound round his neck as if from a wire or string. The conclusion is that some of the bruises and scratches might have been caused by blunt instruments, shortly before death. There is no mention of the possibility that the injuries were caused by the body impacting on the ground after a fall. The Commission finds that on the basis of this report it is a reasonable probability that Metin Can suffered deliberately inflicted and significant physical injury. However, as regards Hasan Kaya, the reports indicate fewer physical signs of ill-treatment. The first autopsy report only mentioned that the lefthand side of the face was subsided but it is not apparent whether this resulted from the distorting effect of the body being frozen or from physical trauma. The second report noted ecchymoses on the right ear area but expressed the view that this might have resulted from pressure to the body. It is not apparent what this means. There were also marks on the wrists, which might have come from the hands being bound, ecchymoses on the nailbases of the left hand, the right knee and left ankle and scratches on the ankle, while the feet were in a condition probably caused by being kept in water or snow

for a long time. The report does not comment on what might have caused the bruises. The Commission regrets that the two doctors involved in the report did not appear to give evidence to its Delegates. This might have clarified various of the findings in the report. Nonetheless, the Commission considers that the report provides uncontroverted evidence that Hasan Kaya suffered injuries prior to his death and that during his captivity with his kidnappers his feet were exposed to snow or water for a significant period of time.

291. The first autopsy, carried out at 16.25 hours on 27 February 1993, estimated death as occurring within the last 14-16 hours, namely, after midnight of the previous night. The second autopsy, carried out at 1.05 hours on 28 February 1993, estimated death as occurring within the last 24 hours, which also places the death after midnight on 27 February 1993. Neither autopsy, as already noted, makes any reference to the possibility of either body having been thrown over the bridge. Nor is there any comment in these reports or any other forensic report as to whether the two victims were killed on the spot or killed elsewhere and transported to the Dinar bridge. Both public prosecutors who gave evidence were of the opinion that the two victims were killed elsewhere and dumped. Hayati Eraslan based this on the way the bodies' faces were crushed and the lack of blood at the scene. The gendarme incident report in describing the bodies at the scene also makes no mention of blood. Although two cartridges were found near the bodies, Eraslan thought that these might have been thrown there. The Commission does not find, in the absence of detailed forensic analysis of the crime scene and bodies, that it is in a position to make any findings as to where the victims were killed.

3. Investigation by the authorities

292. The Commission observes that the responsibility for the investigation changed hands four times. From the report of the disappearance on 22 February 1993 until shortly after the killing, the responsibility lay with the Elazığ prosecutor. Elazığ ceded jurisdiction to the Tunceli prosecutor on 11 March 1993 after the bodies were found in their jurisdiction. On 31 March 1993, the Tunceli public prosecutor issued a decision of withdrawal of jurisdiction and transferred the file to the Kayseri State Security Court. This was a stopgap solution since an earthquake had disrupted the work of the Erzincan State Security Court prosecutor, who normally had jurisdiction. The file was transferred on 22 July 1993 from Kayseri to Erzincan on their resumption of functions. On 25 May 1994, following re-organisation of court jurisdictions, Erzincan transferred the file to the Malatya State Security Court prosecutor's office, where it has since remained.

293. From the documents and evidence given, the investigation included the following:

Investigation into the disappearance

- notification dated 22 February 1993 by the Elazığ governor to all other State of Emergency governors for Metin Can and Hasan Kaya and the missing car to be located; photographs were provided by the Directorate of Security to be transmitted on 24 February 1993;
- the missing car was found at Yazıkonak on the evening of 22 February 1993. The police took a statement from the person who

reported the car and made a sketch and report concerning the car. It was noted that no fingerprints were found. The applicant queries whether a proper examination of the car could have been carried out, finding it highly unusual that no fingerprints were found even on the steering wheel. Şerafettin Özcan who went to the scene was of the opinion that the police were not making a proper examination or taking enough fingerprints. The applicant notes that the prosecutor Süleyman Tutal referred to the fact that the fingerprints did not show a struggle. However, the Commission observes that he might also have meant this only in the context that there was no evidence from fingerprints that there had been a struggle. The Commission considers that there is insufficient material on which to base a finding that the police did not properly conduct a forensic examination of the car;
- the taking of statements from neighbours of Metin Can, which included descriptions of two men calling at the house;
- shoes belonging to Metin Can were found on the evening of 24 February 1994, the police taking a statement from the night watchman who discovered them, obtaining the identification from Can's brother and making a report and sketch;
- a telephone monitoring order was issued in respect of Metin Can's house. However this was not effective since it appears that the PTT failed to switch on the machine in the absence of an express instruction to do so. It is unclear if this was an oversight of the public prosecutor or an obstructive attitude from the PTT.

294. There is no evidence of statements being taken from villagers in Yazıkonak as to what might have transpired when the car was abandoned there. In his statement of 9 March 1993, Ahmet Kaya told the public prosecutor that he had gone to the village where a rumour was going round that his son and his friend had been taken from their car by persons arguing amongst themselves. In later petitions of 18 March and 13 April 1993, Ahmet Kaya said the persons had been plain clothes police officers with radios. The applicant told the Delegates that he had also gone to Yazıkonak and spoken to villagers, who said that they saw two men forced into a vehicle by persons with radios. When asked what steps were taken to investigate these reports, the public prosecutor Süleyman Tutal was vague but then seemed sure that the necessary investigative steps must have been taken. The Commission observes that it is possible that police officers attempted to question villagers but received no information. It is however to be noted that there is no record in the investigation file of Ahmet Kaya's petitions containing the information being transferred to the police or that the police received an instruction to investigate further or notified the public prosecutor that this avenue had been tried without success.

295. Similarly, it is not apparent that any steps were taken to investigate the information given by Ahmet Kaya in his petitions of 18 March and 13 April 1993 that the car in which Metin Can was being driven called for petrol at a garage near Yazıkonak and that he told the attendant that he was with officers.

Investigation into the killing

296. The Commission notes that the investigation after the death included:
- two autopsy reports. The first was brief and incomplete. The second was fuller, made findings as to causation in respect of some injuries but was unhelpful on others;

- scene of crime incident report and sketch map prepared by the gendarmes;
- ballistics report on the cartridges which identified the gun as having been used in two other incidents.

297. The Commission has already noted above that there is no forensic analysis as to whether or not the bodies were killed on the spot or transported there later. There is no material in the file relating to any steps taken to obtain evidence as to how the victims were transported there.

298. Remarkably, following these investigative measures, almost all the impetus in the investigation derived from information given to the public prosecutor by Ahmet Kaya and press sources. Ahmet Kaya seems to have obtained his information by word of mouth or rumour and also from what he read and heard in the media. As the applicant told that Delegates, there were many rumours circulating in the excitement following the disappearance. Some newspapers in particular provided very detailed allegations as to the identity of the persons involved in the killings and placed responsibility on contra-guerilla groups operating in co-operation with sections of the security forces or security agencies.

The Hozat incident

299. In his petition of 18 March 1993, Ahmet Kaya told the Tunceli prosecutor that in Hozat a police officer had told a district judge and lawyer called İsmail that Can and Kaya had been held at the Tunceli Security Directorate. The prosecutor sent the petition to the Hozat public prosecutor and requested statements to be taken from the three persons involved. The Hozat public prosecutor took a statement from İsmail Keleş, a lawyer, who denied hearing any such conversation. In light of that, he informed the Tunceli prosecutor that he had not taken a statement from the district judge. A police report of 14 April 1993 indicated that following investigation it was concluded that no police officer at Hozat had made such a statement.

300. In answer to questions by the Delegates as to what steps were taken in answer to the allegation that the two victims had been detained at Tunceli Security Directorate, Hayati Eraslan recalled enquiring of the Security Directorate on the phone and asking for the custody records. He did not remember if he received them. Since Tunceli was a small place and the Directorate was close to the prosecutors' office, he would have known if they had been detained. The Commission notes that there is no record in the file of custody records being requested or received but does not exclude that this might have occurred informally. It certainly does not appear that the prosecutor took any steps to interview officers of the Directorate in relation to the allegations.

The Pertek beerhouse incident

301. In his petitions of 18 and 19 March 1993 and 13 April 1993 (paras. 99-100 and 106), Ahmet Kaya drew the attention of various public prosecutors to an incident which occurred in a beerhouse in Pertek where it was reported that a man had claimed that he had killed Metin Can and his son. It was stated that the man, Yusuf Geyik known as "Bozo", had a radio and went away with a gendarme. On 30 March 1993,

the Pertek public prosecutor requested that the Pertek police investigate Yusuf Geyik. By letter of 6 March 1993, the Pertek police reported, briefly, that he was not in their jurisdiction. The Pertek prosecutor made a second request for information from the police on 29 April 1993, additionally asking whether an NCO, and if so who, had taken Geyik away. Also on 29 April 1993, the prosecutor enquired from the Pertek district gendarmes whether gendarmes had responded to a request for assistance from the beerhouse and who was involved. On 4 May 1993, the Pertek prosecutor took statements from two eye-witnesses to the incident. Hüseyin Kaykaç, the owner of the beerhouse, confirmed that Geyik had been in his beerhouse on 15 March and had claimed to have killed Can and Kaya. He talked into a radio and was picked up by a gendarme in plain clothes. Ali Kurt, a waiter, agreed with this. By a letter of the same date, the Pertek police reported that there was no-one called Geyik in their jurisdiction but that he had been reported as having been seen in the district. In the final sentence of the letter, there appeared a phrase which has been subject to varying interpretations due to its ambiguous construction in Turkish. This appears to state that it had also been reported that Geyik had stayed at the district gendarmerie a month before but his whereabouts were unknown. By letter of 5 May 1993, the district gendarme commander denied that any assistance had been sent to the beerhouse or that any NCO was involved in any incident.

302. The Commission notes that at this stage there was clear evidence implicating gendarmes in an incident possibly linked to the killing of Metin Can and Hasan Kaya. It also linked the gendarmes with a man who was wanted for various murders and robbery (see para. 303 below). However, no further steps were taken to elucidate the situation, until six months later, when on 8 November 1993, the Erzincan State Security Court prosecutor requested that more detailed statements be taken from Hüseyin Kaykaç and Ali Kurt, in particular to obtain a description of Geyik and whether the NCO could be identified. Ali Kurt's second statement was taken on 17 November 1993. He added the information that he had heard Bozo trying to get through to the regiment commander on the radio but that he did not know who took him away. Even though Ali Kurt gave details of Kaykaç's change of address to Elazığ and an urgent reminder was sent on 14 February 1994 to the Elazığ Security Directorate, Hüseyin Kaykaç was not brought to the prosecutor's office to give a statement until 6 April 1994. In this statement, he elaborated that he had heard that Geyik came from Geyiksu village and that he had called both the Tunceli and Pertek gendarmes on the radio. He recalled that three men came to pick him up, two NCOs called Mehmet and Ali and an NCO in plain clothes called Hüseyin who was still employed in Pertek.

303. The Erzincan prosecutor by this time appears to have become aware that the evidence was tending strongly to indicate that an incident had occurred at Pertek beerhouse in which the gendarmes were implicated. By letter of 2 February 1994, they informed the Pertek prosecutor that there was a discrepancy between the documents from the Pertek police and gendarmes and requested that the prosecutor personally undertake a new investigation to clear up this contradiction. It specifically pointed out that the gendarmerie might be a party and that the police had stated that Geyik had stayed at the district gendarmerie. By letter dated 17 February 1994 from the Pertek prosecutor, the Erzincan prosecutor was given information indicating that Yusuf Geyik was a member of the TKP-ML Partizan group and a suspect in a killing and

robbery committed in 1989 and 1990. On 21 February 1994, Ahmet Kaya was summoned to explain what he knew about Geyik. He explained that he had heard the story only in "Gerçek" magazine, a copy of which had been given to him by Elazığ police officers.

304. There are no other documents provided in the file which relate to any further investigation at Pertek, in particular, as to whether any statements were taken from gendarmes or any verification of the names given by Hüseyin Kaykaç. The investigation appears to have stopped proceeding along a potentially significant line of enquiry. The Commission notes that when the Malatya State Security Court prosecutor took up the case there was a new impetus, when on 13 March 1995, specific instructions were sent out. However, this was limited to the location and identification of Yusuf Geyik by the Tunceli public prosecutor. The only steps taken appear to have been to check his village of registration, Geyiksu-Atadoğdu, it being reported on 3 April 1995 that he had moved to İstanbul 8-10 years before and his address was unknown.

305. It is to be noted that Judge Major Ahmet Bulut, who had responsibility for the file, agreed, when shown the documents from the Pertek police and gendarmes, that it would have been appropriate to make enquiries to clarify any doubts.

Alleged involvement of Ahmet Demir and Mehmet Yazıcıoğulları

306. In a petition dated 3 September 1993, Ali Demir, a lawyer, and Mehmet Gülmez, President of the Tunceli Human Rights Association, drew the prosecutor's attention to an Aydınlık article appearing about 25-26 August 1993, which named Ahmet Demir and Mehmet Yazıcıoğulları as responsible for organising the murder of Metin Can and Hasan Kaya as contra-guerillas working for State authorities. Ali Demir was summoned to give further information and explained that though he had no personal knowledge of Ahmet Demir, he had heard complaints between 1989 and 1991 that an individual known as "the Beard" (Sakallı) who was associated with State security forces had been carrying out attacks in the Ovacık-Nazımiye district. Gülmez also told the prosecutor on 18 October that he had heard of "the Beard" 3-4 years earlier. By instruction dated 14 October 1993, the Tunceli prosecutor requested that the Security Directorate locate and summon Mehmet Yazıcıoğulları and Ahmet Demir. By reply of 18 October 1993, the Security Directorate replied that they were not known. The Tunceli prosecutor reiterated its instruction on 11 November 1993. A police report dated 6 December 1993 indicates that they were not found within their jurisdiction (in Tunceli). Though at this stage the responsibility for the investigation lay with Erzincan, no steps were taken to widen the search beyond Tunceli.

307. More allegations as to the involvement of Ahmet Demir, also known as Mahmut Yıldırım, were drawn to the attention of the prosecutors in early 1994. On 31 January 1994, Hale Soysu, editor of Aydınlık, formally accused Mahmut Yıldırım of a number of crimes, including the murder of Metin Can and Hasan Kaya, basing his complaints on information received by the newspaper. He enclosed extracts from the newspaper which in January 1994 ran a series of articles on interviews given to the journalist Soner Yalçın by Major Cem Ersever, a gendarme major with extensive experience in the south-eastern region who had been found murdered near Ankara. Ahmet Kaya made two similar petitions

on 14 February 1994, referring to reports in Aydınlık, Özgür Gündem and a programme on Show TV in which Soner Yalçın talked about Major Ersever. He also stated that Mahmut Yıldırım was known in his district of Elazığ as someone involved in incidents and gave what he had heard to be Mahmut Yıldırım's home and work address. On 21 February 1994, Anik Can gave the same information about the address.

308. In response to this information, Erzincan State Security Court requested a copy of the Show TV transcript from İstanbul, while on 15 February 1994, Ahmet Kaya's petition was sent to the Elazığ Security Directorate who were asked to carry out a "very confidential" investigation and apprehend the suspects. A police report dated 25 February 1994 stated that Mahmut Yıldırım had left his address 15-20 days previously and his location was unknown. A further report of 11 April 1994 stated that the investigation of his whereabouts was ongoing. However no steps appear to have been taken in respect of Yıldırım's purported work address at this time. The transcript of the TV programme was received by the Erzincan State Security Court prosecutor in May 1994, disclosing that Soner Yalçın had given further details about Ahmet Demir or Yeşil, alleging that he had been employed by the public service in Elazığ and that Yeşil was a codename widely known in the security forces and police. No steps were apparently taken to contact Soner Yalçın and question him about this information or to trace in Elazığ whether or not such an individual had been employed by a State agency.

Period from April 1994

309. The Commission notes a complete absence of any investigative activity from about April 1994 until March 1995, when the Malatya State Security Court prosecutor took up the case actively. In an instruction of 13 March 1995, the prosecutor then made requests that Mahmut Yıldırım/Ahmet Demir and Mehmet Yazıcıoğulları be located and also that statements be taken from Ayhan Öztürk, İdris Ahmet and Mehmet Mehmetoğlu who had been named in various news articles. In response to this request, information was received from Diyarbakır E-type prison that the latter three were all confessors who had been detained for overlapping periods in 1992-1993, all released shortly before the disappearance of Can and Kaya. Mehmet Mehmetoğlu, who had been re-detained for a suspected new offence, gave a statement in the prison on 6 April 1995, in which he confirmed that he knew İdris Ahmet and Ayhan Öztürk but denied any involvement in the killing of Can and Kaya stating that he had been in Hazro at the time. Mehmet Yacızıoğulları was also located and gave a statement on 28 March 1995, denying any involvement. As regarded Mahmut Yıldırım, the police reported on 7 April 1995 that the home address given did not exist and that his work address was outside their jurisdiction. On 28 April 1995, the gendarmes reported that their investigation disclosed that his identity and location could not be established.

310. The Commission has not been provided with any other investigation documents dating after May 1995. It notes that there is no indication that any steps were taken to clarify the police claim that the home address attributed to Mahmut Yıldırım did not exist which was in conflict with the prior police report that Yıldırım was not present at his home address. The second police report indeed wrongly spells the address as Panarlı street rather than Pancarlı street. In his evidence to the Delegates, Judge Major Ahmet Bulut did not recall that he had

noticed this discrepancy. It is not apparent that any further action was taken to verify the alibi given by Mehmet Mehmetoğlu or to investigate Mehmet Yazıcıoğulları's background. Judge Major Ahmet Bulut stated that following further revelations in the press at the end of 1996 in the Milliyet newspaper he had been able to make new enquiries, in particular contacting the Tunceli district gendarmerie and the gendarme headquarters to enquire whether they knew of Yeşil. He had also checked the statements of a suspect Bilgiç whom Mevlut Kaya had said had information but found that they contained no information. His words implied that no other avenues of enquiry were pending. There has been no information forthcoming from the Government as to whether, following the publication of the Susurluk report, which makes express reference to Metin Can in connection with unlawful activities by covert groups, any progress has been made towards identifying the perpetrators of the murder. In the absence of further documentation or information from the Government concerning the investigation, the Commission draws the inference that no significant steps, other than those referred to above, have been taken.

311. The Commission finds that there was a body of evidence implicating a number of persons in the killing of Metin Can. This evidence was in some cases derived directly from eyewitnesses, as in the Pertek beerhouse incident. In other cases, the evidence derived via hearsay, rumours and press reports but showed a significant degree of consistency. The investigation followed most of those leads but only up to a certain point, coming inconclusively to a halt at the first denials or obstacles. It has therefore not provided sufficient evidence either to show that allegations were groundless or that they were substantiated.

4. Evidence as to the identity of the perpetrators of the killing

312. Notwithstanding the lack of progress in the official investigation, the applicant submits that there is overwhelming evidence that Hasan Kaya and Metin Can were killed by "contra-guerillas", agents of the State permitted to operate outside the legal framework of accountability. He relies principally on:

- the previous threats made against Metin Can and Hasan Kaya.

- evidence that Metin Can and Hasan Kaya were forced into a vehicle at Yazıkonak by persons using walkie-talkies and seen in a car at a petrol station in the company of police officers;

- the way in which the two victims were held for six days and transported from Elazığ to Tunceli through numerous checkpoints;

- evidence from the Pertek beerhouse, where two eyewitnesses gave statements that Yusuf Geyik, "Bozo", claimed responsibility for the killing and was taken away by gendarmes;

- information obtained from Major Cem Ersever, who gave interviews to the journalist Soner Yalçın, who wrote articles and a book, "The secrets of Major Cem Ersever". This source identifies an individual variously known as Ahmet Demir, Mahmut Yıldırım or "Yeşil" as a ringleader in unknown perpetrator killings in the Tunceli-Elazığ-Diyarbakır area and as having organised the kidnapping and killing of Metin Can and Hasan Kaya.

Mehmet Yazıcıoğulları was named also as involved in the contra-guerilla group;

- newspaper report of the confession of Erhan Öztürk, who was the triggerman who killed Metin Can and Hasan Kaya, and named İdris Ahmet and Mehmet Mehmetoğlu as assisting him;

- the Susurluk report which confirms that confessors, contra-guerillas and undercover groups acting on the direction of, or with the knowledge of, the security agencies or security forces were implicated in the deliberate targeting of Kurdish citizens from 1992 to 1996. The name of Metin Can is listed as one of the victims of these activities. The report supports many of the alleged confessions of Major Ersever;

- the lack of any motive for the PKK to kill Metin Can and Hasan Kaya.

313. The Commission has considered each of these points in turn:

Threats made against Hasan Kaya and Metin Can

314. As found above (para. 279), there is no direct evidence that the two men received threats from official sources. The Commission has found however that both men were under suspicion by the authorities as being PKK sympathisers.

The circumstances of the disappearance and killing

315. The applicant and his father were suspicious from an early stage as to how two bodies, or kidnapped persons could be transported from Elazığ to Tunceli, approximately, 130-140 km away (see para. 64). The applicant submits that the impossibility for the victims to have been transported undetected from Elazığ to Tunceli is evidence that they were in fact being held by State agents or persons working for State, who, for example, had special identity cards which would have permitted them to pass without hindrance through the security force checkpoints, which numbered from four to ten according to various accounts.[4]

316. When the matter was put to the two public prosecutors, they confirmed that there was only one road for traffic between the two towns and that at the time there would have been permanent checkpoints. Eraslan stated that at the checkpoints all cars would be stopped and identity cards checked. Not all cars would be searched. He did not think that it would have been possible though for two bodies to have been brought through the checkpoints from Elazığ without discovery. Tutal also considered that that would have been very difficult. Both considered that it might have been possible for them to have been transported alive through the checkpoints, though Tutal agreed that it would have been possible in that event for the two victims to seek to draw the attention of the security forces. The Commission would also note that, even if the victims were held under coercion, which would have been a risky action under the noses of the security forces at the

[4] Şerafettin Özcan remembered four; Fatma Can in her oral evidence to the Delegates and Ahmet Kaya in his petition of 13 April 1993 said there were eight; the applicant in his oral evidence said eight to ten; the public prosecutors Süleyman Tutal and Hayati Eraslan did not know how many.

checkpoints, their identity cards would still have had to be presented for examination. From the day after the disappearance however, Metin Can and Hasan Kaya had been reported as missing and were presumably being looked for by the authorities. Unless the kidnappers had taken their victims immediately from Elazığ and Tunceli before the alarm was given, it would appear impossible that they could have passed undetected between the two towns. PKK kidnappers certainly could not have attempted the journey without a serious risk of discovery. It is not apparent however that the authorities took any steps to investigate this highly relevant aspect of the case.

317. The Commission sees however no persuasive force in the argument that holding of the two victims over a six day period of itself indicated official involvement. There is nothing to suggest that non-official kidnappers would be incapable of hiding their victims for long periods of time.

Sightings of police officers at Yazıkonak and the petrol station

318. The evidence that police officers took Metin Can and Hasan Kaya into custody at Yazıkonak consists of the statements of Ahmet Kaya dated 18 March and 13 April 1993 and the oral testimony to the Delegates of the applicant and Şerafettin Özcan who heard from villagers that Metin Can and Hasan Kaya were seen being forced into a vehicle at Yazıkonak by persons using walkie-talkies. This evidence is rather vague and by way of hearsay.

319. The evidence that Metin Can, and impliedly Hasan Kaya, were seen in a car at a petrol station in the company of police officers comes from the same statements of Ahmet Kaya, which do not specify the source of the information. The applicant had also heard this but from equally unspecified sources. The Commission does not consider that this is sufficient basis for any findings of fact as to police involvement in the disappearance of Metin Can and Hasan Kaya.

The Pertek beerhouse incident

320. The Commission has noted above (paras. 301-305) the evidence of two eyewitnesses that Yusuf Geyik, a suspected terrorist wanted in respect of murder and robbery, claimed that he killed Metin Can and Hasan Kaya and was taken away by gendarmes. The investigation revealed a certain, unresolved discrepancy between the Pertek police report and the Pertek gendarme reply to enquiries, the Pertek police chief referring in ambiguous terms to Yusuf Geyik having stayed at the district gendarmerie.

321. Before the Delegates, both the Pertek chief of police and the district gendarme commander gave evidence. Geyik was known to both of them as a man wanted for various incidents which had occurred in the surrounding rural areas. The police chief recalled that enquiries had been made into the beerhouse incident at the request of the prosecutor. It had been his assistant who had taken the eyewitnesses, Kaykaç and Kurt, to make statements. He remembered that it had been reported that Geyik had been taken away from the beerhouse by gendarmes and had stayed at the district gendarmerie but could not recall exactly where this derived from. His officers might have told him this or it might have come from the owners of the beerhouse or other people. The police had not been able to pursue any enquiries themselves with the

gendarmerie, this being beyond their powers. Bülent Ekren denied firmly that the gendarmes under his command were involved with any incident in the beerhouse or that Geyik had stayed at the gendarmerie, pointing out that 70% of the local population were hostile to the security forces and could have spread stories to discredit them.

322. The Commission is unable on the basis of this testimony to resolve the matter one way or the other. The police chief impressed as an honest man and if he was vague on the subject of the source of information about Geyik staying at the gendarmerie, this could be explained by the lapse of time. The district gendarme commander was polite, concise and categorical. There is no basis from the content of his evidence to draw the conclusion that he was untruthful in his denials. However, the possible theory that Ali Kurt and Hüseyin Kaykaç fabricated the story in order to discredit the security forces is not convincing either.

323. The Commission has found above that the investigation into the Geyik incident came to a halt in about February-March 1994, without seeking, inter alia, to trace the NCOs named by Hüseyin Kaykaç or to find other witnesses from the beerhouse. It concludes that suspicion remains as to the involvement of Geyik in the murder and as to his links with the security forces but that no fact in this respect can be regarded as established.

Major Cem Ersever

324. It is undisputed that Major Cem Ersever was a gendarme officer in JİTEM, who served in the south-eastern region for a considerable time. In or about 1993, he voluntarily retired from service and returned to Ankara. In or about the end of October 1993, he was found murdered, his hands bound and with a bullet in the back of the head near Ankara.

325. Soner Yalçın, a journalist for Aydınlık, interviewed him in Ankara before he died. The information which Cem Ersever gave him appeared in a series of articles in Aydınlık, from 26 August 1993 (in which the source given was an unnamed special warfare officer), until January 1994 and in his book, "The secrets of Major Cem Ersever".

326. Soner Yalçın gave evidence before the Commission's Delegates. He was an intelligent, articulate witness and he was careful to distinguish what he knew or had been told from what he deduced or implied. His evidence was credible and convincing. The Commission has no reason to doubt that he did meet Major Cem Ersever five or six times in 1993 and that Major Cem Ersever gave him information about events in the south-eastern region. The Commission notes from Soner Yalçın's evidence that Ersever did not confess as such to any wrongdoing himself or expressly attribute particular killings to any group under his control or general auspices. He did describe how in order to fight the PKK by their own methods, he set up teams of PKK confessors, who spoke Kurdish and wore PKK dress. They initially went round the villages to gather intelligence. They passed on information about PKK sympathisers and later began to pick them up, interrogate and kill them. Yalçın stated that Ersever referred to the Can and Kaya murders as an example of this pattern. He said that Ersever did not refer to them by name but as the doctor and lawyer from Elazığ. He described how two PKK confessors went to the house of the lawyer, who was regarded as a PKK

sympathiser and told him that there was a clash and that their comrades were injured. When they went to meet outside town, they were taken and interrogated before being killed. Ersever named Ahmet Demir, known as "Yeşil" as the ring leader of the group of confessors operating in the Diyarbakır-Tunceli-Elazığ area. He was responsible for the assassinations there. Mehmet Yazıcıoğulları was also named as involved.

327. The Commission observes that, when questioned by the Delegates about the information given to him by Ersever, Soner Yalçın was unable to say whether the State authorities knew about the actions that this group carried out or whether Ersever acted on his own initiative or on instructions from superior officers. His opinion was however that the authorities turned a blind eye.

328. The Commission notes that Yalçın's description of Ersever's account of the murder is consistent with the description of events recounted by Fatma Can and Şerafettin Özcan, which had not been made public previously. Further, as the applicant has submitted, Ersever's revelations are consistent also with the descriptions in the Susurluk report of the activities of confessor groups (see below). It concludes that Soner Yalçın's evidence concerning Ersever, although strictly speaking hearsay, is strongly probative concerning the formation of confessor groups by the security forces and the involvement of such groups in unlawful killings, including those of Metin Can and Hasan Kaya.

Erhan Öztürk's confessions

329. Erhan Öztürk was named in the Özgür Gündem and Aydınlık newspapers as having confessed that he had been trained as a contra-guerilla while in prison and on his release met Yeşil who took orders from the Minister of the Interior. According to this account, Yeşil obtained the address and telephone number of Metin Can from the Elazığ Security Directorate and on his instructions, they went to Can and Kaya, introduced themselves as PKK members and asked them to treat a wounded person. Can and Kaya were interrogated at the Elazığ Security Directorate by Yeşil, the Syrian İdris Ahmet and two or three security officers. Öztürk later executed them both at a bridge near Tunceli. Mehmet Mehmetoğlu was named also as involved. The source of this information appears to be a press release from the Kurdish news agency (Kurd-HA), which based itself on confessions made by Öztürk who had been captured by the PKK.

330. The Delegates heard evidence from Mehmet Mehmetoğlu. He confirmed that he knew İdris Ahmet and Erhan Öztürk but denied any involvement in any killings or contra-guerilla activities, stating that he had been at Hazro at the time of Can's and Kaya's murder. He had heard that Öztürk had fallen into a PKK trap set up by his brother in Malazgirt. A man told him that Öztürk had been tortured and executed by the PKK, after he had been interrogated. His statements and a video had been sent to the press. Mehmetoğlu's evidence was surprising to the extent that this was the first occasion that the Commission had been informed that Erhan Öztürk was allegedly dead. The Commission had requested the Government to summon Erhan Öztürk as a witness but had been informed by the Government that they were unable to contact him.

331. The Commission considers that the source of Öztürk's "confession", and the fact that it was derived under some degree of

coercion, means that it must be approached with caution. The detailed version of the confession as cited in Soner Yalçın's book is also inconsistent with the account given by Fatma Can and Şerafettin Özcan, referring to the two men taking Metin Can from his home and then the doctor from his home. It also referred to the faces of the doctor and lawyer being smashed to pieces, which does not accord with the autopsy evidence in respect of Hasan Kaya. It stated that they were shot with a 16mm rifle, while the ballistics report mentions 9mm parabellum cartridges being found at the scene.

332. Şerafettin Özcan, who had had sketch drawings made up of the two men who came to Can's house, said that he had identified one of them from the photograph of Erhan Öztürk which appeared in the newspaper. It is also to be remarked that according to Fatma Can one of the men was Syrian, fairhaired, with hazel eyes which accords with the description given of İdris Ahmet in the press. The Commission cannot however rely on these elements in reaching any findings of fact. It would note again however that it raises questions which could usefully have been pursued further in a domestic investigation.

Susurluk report

333. This report, issued by the Prime Minister's office, contains a remarkable analysis of the situation and events in particular in south-eastern region, covering the Special Warfare Department, MİT, JİTEM, confessors, village guards, organised crime, drugs smuggling and financial and banking connections. It reaches the conclusion that certain persons and groups, acting outside legal structures but with the knowledge of the authorities, carried out unlawful actions, including killings, in furtherance of perceived interests in suppressing PKK sympathisers or of their own interests. Ersever is named as the organiser of JİTEM, which used confessors, and Yeşil, who with his group of confessors carried out extortions, kidnappings, rape, murder and torture, is mentioned as having close links with MİT and JİTEM.

334. The name of Metin Can is expressly mentioned in the report in the context of the unlawful acts carried out by such persons with the knowledge of the authorities. The Commission acknowledges that this is persuasive evidence that the drafter of the report was of the opinion that Metin Can, and presumably Hasan Kaya, was deliberately targeted as a PKK sympathiser by one of these groups acting outside the law and that the authorities were aware of it. However, though the drafter appears to have had wide, official sources to draw on, the basis of his opinion is not apparent. As the Government have pointed out, the report is not a judicial or factfinding exercise. The report is an indication that strong suspicions exist as to contra-guerilla and State involvement in the deaths of Metin Can and Hasan Kaya but no more.

Lack of motive of the PKK

335. The Commission agrees that in the normal course of events the PKK would appear to have no motive to murder two persons suspected of PKK sympathies, and who had provided legal and medical services to suspected PKK members. The Government have previously submitted that the PKK are capable of carrying out attacks in order to throw blame on the security forces. The Commission is aware of the ruthlessness of this organisation. It would observe however that from the testimony of

Fatma Can and Şerafettin Özcan the two men who lured Metin Can and Hasan Kaya into an ambush claimed to be PKK members and there was no element of trying to throw suspicion on the security forces. This however cannot be regarded as a particularly persuasive element.

Concluding finding

336. In light of the above, the Commission cannot find that it is established beyond reasonable doubt that Hasan Kaya and Metin Can were killed by PKK confessors acting under the direction or with the knowledge of any State authority. It does find however that there is a significant body of evidence which supports a strong suspicion of connivance or knowledge by some elements of State security or intelligence agencies.

D. As regards Article 2 of the Convention

337. Article 2 of the Convention provides:

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

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

a. in defence of any person from unlawful violence;

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

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

338. The applicant submits that his brother Hasan Kaya was killed by contra-guerillas who were agents of the State, operating with full knowledge of the State organs and enjoying full immunity for their actions. They rely on the evidence referred to above (para. 312). They submit that the authorities at the very minimum tolerated and thus condoned the practice of "unknown perpetrator" killings as a counter-insurgency practice and that the comprehensive tolerance at a high level engages State responsibility in the killings. In that context, they refer to a repetition of acts - a pattern of unknown perpetrator killings - and a consistent indifference of the authorities who failed to take steps to end them.

339. The applicant also submits that there was a failure to provide the procedural protection required by Article 2 in that there was no adequate investigation into his brother's death. He points, inter alia, to the failure to collect forensic evidence at the scene of the crime and in the car, to take statements from possible witnesses at Yazıkonak and to the attitude of the public prosecutors, who refused to consider that the PKK were not responsible and failed to take a pro-active role in the investigation. He alleges that there is a practice of ineffective investigations, referring to the numerous Commission decisions in Turkish cases in which investigations had not been found

to furnish an effective remedy for the purposes of Article 26, as well as to the six cases in which the Commission's opinion on the merits included findings of inadequate domestic investigations into killings.

340. Finally, the applicant submits that the case discloses a violation of Article 2 in that the right to life is inadequately protected in domestic law. He argues that, where the domestic law or legal authorities permit actions, behaviour and practices in violation of the right to life to occur without proper investigation, this is a failure of domestic law to provide adequate protection. In this regard, he relies in particular on the practices of the prosecuting authorities in this case.

341. In very brief submissions, the Government deny the applicant's complaints under Article 2. They state that the facts still implicate terrorist involvement and that allegations of gendarme involvement at Pertek have not been clarified. They emphasise that the domestic investigation is still pending and that progress has recently been made in the investigation of unknown perpetrator killings. They submit however that the Susurluk report cannot be relied upon as a judicial document.

As regards responsibility for the killing of Hasan Kaya

342. The Commission recalls its finding above (para. 336) that it is unable to determine who killed Hasan Kaya. It is not established beyond reasonable doubt that it was a member of the security services or contra-guerilla agents acting on their behalf or with their knowledge.

343. However, this does not exclude the responsibility of the Government. The Commission has examined in addition whether the circumstances disclose any failure on the part of the Government to fulfil any positive obligation under Article 2 to protect the right to life.

344. The Commission recalls that Article 2 of the Convention, which safeguards the right to life, ranks as one of the most fundamental provisions in the Convention, and together with Article 3 of the Convention enshrines one of the basic values of the democratic societies making up the Council of Europe. It must be interpreted in light of the principle that the provisions of the Convention be applied so as to make its safeguards practical and effective (Eur. Court HR, McCann and others judgment of 27 September 1995, Series A no. 324, pp. 45-46, paras. 146-147).

345. Article 2 extends to but is not exclusively concerned with intentional killing resulting from the use of force by agents of the State. The first sentence of Article 2 para. 1 also imposes a positive obligation on Contracting States that the right to life be protected by law. In earlier cases, the Commission considered that this may include an obligation to take appropriate steps to safeguard life (see e.g. No. 7154/75, Dec. 12.7.78, D.R. 14 p. 31).

346. As a minimum, the Commission considers that a Contracting State is under an obligation to provide a framework of law which generally prohibits the taking of life and to ensure the necessary structures to enforce these prohibitions, including the provision of a police force with responsibility for investigating and suppressing infringements.

This does not impose a requirement that a State must necessarily succeed in locating and prosecuting perpetrators of fatal or life-threatening attacks. It does impose a requirement that the investigation undertaken be effective:

> "The obligation to protect the right to life under this provision, read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention', requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State." (Eur. Court HR, McCann and others, op.cit., p.49, para. 161)

347. The Commission would emphasise that effective investigation procedures and enforcement of criminal law prohibitions in respect of events which have occurred provide an indispensable safeguard.

348. The Commission is also of the opinion that for Article 2 to be given practical force it must be interpreted as requiring preventive steps to be taken to protect life from known and avoidable dangers. However, the extent of this obligation will vary inevitably having regard to the source and degree of danger and the means available to combat it. Whether risk to life derives from disease, environmental factors or from the intentional activities of those acting outside the law, there will be a range of policy decisions, relating, inter alia, to the use of State resources, which it will be for Contracting States to assess on the basis of their aims and priorities, subject to these being compatible with the values of democratic societies and the fundamental rights guaranteed in the Convention.

349. The extent of the obligation to take preventive steps may also increase in relation to the immediacy of the risk to life. Where there is a real and imminent risk to life to an identified person or group of persons, a failure by State authorities to take appropriate steps may disclose a violation of the right to protection of life by law. In order to establish such a failure, it will not be sufficient to point to mistakes or oversights or that more effective steps might have been taken. In the Commission's view, there must be an element of gross dereliction or wilful disregard of the duties imposed by law such as to conflict fundamentally with the essence of the guarantee secured by Article 2 of the Convention (see No. 23452/94, Osman and Osman v. UK, Comm. Rep. 1.7.97, pending before the Court, paras. 88-92).

350. The Commission has therefore examined whether the State has in this case protected the right to life of Hasan Kaya by the preventative and protective framework in place at the time of his death and by the investigative procedures implemented after his death.

a. The preventative and protective structures

351. The Commission observes that Turkish law prohibits murder and that there are police and gendarmerie forces which have functions to prevent and investigate crime, under the supervision of the judicial branch of public prosecutors. There are also courts which apply the provisions of the criminal law, in trying, convicting and sentencing offenders. However, where offences are committed by State officials,

in certain circumstances the public prosecutor has no competence to proceed but decisions to prosecute are taken by administrative councils (para. 266). Where it is considered that an offence is linked to terrorist or separatist elements, the jurisdiction of the ordinary courts is also removed and the cases determined by State Security Courts (para. 265).

352. The question remains whether this system functions in practice in respect of alleged killings perpetrated by State officials or by persons acting on their behalf.

353. The Commission recalls, firstly, that the administrative councils which have the jurisdiction to investigate allegations that killings have been committed by members of the security forces are comprised of civil servants (para. 266). In two cases, concerning alleged killings by the security forces, it has found that the members of the administrative councils who investigated the cases did not present the external signs of independence, that they were not safe from being removed and that they did not enjoy the benefit of legal guarantees protecting them against pressure from their superiors (see Nos. 21593/93, Güleç v. Turkey, Comm. Rep. 17.4.97, para. 226 and 21594/93 Oğur v. Turkey, Comm. Rep. 30.10.97, para. 136 pending before the Court). It noted in the Oğur case (op. cit., para. 140) that a member of an administrative council, who gave evidence before the Commission's Delegates, had stated that the members of the council had no effective freedom of decision and were bound to accept the views of the Governor. The Commission found in both cases that this procedure disclosed a breach of the State's duty to "protect the right to life by law", in that the investigations into the deaths were not carried out by independent bodies, were not thorough and took place without the party who had filed the criminal complaint being able to take part in it. In its judgment in the Güleç case (Eur. Court HR, judgment of 27 July 1998, paras. 80 and 82), the Court agreed that the administrative council did not provide an independent, investigative mechanism in respect of an alleged killing by the security forces.

354. The Commission has had careful regard in this context to the Susurluk report relied on by the applicant. It observes that this report, while expressly stated not to be an investigative or legal report, was drawn up under the instructions of the Prime Minister who has made the majority of it public. It is therefore a document of some significance. It does not purport to attribute responsibility or establish facts but describes and analyses certain problems brought to public attention. On this basis, it states that certain elements, particularly in the south-east, were operating outside the law and using methods which included extra-judicial executions of persons suspected of supporting the PKK. It also states that this was known to the relevant authorities. The report lends strong support to the allegations that State agencies, such as JİTEM, were implicated in the planned elimination of alleged PKK sympathisers, including Musa Anter and other journalists.

355. It is of considerable concern that, according to the report, the rule of law ceased to apply. The fact that the authorities were aware of and connived at unlawful acts, including murder, and that JİTEM and the groups acting under their auspices are described as operating

outside the military hierarchy substantiates allegations that the persons who carried out these acts were unaccountable to the normal processes of criminal justice.

356. The Commission has investigated over forty cases relating to incidents in the south-east over the period 1992-1994. It has heard evidence from over 35 public prosecutors, over 29 police officers and over 64 gendarmes in fact-finding missions. In the investigated cases in which to date it has made findings on the merits, it is to be noted that no prosecutions have been brought in respect of alleged unlawful conduct by persons acting under the responsibility of the State. Problems of inadequate and superficial investigations have been a common feature, including a tendency for the authorities to attribute blame for killings, disappearances or damage to property on terrorist groups and to ignore complaints or evidence that security forces or State agents were incriminated in events. The Commission has repeatedly found that public prosecutors have failed to pursue investigations of complaints that members of the security forces have acted unlawfully, disclosing an attitude of restraint which gives the security forces a wide margin of unaccountability (see eg. Aydın v. Turkey, Comm. Rep. 7.3.96, para. 202, Eur. Court HR, judgment of 25 September 1997, Reports 1997-VI). Specific failings identified include the ignoring of visible evidence, failure to question officers named as suspects, failure to verify custody records, failure to identify security force members involved in incidents and the discounting of evidence which supports allegations of security force involvement.[5] The Commission has consistently observed a readiness on the part of the authorities to place the blame for unlawful acts on PKK terrorists, even where there was no substantiated evidence as to PKK responsibility (see eg. Eur. Court HR, Kurt v. Turkey judgment of 25 May 1998, to be cited in Reports 1998, para. 141, Comm. Rep. 5.12.96, para. 228).

357. The Commission recalls in particular that in four cases where there have been allegations that security forces have used lethal force, there have been findings of violations, both regarding the failure to comply with the procedural requirements under Article 2 of the Convention to carry out effective investigations and the lack of effective remedy under Article 13 of the Convention. In Mehmet Kaya v. Turkey, the Commission noted that the authorities took it for granted that the applicant's brother had been killed by the PKK and did not seriously consider any other alternative (Eur. Court HR, judgment of 19 February 1998, Reports 1998-I, Comm. Rep. 24.10.96, para. 195 - see also the Court's judgment at para. 108). In Ergi v. Turkey, where the Commission found that the applicant's sister had been killed during an operation by the security forces which failed, through adequate planning and control, to respect the right to life, it noted that no independent enquiry had been made by the public prosecutor into the circumstances of the death, which had been attributed on the basis of no substantiated evidence to the PKK (Eur. Court HR, judgment of 28 July 1998, to be cited in Reports 1998, Comm. Rep. 20.5.97, paras. 152-154 -see also Court's judgment paras. 82-85). In Güleç v.

[5] See Eur. Court HR, Aksoy judgment of 18 December 1996, Reports 1996-VI, p. 2287, para. 99 and Comm. Rep. 23.10.95 para. 189; Tekin v. Turkey judgment of 9 June 1998, Reports 1998, para. 67 and Comm. Rep. 17.4.97, paras. 192-194, 238; Selçuk and Asker v. Turkey, judgment of 24 April 1998, Reports 1998-II, para. 97 and Comm. Rep. 28.11.96, para. 196; Çakıcı v. Turkey, No. 23657/94, Comm. Rep. 12.3.98, para. 284; Oğur v. Turkey, No. 21549/93, Comm. Rep. 30.10.97, paras. 137-139, pending before the Court.

Turkey, where the applicant's son was killed during a demonstration, the Commission found that the investigation was inadequate, ignoring evidence that the son had been hit by bullets fired from an armoured vehicle of the security forces (Eur. Court HR, judgment of 27 July 1998, to be cited in Reports 1998, Comm. Rep. 17.4.97, paras. 227 and 237 - see also Court's judgment at paras. 79-80). In Oğur v. Turkey, where the applicant's son was killed by security forces at a mine, the Commission found the authorities failed to seek to identify the members of the security forces involved in the incident or to make enquiry from the security personnel as to what occurred (No. 21549/93, Comm. Rep. 30.10.97, paras. 137-139, pending before the Court).[6]

358. The Commission concludes that during the period relevant to this application, namely, during and about 1993, there was a consistent disregard of allegations made of involvement of security forces or State agents in unlawful conduct. Public prosecutors appeared unwilling, or unable, to pursue enquiries about matters involving the police or gendarmerie, with the result, inter alia, that assertions by the security forces attributing deaths or disappearances or destruction of property to the PKK, were accepted without seeking independent verification or substantiation.

359. The Commission observes that the functioning of the court system also gives rise to legitimate doubts as regards the independence and impartiality of the State Security Courts, which have jurisdiction to try offences purported to be carried out by terrorists. In practice, it appears that killings by unknown perpetrators have been considered as falling under their jurisdiction also.[7] The main distinguishing feature of these courts which were set up pursuant to the Constitution to deal with offences affecting Turkey's territorial integrity and national unity, its democratic regime and its State security, is that, although they are non-military courts, one of their judges is always a member of the Military Legal Service. In finding a breach of Article 6 of the Convention in İncal v. Turkey (Eur. Court HR, judgment of 9 June 1998, to be cited in Reports 1998), the Court held that in cases concerning civilians the participation of a military member may give rise to legitimate fears that the State Security Court might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case. This discloses a significant procedural defect which potentially applies to the numerous cases in which suspects of alleged terrorist and separatist offences have been tried by the State Security Courts.

360. Having regard to the above factors, the Commission finds that the legal structures in the south-east of Turkey during the relevant period in this case, namely, in or about 1993, operated in such a manner that

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[6] Violation of procedural obligations under Article 2 and failure to provide an effective remedy under Article 13 were also found, most recently, in the case of a case of a killing and wounding by an unknown perpetrator in Yaşa v. Turkey (Eur. Court HR judgment of 2 September 1998, to be reported in Reports 1998). See also the Commission's report in Tanrikulu v. Turkey, No. 23763/94, Comm. Rep. 15.4.98, pending before the Court, where the Commission found that the investigation into the killing of the applicant's husband by unknown persons was so inadequate and ineffective as to amount to a failure to protect the right to life.

[7] See also Tanrikulu, supra, where the Silvan public prosecutor issued a decision of lack of jurisdiction referring the killing of the applicant's husband by two unknown perpetrators to the prosecutor's office at the State Security Court.

security force personnel and others acting under their control or with their acquiescence were often unaccountable for their actions. It considers that this situation was incompatible with the rule of law which should apply in a democratic state respecting fundamental human rights and freedoms.

361. This finding is not however sufficient by itself to found a violation of Article 2 of the Convention, which requires that an applicant demonstrate that he is himself a victim of the breach alleged. There must be a direct connection between the general failings above and the particular circumstances of the case.

362. The Commission notes its finding that Hasan Kaya was suspected of being a PKK sympathiser and that he was victim of kidnapping and murder in an incident also involving his friend Metin Can, a lawyer suspected of being a PKK sympathiser, named as a victim in the Susurluk report. The Commission further recalls its finding that there is strong suspicion, supported by some evidence, to substantiate the allegations that persons identified as PKK sympathisers were at risk derived from targeting by State officials or those acting on their behalf or with their connivance or acquiescence (para. 336). There are factors in this case which raise grave doubts that have not been dispelled by the official investigation. In particular, there is the circumstance in which the applicant's brother was transported from Elazığ to Tunceli (paras. 315-316); the eyewitness statements of gendarme links with a wanted suspect Yusuf Geyik; the consistency of Ersever's account of the killing of a doctor and lawyer at Elazığ with the evidence of Fatma Can and Şerafettin Özcan; and the substantiation of his general veracity by the Susurluk report.

363. The Commission consequently concludes that the applicant's brother fell into a category of people who were at risk from unlawful violence from targeting by State officials or those acting on their behalf or with their connivance or acquiescence. In respect of this risk, the applicant's brother did not enjoy the guarantees of protection required by the rule of law. It is to be remarked that, while allegations of State-sanctioned contra-guerilla groups, the misuse of confessors and the implication of State officials in unknown perpetrator killings were current from an early stage, the responsible State authorities ignored or discounted them, consistently laying the blame on PKK or other terrorist groups.[8]

b. The investigation into the killing of Hasan Kaya

364. The Commission notes that the investigation included many of the necessary initial measures, as regards the scene of crime and discovery of material evidence (para. 296). It has noted however a number of omissions and defects:

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[8] eg. No. 22492/93, Kılıç v. Turkey, Comm. Rep. 23.10.98, in which case the killing of the journalist Kemal Kılıç by an unknown perpetrator was investigated as terrorist crime, notwithstanding concerns about the targeting of persons connected with the Özgür Gündem. See also Yaşa v. Turkey, Eur. Court HR judgment of 2 September 1998, to be reported in Reports 1998, para. 105, where despite a total lack of progress in the investigation, the Government asserted that the shooting of the applicant and the killing of his uncle by unknown perpetrators were the acts of terrorists.

- the brief, unsatisfactory first autopsy report was remedied in some respects by the second. However the second report still did not make findings or give explanations as to the possible causes of some of the injuries;
- no attempt was made to analyse whether the victims were killed at the spot or transported there afterwards, in the autopsy reports or any other forensic analysis;
- there was no investigation of how Can and Kaya could have been transported from Elazığ to Tunceli;
- there was no documented attempt to check custody records at Tunceli;
- there was no documented attempt to find or take statements from possible witnesses at Yazıkonak;
- there was no follow-up of the conflicting evidence from Pertek, by way of verifying the existence of partly-named gendarmes or other witnesses;
- no attempt was made to interview Soner Yalçın as regards his sources of information;
- there was no follow-up of the allegations that Mehmet Mehmetoğlu, İdris Ahmet or Erhan Öztürk were involved in the killing;
- there was no serious attempt to locate Mahmut Yıldırım/Yeşil or discover information as to his background and identity.

365. The Commission notes that the prosecutors involved did respond to matters raised by members of the family and the press but rarely initiated their own lines of enquiry. It recalls its finding that they appeared to stop as soon as they met with denials or claims of ignorance (para. 311). Such steps as were taken were often dilatory. It notes an absence of any significant investigative input in the file from 5 May 1993 to September 1993 when activity was stirred by a petition from a lawyer and President of Tunceli HRA; the delay from May to November 1993 in seeking further information about the beerhouse incident in Pertek; a delay from 17 November 1993 to April 1994 in obtaining Hüseyin Kaykaç's second statement; and an absence of meaningful, investigative steps from April 1994 until Judge Major Bulut's request for action on the file in his letter of 13 March 1995. According to the evidence of Judge Major Bulut, from May 1995 to February 1997 only a limited number of steps were taken (paras. 234 and 310).

366. The Commission considers that the periods of inaction and the failure to follow certain leads may derive from, and certainly were not assisted by, the way in which the case was transferred on four occasions. It also notes Judge Major Bulut's explanation for the delay in taking action, namely, that he had 500 other files to deal with. This might explain the dilatoriness and lack of focused attention on the case but does not justify it in terms of Article 2.

367. The Commission has found that strong suspicions existed that a contra-guerilla group acting under the auspices of the State agencies was involved in the kidnapping and killing of Hasan Kaya (para. 336). In these circumstances, there was a particularly pressing need for the investigative authorities to act effectively and diligently in confirming or dispelling the rumours. The Commission is struck however by the apparent impotence of the public prosecutors faced with these allegations. It observes that the public prosecutors in the south-east at this time relied heavily on their police and gendarme collaborators, particularly where their own safety was at risk from terrorist activities. A reluctance to entertain the possibility that the police

or gendarmes had acted unlawfully might in those circumstances be a natural reaction. The Commission acknowledges that there must also have been a practical dilemma as to how a public prosecutor could investigate the officers who were meant to be carrying out his investigations. Under those conditions, it would perhaps appear easier and safer to ignore or discount such allegations. The Commission notes that while allegations of State-sponsored counter-guerilla activities were current from an early stage in the media, known to ordinary citizens and subject to enquiry by a delegation of the Turkish Grand National Assembly (para. 158), two of the public prosecutors who gave evidence before the Commission's Delegates were reluctant to admit that they had ever heard of any such phenomenon. Süleyman Tutal, a public prosecutor at Elazığ, had never heard of contra-guerillas in Elazığ or of Yeşil. While Hayati Eraslan, the prosecutor from Tunceli, had heard rumours in the press about Yeşil and contra-guerillas, he was able to assert there was no such activity in his area and knew nothing of the National Assembly delegation which had come to Tunceli in 1991 or that Yeşil was alleged to work for the State and had been involved in killing Can or Kaya.

368. The Commission finds that in light of these fundamental defects the investigation cannot be regarded as providing an effective procedural safeguard under Article 2 of the Convention.

c. Concluding findings

369. Having regard to the facts of this case which disclose a lack of effective guarantees in respect of unlawful conduct by State agents and the defects in the investigative procedures carried out into the kidnapping and killing of Hasan Kaya, the Commission finds that the State did not comply with their positive obligation to protect Hasan Kaya's right to life.

CONCLUSION

370. The Commission concludes, unanimously, that there has been a violation of Article 2 of the Convention in relation to the death of Hasan Kaya.

E. As regards Article 3 of the Convention

371. Article 3 of the Convention provides:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Concerning Hasan Kaya

372. The applicant submits that his brother was tortured before his death. He refers to the autopsy report which records bruises and other injuries. He also argues that his brother was a victim of degrading treatment in that he was ill-treated because of his ethnic origin.

373. The Government have made no separate submissions on this point.

374. The Commission recalls its findings above (para. 290) that Hasan Kaya suffered physical injury prior to his death. The exact circumstances in which the injury was inflicted is unknown. However,

the Commission is satisfied that the existence of bruises, scratches and wounds on the wrists from being bound from wire and evidence that Hasan Kaya's feet were exposed in winter conditions to water or snow for a long period establishes beyond a reasonable doubt that he suffered inhuman and degrading treatment within the meaning of Article 3.

375. As regards State responsibility for this treatment, the Commission recalls that it is not established that any State officer was involved or knew of Hasan Kaya's disappearance and killing. The same applies to the infliction of inhuman and degrading treatment. However, the Commission found that State responsibility existed as regards a failure to protect Hasan Kaya's right to life by law under Article 2 of the Convention. It is satisfied on the same basis that State responsibility is engaged in respect of ill-treatment which he suffered between his disappearance and murder. It finds no separate issue arising in respect of the complaint that the applicant's brother suffered degrading treatment.

CONCLUSION

376. The Commission concludes, by 26 votes to 2, that there has been a violation of Article 3 of the Convention in relation to the treatment suffered by Hasan Kaya.

Concerning the applicant

377. The applicant submits that the anguish endured by himself and his family over the six days when his brother was missing constituted inhuman and degrading treatment. He relies on the uncertainty during this period and the heightened distress resulting from the telephone calls to the house during which sounds of torture were heard.

378. The Government have made no separate submissions on this point.

379. The Commission recalls that in Kurt v. Turkey (No. 24276/94, Comm. Rep. 5.12.96, para. 220, Eur. Court HR judgment of 25 May 1998, Reports 1998 at para. 133-134) and Çakıcı v. Turkey (No. 23657/94, Comm. Rep. 12.3.98, para. 259, pending before the Court) it found that the applicants had suffered inhuman treatment resulting from the prolonged anguish and distress suffered in respect of the disappearance of their son, and brother, respectively. These findings were however in the context of the years of uncertainty resulting from the disappearance. The disappearance in the present case lasted six days and cannot be considered as falling within the specific phenomenon of involuntary disappearances, the primary characteristic of which is that the family is never told anything, or very little, about the fate of the person concerned.

380. As regards the aggravating factor of the telephone calls, the Commission notes that the applicant did not himself receive one of these calls. The information concerning these calls is derived only from the applicant's recollection of what his brother said of them. His father did not make detailed mention of them in any of his statements to the public prosecutors. The Commission does not doubt that the applicant and his family suffered great distress from the circumstances in which his brother failed to return home and was found dead six days

later. However, the Commission does not find that the uncertainty and anxiety suffered by the applicant reaches the threshold of severity imposed by Article 3 in respect of inhuman and degrading treatment (see eg. Eur. Court HR, Ireland v. the United Kingdom judgment, op.cit, p. 65, para. 162).

CONCLUSION

381. The Commission concludes, unanimously, that there has been no violation of Article 3 of the Convention in respect of the applicant.

F. As regards Articles 6 and 13 of the Convention

382. Article 6 of the Convention provides in its first sentence:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

383. Article 13 of the Convention provides as follows:

> "Everyone whose rights and freedoms as set forth in this 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."

384. The applicant complained in his application of both a lack of access to court contrary to Article 6 of the Convention and of a lack of effective remedies in respect of his complaints under Article 13 of the Convention. In his observations on the merits, the applicant's submissions concern solely his complaints under Article 13. He argues that there was no effective investigation into the killing of his brother. He submits that the system in the south-east fails to satisfy the requirements of Article 13 due to the lack of judicial officials with the independence and willingness to contemplate the possibility that agents of the State have violated human rights. He alleges that there are basic problems disclosed in official attitudes and practical inadequacies. He also refers to failings in autopsy and forensic practices. The applicant further submits, relying on the findings of lack of effective remedies in other cases, that violation of Article 13 occurs as a matter of practice in the south-east and thus he is a victim of an aggravated violation of this provision.

385. The Government have denied that there is any problem with remedies, relying on the pending investigation in this case which will continue until the end of the statutory 20 year period. They state that progress is being made into the investigation of unknown perpetrator killings and that nationwide investigation will definitely bring to light any illegal acts, whoever carried them out.

386. Having regard to the findings of the Court in previous cases (eg. Eur. Court HR, Aydın v. Turkey judgment of 25 September 1997, Reports 1997, para. 102, Kaya v. Turkey judgment of 19 February 1998, to be reported in Reports 1998, para. 105), the Commission has found it appropriate to examine the applicant's complaints about remedies under Article 13 of the Convention alone.

387. The Commission recalls that, in concluding that there was a violation of Article 2 of the Convention, it found that the system of criminal justice in the south-east disclosed serious problems of accountability of members of the security forces and that in the particular circumstances of the case the investigation into the applicant's brother's death was inadequate. It recalls however that the Court has held that the requirements of Article 13 are broader than the procedural requirements of Article 2 to conduct an effective investigation (Eur. Court HR, Kaya v. Turkey judgment of 19 February 1998, to be cited in Reports 1998, para. 107). Where relatives have an arguable claim that the victim has been unlawfully killed in circumstances engaging the responsibility of the State, the notion of Article 13 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 and including effective access for the relatives to the investigatory procedure (see also, Eur. Court HR, Ergi v. Turkey, op. cit., para. 96-98)

388. The Commission recalls its findings above on the inadequacies of the investigation, in particular, the failure to pursue enquiries as to the involvement of alleged contra-guerilla groups in the death of Hasan Kaya (paras. 364-368). Having regard to the fact that the investigation has already lasted more than five and a half years without any progress being made the Commission also finds that the applicant has been denied an effective remedy against the authorities in respect of the death of his brother, and thereby access to any other available remedies at his disposal, including a claim for compensation.

389. In light of its findings above, the Commission finds it unnecessary to examine the applicant's complaints as regards an alleged practice of failure to provide effective remedies under Article 13.

CONCLUSION

390. The Commission concludes, by 27 votes to 1, that there has been a violation of Article 13 of the Convention.

G. <u>As regards Article 14 of the Convention</u>

391. Article 14 of the Convention provide as follows:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

392. The applicant maintains that his brother was clearly a victim of violations of his rights under Articles 2, 3 and 13 of the Convention because of his political opinions (namely, as person hostile to the State's policy towards the Kurdish question) and because of his Kurdish origin. Most of the victims of unknown perpetrator killings were Kurdish and the State chose to support an extrajudicial killing system to eliminate alleged PKK sympathisers, its attitude being in practice that all Kurdish civilians fell into that category.

393. The Government have not addressed these allegations beyond denying the factual basis of the substantive complaints.

394. The Commission has examined the applicant's allegations in the light of the evidence submitted to it. However, in light of its findings above (paras. 369-370), it considers that no separate issue arises under Article 14 of the Convention in conjunction with the provisions invoked by him.

CONCLUSION

395. The Commission concludes, unanimously, that no separate issue arises under Article 14 of the Convention.

H. Recapitulation

396. The Commission concludes, unanimously, that there has been a violation of Article 2 of the Convention (para. 370 above).

397. The Commission concludes, by 26 votes to 2, that there has been a violation of Article 3 of the Convention in respect of the applicant's brother (para. 376 above).

398. The Commission concludes, unanimously, that there has been no violation of Article 3 of the Convention in respect of the applicant (para. 381 above).

399. The Commission concludes, by 27 votes to 1, that there has been a violation of Article 13 of the Convention (para. 390 above).

400. The Commission concludes, unanimously, that no separate issue arises under Article 14 of the Convention (para. 395 above).

M. DE SALVIA
Secretary
to the Commission

S. TRECHSEL
President
of the Commission

(Or. French)

PARTLY CONCURRING AND PARTLY DISSENTING OPINION OF Mr I.C. BARRETO

Je regrette de ne pas pouvoir me rallier à l'ensemble du raisonnement de la Commission concernant la violation de l'article 2 de la Convention.

Pour moi, s'il est clair que l'Etat turc a violé l'article 2 compte tenu de ce que l'obligation de protéger le droit à la vie inclut un aspect procédural, j'éprouve des difficultés à suivre l'approche de la majorité qui a vu, de surcroît, un manquement à l'obligation positive de protéger la vie du frère du requérant.

Je note qu'à la différence de l'affaire Kiliç, la victime ne s'est jamais adressée aux autorités pour faire état des menaces proférées à son encontre.

Or on ne saurait déduire de l'article 2 une obligation positive d'empêcher toute possibilité de violence (voir N° 9348/81, déc. du 28.2.83, D.R. 32, p. 190, et N° 22998/93, déc. du 14.10.96, D.R. n° 87-A, p. 24).

Il me semble que c'est aller trop loin que de demander à l'Etat turc de prendre des mesures spéciales pour protéger, dans le sud-est du pays, tous ceux qui, d'une façon ou d'une autre, se manifestent comme sympathisants du PKK.

Je me borne à dire que l'exigence de mesures de protection de la vie d'une personne doit être conditionnée par l'existence de menaces portées à la connaissance des autorités.

Ceci m'amène à ne pas constater un manquement à l'obligation positive découlant de l'article 2 de la Convention, puisque l'Etat n'était pas en mesure de prévoir ni, par voie de consequence, d'écarter la torture infligée à la victime.

APPENDIX I

DECISION OF THE COMMISSION

AS TO THE ADMISSIBILITY OF

Application No. 22535/93
by Mahmut KAYA
against Turkey

The European Commission of Human Rights sitting in private on 9 January 1995, the following members being present:

MM. H. DANELIUS, Acting President
C.L. ROZAKIS
F. ERMACORA
E. BUSUTTIL
G. JÖRUNDSSON
S. TRECHSEL
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
Mrs. G.H. THUNE
Mr. F. MARTINEZ
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
D. ŠVÁBY
E. KONSTANTINOV
G. RESS

Mr. M. DE SALVIA, Deputy Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 20 August 1993 by Mahmut KAYA against Turkey and registered on 26 August 1993 under file No. 22535/93;

Having regard to:

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 23 June 1994 and the observations in reply submitted by the applicant on 5 July, 7 July and 2 August 1994;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, a Turkish citizen of Kurdish origin, was born in 1958 and resides at Elazığ. At the present time he is in Switzerland. He is represented before the Commission by Professor Kevin Boyle and Ms. Françoise Hampson, both university teachers at the University of Essex. The applicant states that he is bringing the application on his own behalf and on behalf of his deceased brother, Hasan Kaya.

The facts as submitted by the parties may be summarised as follows.

A. The particular circumstances of the case

The applicant states that the following occurred:

Hasan Kaya was born in 1966 and practised medicine since May 1992 at Poyraz Health Clinic in Elazığ province. Prior to that, between November 1990 and May 1992, he practised medicine in the province of Şırnak.

Hasan Kaya was threatened for treating demonstrators wounded as a result of firing by State forces during the Newroz celebrations in 1992. When he attended the funeral of a journalist who had been killed, the Şırnak Chief of Security told him that his end would be like that of the journalist. He belonged to no political organisation.

Hasan Kaya had been a friend of Metin Can, an advocate and the Director of the Elazığ Human Rights Association. Metin Can had conducted the defence of Kurdish political prisoners in Elazığ prison. He had made public the poor conditions and ill-treatment in the prison.

On 21 February 1993, Metin Can received a telephone call at home. Two persons whose identities were unknown to him asked to meet him. They later came to his house and asked for help with the treatment of someone who had been injured. Metin Can telephoned Hasan Kaya and the Secretary of the Elazığ Human Rights Association, Şerafettin Özcan. The two unknown persons left the house, having arranged to meet later at 19.00.

Metin Can and Hasan Kaya left the house together at 19.00 to "treat the wounded". Metin Can's wife, Fatma, and the Secretary of the Human Rights Association waited for them at Can's home.

On 22 February 1993, Mrs. Can received a telephone call from an unknown person who said, "We have killed them both". Mrs. Can called the police. Later on the same day the police received information that an ownerless parked car had been found, the registration number being that of the car which Hasan Kaya had been using.

On 23 February 1993, Mrs. Can received another telephone call from an unknown person who said, "They are both in our hands". Later on the same day, sounds of torture and music were played over four telephone calls at half-hourly intervals to the home of Hasan Kaya. Towards the evening the shoes of Metin Can were found by relatives and handed over to the police who said mockingly, "His trousers will come tomorrow".

On 26 February 1993, the applicant and his family heard that two persons had died at Tunceli Security Headquarters. The information was passed on to the Elazığ police. A judge and a police officer have made statements during a conversation with an advocate to the effect that Metin Can and Hasan Kaya had been taken to Tunceli Security Headquarters. The police authorities showed no interest in the report and simply said that the information was groundless.

On 27 February 1993, it was learnt that two bodies had been found under the Dinar Bridge, about 15 kilometres from Tunceli city. The applicant identified one of the bodies as being that of his brother. The other body was that of Metin Can. Near the bodies empty cartridges were found, but there was no blood on the ground and no mud on the victims' socks, which may suggest that they had been killed elsewhere and the bodies then dumped by the river. The bodies were taken to Elazığ where an autopsy was made. It was established that Metin Can and Hasan Kaya had been shot and had died on 26 February 1993 at about 22.00. There were no bullets in their heads. Their hands had been bound. It has been suggested that their feet had been in water and snow for a long period, but this is not clear. Another suggestion has been that the condition of their feet was due to torture. A surgeon has stated that the post mortem examination was very badly performed and that it was probably deliberately vague in order to focus the attention on the head injury only.

In the applicant's opinion, his brother had been tortured. When he briefly saw his brother's body to identify it, he noticed a bruise on the forehead; marks on the nail beds of the fingers; an open wound on the knee; marks of a sharp instrument around the left ankle and the condition of the feet referred to above.

The applicant and his family have obtained further information about what had happened. Metin Can and Hasan Kaya were seen by people in Yazıkonak village, where the car which Hasan Kaya had been driving was found. The witnesses, who do not wish their names to be revealed, saw Metin Can and Hasan Kaya being forced into another vehicle by people using walkie-talkies. The two men were resisting. Fuel was bought for the vehicle from a petrol station by the side of the road. The attendant knew Metin Can and asked him where they were going. Can answered that they were going somewhere with the officers.

The applicant has obtained information from a policeman indicating that the murders of Metin Can and Hasan Kaya were carried out by State forces. There has also been information in the daily Tercüman newspaper as to how the murders were carried out.

Some time after the murders, there was a television programme where the Director General of the Human Rights Association, Akin Birdal, said to the Deputy Prime Minister Erdal Inönü that the killers of Metin Can and Hasan Kaya were contraguerillas. Inönü denied that there were any contraguerillas in Turkey. A person by the name of Yusuf Geyik, who was watching the programme in the Pertek Beerhouse in the Pertek district of Tunceli, reacted to the statement by Inönü by saying, "You are lying. We killed Metin and Hasan." In view of the unrest which followed, he made a call to the Pertek District Commander on his walkie-talkie, introducing himself as a "mobile team agent" and leaving shortly afterwards with a gendarme.

Mrs. Can and Serafettin Özcan would recognise the two persons who called on Metin Can and Hasan Kaya, claiming to seek treatment for someone who had been wounded.

Serafettin Özcan is currently in Germany as he has no guarantee of safety. The applicant has submitted the application rather than his mother and father, because of the risk that their lives would be threatened if they were to open such a case. As he has no guarantee of safety, the applicant is currently in Switzerland.

On 18 May 1993, the applicant's father made complaint to the Tunceli-Pertek public prosecutor and the Tunceli chief public prosecutor. He addressed a further request for investigation to be made to the chief public state prosecutor on 13 April 1993 and to the Elazig chief public prosecutor on 14 February 1994. In the request dated 14 February 1994, the applicant's father referred to newspaper reports in which a Major Ersever, a former State of Emergency Gendarme Intelligence leader, revealed details of a contraguerilla undercover force and identified the leader of the contraguerilla force who killed the applicant's brother and Metin Can as Mahmut Yildrim, code-named Yesil, an official agent working for the interests of the police. The applicant's father requested that the alleged perpetrator be arrested. A state prosecutor in Elazig is alleged to have said to the applicant's father that "this investigation is above our powers".

The Government state that the investigations into the killings of Hasan Kaya and Metin Can are being carried out by the Erzincan State Security Court prosecutor which has taken over the two separate investigations in Tunceli and Elazig (where the kidnapping took place). They submit that the advocate who allegedly told the applicant that the two kidnapped men had been taken to Tunceli police headquarters denied that he had had any information as to the whereabouts of the men.

The Government have stated further:

Hasan Kaya and Metin Can were found killed under a bridge at Dinar, 12 kilometres from Tunceli on the Tunceli-Elazig state road. There was one shot on each body directed to their skull with a 9 mm shotgun. Necessary investigations were carried out at the State Hospital with the attendance of a doctor. Two 9 mm shells were recovered at the area and were collected as evidence.

When the bodies were brought to Elazig, an autopsy was carried out. The autopsy showed that Hasan Kaya had been shot from the oxipital area of the head and had died due to brain damage, and that Metin Can had also been shot in the head and had died of brain damage. There were no other injuries on their bodies.

The bullets were evaluated forensically and it was found out that they had been fired from the same weapon and that the weapon had also been used in other terrorist incidents.

A watchman by the name of Ihsan Denizhan found two pairs of shoes close to a shoe shop across the Social Democratic People's Party building at Elazig Cakir Police Headquarters. When he searched the contents of a handbag, he found the shoes, and a person passing by said that they belonged to his missing brother Metin Can. The watchman kept the shoes as evidence and gave them to the headquarters. There the

shoes were shown to Hasan Kaya's brother and Metin Can's brother who could not identify the shoes, as reported in their written testimony of 24 February 1993.

B. Relevant domestic law and practice

Criminal procedures

The Turkish Criminal Code makes it a criminal offence to subject some-one to torture or ill-treatment (Article 243 in respect of torture and Article 245 in respect of ill-treatment, inflicted by civil servants). As regards unlawful killings, there are provisions dealing with unintentional homicide (Articles 452, 459), intemtional homicide (Article 448) and murder (Article 450).

For criminal offences, complaints may be lodged, pursuant to Articles 151 and 153 of the Code of Criminal Procedure, with the public prosecutor or the local administrative authorities. The public prosecutor and the police have a duty to investigate crimes reported to them, the former deciding whether a prosecution should be initiated, pursuant to Article 148 of the Code of Criminal Procedure. A complainant may appeal against the decision of the public prosecutor not to institute criminal proceedings within fifteeen days of being notified (Article 165 of the Code of Criminal Procedure).

If the alleged author of a crime is a State official or civil servant, permission to prosecute must be obtained from local administrative councils. The local council decisions may be appealed to the State Council; a refusal to prosecute is subject to an automatic appeal of this kind.

Civil action for damages

Pursuant to Article 41 of the Civil Code, an injured person may file a claim for compensation against the alleged perpetrator:

> "every person who causes damage to another in an unlawful manner, be it wilfully or be it negligently or imprudently, is liable for compensation."

Pursuant to Article 46, any victim of an assault may claim material damages:

> "The person who has been injured is entitled to compensation for the expenses as well as for the losses resulting from total or partial disability to work due regard being had to the detriment inflicted on the economic future of the injured party."

Moral damages may also be claimed under Article 47:

> "...the court may, taking into consideration the particular circumstances, award adequate general damages to the injured..."

COMPLAINTS

The applicant complains of violations of Articles 2, 3, 6, 13 and 14 of the Convention.

As to Article 2, he complains that his brother was killed in circumstances suggesting that undercover agents of the State were involved, or that the killing took place in violation of the State's obligation to protect his right to life. He further complains of the lack of any effective system for ensuring protection of the right to life and of the inadequate protection of the right to life in domestic law.

As to Article 3, the applicant complains of his brother having been tortured. He considers that he is himself the victim of a violation of Article 3 as a result of his inability to discover what had happened to his brother. Finally, he alleges a violation of Article 3 on account of discrimination on grounds of race or ethnic origin.

As to Article 6, the applicant complains of the failure to initiate proceedings before an independent and impartial tribunal against those responsible for the killing, as a result of which the applicant cannot bring civil proceedings arising out of the killing. The applicant is therefore denied effective access to court.

As to Article 13, the applicant complains of the lack of any independent national authority before which his complaints can be brought with any prospect of success.

As to Article 14, he complains of discrimination on the grounds of race and/or ethnic origin in the enjoyment of the rights guaranteed under Articles 2, 3, 6 and 13 of the Convention.

The applicant considers that there is no requirement that he pursue alleged domestic remedies, since any alleged remedy is illusory, inadequate and ineffective because

(a) there is an administrative practice of non-respect for the rule which requires the provision of effective domestic remedies (Article 13);

(b) there is an administrative practice of unlawful killing at the hands of undercover forces of the Turkish security forces in South-East Turkey;

(c) whether or not there is an administrative practice, domestic remedies are ineffective in this case, owing to the failure of the legal system to provide redress;

(d) whether or not there is an administrative practice, the situation in South-East Turkey is such that potential applicants have a well-founded fear of the consequences, should they pursue alleged remedies.

The applicant also refers to the arguments raised in Application Nos. 21895/93 Cagirge v. Turkey, Dec. 19.10.94 and 22057/93, Kapan v. Turkey).

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 20 August 1994 and registered on 26 August 1993.

On 29 November 1993, the Commission decided to communicate the application to the Government and to ask for written observations on the admissibility and merits of the application.

The Government's observations were submitted on 10 March 1994 after two extensions in the time-limit. The applicant submitted further information and observations in reply on 5 July, 7 July and 2 August 1994.

THE LAW

The applicant alleges that his brother was killed in circumstances for which the State is responsible. He invokes Article 2 (the right to life), Article 3 (prohibition on inhuman and degrading treatment), Article 6 (the right of access to court), Article 13 (the right to effective national remedies for Convention breaches) and Article 14 (prohibition on discrimination).

Exhaustion of domestic remedies

The Government argue that the application is inadmissible since the applicant has failed to exhaust domestic remedies as required by Article 26 of the Convention before lodging an application with the Commission. They contend that the applicant had a number of remedies at his disposal which he did not try.

The Government point out that there is an ongoing investigation by the public prosecutor of Erzincan into the death of the applicant's brother. If the public prosecutor should reach a decision not to prosecute, the applicant would be able to challenge the decision within 15 days following the notification (Article 165 of the Code of Criminal Procedure). Since the investigation has yet to be completed, the Government submit that internal domestic remedies have not been exhausted in this regard.

Further, the Government submit that the applicant has the possibility of introducing an action in the civil courts for compensation if the perpetrators of the killing are found.

The applicant maintains that there is no requirement that he pursue domestic remedies. Any purported remedy is illusory, inadequate and ineffective since, inter alia, the operation in question in this case was officially organised, planned and executed by agents of the State. He refers to an administrative practice of unlawful killings and of not respecting the requirement under the Convention of the provision of effective domestic remedies.

Further, the applicant submits that, whether or not there is an administrative practice, domestic remedies are ineffective in this case having regard, inter alia, to the situation in South-East Turkey which is such that potential applicants have a well-founded fear of the consequences; the lack of genuine investigations by public prosecutors

and other competent authorities; positive discouragement of those attempting to pursue remedies; an official attitude of legal unaccountability towards the security forces; and the lack of any prosecutions against members of the security forces for alleged extra-judicial killings or torture.

In respect of the investigation by the public prosecutor of Erzincan referred to by the Government, the applicant submits that the prosecutor has had adequate time to complete his investigation and that the file is simply being left open with no ongoing inquiries being conducted.

The Commission recalls that Article 26 of the Convention only requires the exhaustion of such remedies which relate to the breaches of the Convention alleged and at the same time can provide effective and sufficient redress. An applicant does not need to exercise remedies which, although theoretically of a nature to constitute remedies, do not in reality offer any chance of redressing the alleged breach. It is furthermore established that the burden of proving the existence of available and sufficient domestic remedies lies upon the State invoking the rule (cf. Eur. Court H.R., De Jong, Baljet and Van den Brink judgment of 22 May 1984, Series A no. 77, p. 18, para. 36, and Nos. 14116/88 and 14117/88, Sargin and Yagci v. Turkey, Dec. 11.05.89, D.R. 61 p. 250, 262).

The Commission does not deem it necessary to determine whether there exists an administrative practice on the part of Turkish authorities tolerating abuses of human rights of the kind alleged by the applicant, because it agrees with the applicant that it has not been established that he had at his disposal adequate remedies to deal effectively with his complaints.

The Commission first notes the applicant's statement regarding the complaints which his father made to various prosecuting authorities but which apparently did not give any significant results.

Furthermore, while the Government refers to the pending inquiry by the public prosecutor into the death of the applicant's brother on 26 February 1993, the Commission notes that almost two years have elapsed since the killing and the Commission has not been informed of any significant progress having been made in the investigation. In view of the delays involved and the serious nature of the crime, the Commission is not satisfied that this inquiry can be considered as furnishing an effective remedy for the purposes of Article 26 of the Convention.

The Commission further considers that in the circumstances of this case the applicant is not required to pursue any other legal remedy in addition to the public prosecutor's inquiry (see eg. No. 19092/91, Yagiz v. Turkey, Dec. 11.10.93, to be published in D.R.75). The Commission concludes that the applicant should be considered to have complied with the domestic remedies rule laid down in Article 26 of the Convention. Consequently, the application cannot be rejected for non-exhaustion of domestic remedies under Article 27 para. 3 of the Convention.

As regards the merits

The Government deny that there is any administrative practice of unlawful killings by the State and assert that death incidents are usually terrorist acts carried out by illegal terrorist organisations operating within the area of State of Emergency. They refer in particular to the illegal organisation known as the PKK (Kurdish Workers' Party) which has since the 1980's been carrying out an intensive campaign aimed at securing a part of Turkish territory for a proclaimed Kurdish state.

The applicant maintains his submission that the attack was carried out by, or with the complicity of, agents of the State.

The Commission considers, in the light of the parties' submissions, that the case raises complex issues of law and fact under the Convention, the determination of which should depend on an examination of the merits of the application as a whole. The Commission concludes, therefore, that the application is not manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention. No other grounds for declaring it inadmissible have been established.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION ADMISSIBLE, without prejudging the merits of the case.

Deputy Secretary to the Commission — Acting President of the Commission

(M. DE SALVIA) — (H. DANELIUS)

APPENDIX II

Summary of the Susurluk report

1. The first section of the report, which describes general matters and general aspects of the situation, included the following extracts:

> (page eight)
> The bombing of the newspaper Özgür Gündem in İstanbul, the murder of Behçet Cantürk, the murder of the writer Musa Anter in Diyarbakır, the action concerning Tarık Ümit in İstanbul ..... the trillions of credits in the banks are in reality various aspects of the incident which occurred in Ankara."
>
> (page nine)
> While the continuation of the fighting in the region and the attacks of the PKK resulted in a reaction spreading out to the region in the West as well, it is possible to understand and excuse, some of the attitudes of martyrs[9], the reactions, the anger and attitudes of the State forces who fought the PKK and lived in the State of Emergency region. It is in fact inevitable..."

2. On pages 10-24, there is a description of various concerns arising out of the personnel and operations of the General Directorate of Security, including the Special Operations Bureau.

3. On pages 25-27, there is a description of the development and involvement of the National Intelligence Organisation (MİT). References are made to a person known as Mahmut Yıldırım, sometimes known as Ahmet Demir or under the codename "Yeşil":

> - (page 26) "Whilst the character of Yeşil, and the fact that he, along with the group of confessors he gathered around himself, is the perpetrator of offences such as extortion, seizure by force, assault on homes, rape, robbery, murder, torture, kidnap etc were known, it is more difficult to explain the collaboration of the public authorities with such an individual.
> It is possible to understand that a respected organisation such as MİT may use a lowly individual... it is not an acceptable practice that MİT should have used Yeşil several times...
> Yeşil, who carried out activities in Antalya under the name of Metin Güneş, in Ankara under the name of Metin Atmaca, Ahmet Demir, is an individual whose activities and presence were known both by the police and by the MİT...As a result of the State's silence the field is left open to the gangs."
> - (page 27) Yeşil was also associated with JİTEM, an organisation within the gendarmes, which used large numbers of protectors and confessors;

4. On page 28, there is a description of the role and functioning of the gendarmes, including a reference to JİTEM. JİTEM is described as being used to co-ordinate the special teams. They carried out work mostly without the knowledge of the local gendarmes. It is stated that due to the large number of confessors and protectors in its ranks, the number of offences increased. Due to their mobility and independence, the special teams developed practices outside their duty and developed a tendency to tolerate those who committed

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[9] Persons, working for the State, who died in the struggle against terrorism.

offences.

5. On pages 29-32, there is a description of Cem Ersever, the gendarme officer who formed and administered JİTEM, the intelligence unit of the gendarmes and the allegations arising out of his killing by an unknown perpetrator after he had made public criticisms of affairs in the south east.

6. From pages 34 to 44, records are cited principally from MİT which state that from 1989 Yeşil took part in operations with the security forces in the Nazımiye and Ovacık districts under the command of Tunceli gendarme regimental command (check Turkish); that as a result of this work he was withdrawn to Diyarbakır where he carried out rural activities under the command of the gendarme public order commanding officer in Diyarbakır; that on 27 May 1993 he murdered five PKK suspects apprehended in Muş; that as Ahmet Demir he planned the kidnap of Bayram Kanat who was found dead on 6 April 1994; that he murdered Major Cem Ersever in November 1994; that he raped and tortured Zeynap Baba and Şükran Mizgin, the latter found dead near Muş; that with Alaattin Kanat, Mesut Mehmetoğlu and others he planned and carried out the murder of Mehmet Sincar (Batman member of Parliament); that he personally planned and executed the murders of Vedat Aydın and Musa Anter. His relationship with MİT is stated as ending on 30 November 1993.

7. From pages 45 to 59, there is a description of the activities of a powerful "mafioso" style leader, Ömer Lütfi Topal, his business connections, his connections with the various officials and authorities and his killing, allegedly conducted with the acquiescence or connivance of State authorities, in which Abdullah Çatlı was implicated.

8. From pages 59 to 67, there is a description of gang leader Mehmet Ali Yaprak and his kidnap incident, in which Abdullah Çatlı was implicated.

9. Information is set out concerning Behçet Cantürk(pp. 72-73). He is described as one of the financiers of the Özgür Gündem from 1992 and as having been involved in drugs smuggling and terrorist action, handing over drugs money to the PKK. It is stated that:

> "Although it was obvious who Cantürk was and what he did, the State was unable to cope with him. Legal avenues were insufficient and as a result, "the newspaper Özgür Gündem was blown up with plastic explosives and when Cantürk moved to set up a new establishment ... it was decided by the Turkish Security Organisation to kill him and the decision was carried out."
> By doing so one individual was dropped from the "list of businessmen financing the PKK" as the Prime Minister of the time referred to it..." (page 73)

10. Comment is made that the situation arose where a chaotic system permitted, inter alia, a person like Yeşil to operate and Abdullah Çatlı, working under the orders of the State, to carry out smuggling and to spread fear around him and to take advantage of this to allow others a share in the protection money. The acquiescence in these activities permitted a group of individuals, civilians and public officials to turn from the service of the nation to their own personal advantage (page 73). It is stated that all the relevant bodies of the State were aware of these affairs and actions (page 74). Reference is made to these factors applying to the murder of Savaş Buldan, a PKK supporter, Medet Serhat Yöş, Metin Can, Vedat Aydın and Musa Anter and other journalists. Comment is made on page 74:

"Those who act against the unity and sovereignty of the State deserve a heavy punishment. Our only disagreement with what was done relates to the form of procedure and its results."

After commenting on the fact that there was regret at the killing of Musa Anter, even by those who supported the incidents, the page ends with the sentence, "There are other murdered journalists." Page 75 is not published.

11. On page 76, a statement by an unspecified person is continued:

"... an illegal formation was carried out under the umbrella of JİTEM. We had the authority to execute almost anybody whom we suspected of having a relationship with the PKK. We used the method of apprehending these individuals, establishing their offences, and instead of handing them over to justice, murdered them in a way which ensured the perpetrator would remain unknown. This was required from us and we were receiving instructions in that fashion."

12. Pages 81-82 appear to continue a description of Abdullah Çatlı's activities and his connections with State officials and various authorities.

13. On pages 83-88, there is a description of the organisation and significance of the Bucak tribe headed by Sedat Bucak, who is described as arming his tribe with the close collaboration of the security forces. There were 1000 village protectors in Siverek and Hilvan receiving a salary from the State, as well as voluntary village protectors who carried weapons with the State's permission. Following their success in scoring blows against the PKK, they were accorded privileges, including official tolerance to smuggling and their shows of strength (firing their guns into the air). The local security forces also tended to leave the planning and execution of operations to the tribe. There were indications that the tribe was getting out of control, incidents occurring, for example, of individuals being interrogated without the knowledge of security officials, of a PKK supporter Hasan Taşkaya being killed. The tribe's rivalry with the PKK was not based on ideology but on rivalry for power and control. They marketed their struggle with the PKK to the State and used it to disguise their own illegal behaviour.

14. On pages 89-96, there is a description of the gangs, in particular the Kocaeli, Söylemezler and Yüksekova gangs. Police and security forces officers are named as being implicated in various incidents. MİT is named as intervening to extend the residence permits of persons involved in drugs trafficking who were threatened with deportation. MİT also stalled the proposed deportation of an arms dealer involved in illegal activities.

15. On pages 96-98, there is a description of various disquieting developments in public banks, including the grants of loans to certain groups, holdings and companies of amounts greater than they were capable of repaying. Some banks acted as if they were the banks of certain companies. They concentrated investments on a few companies increasing their risks. While the banks made losses, companies receiving credit were placed in advantageous positions.

16. In the report's final evaluation, page 100-109, the report seeks to describe the connections between illegal elements and the security forces. It describes how the JİTEM grew and expanded with the southeastern situation which was its reason for existence. The confessors and local elements employed by it however became loose and free. The intelligence staff were also left outside the military hierarchy and even higher ranking officers

such as Major Cem Ersever acted independently. Officers returning from the south east maintained contacts and used what they had learned. The harshness of the tools applied and the cruelty of the methods used by the PKK caused those who fought against them to use similar methods.

17. From pages 110-118, the report makes numerous recommendations, including the limiting of the use of confessors, the reduction in the number of village protectors, the cessation of the use of Special Operations Bureau outside the south east and its incorporation into the police structure outside that area, the taking of steps to investigate various incidents and to suppress gang and drugs smuggling activities.

APPENDIX III

Extracts from the book "The secrets of Major Cem Ersever" by Soner Yalçın

"The girl who wanted to go to the mountains

"Let's look into it. Who tortured the President of the Elazığ branch of the Human Rights Association, lawyer Metin Can, and Dr. Hasan Kaya on 21 February 1993 and shot them in the head? Who killed the lawyer and the doctor and threw their bodies under Dinar Bridge in Tunceli? Who did it?

"It was Yeşil who carried out all of the killings within the Elazığ, Bingöl and Tunceli boundaries. If you investigate all of the murders by unknown perpetrator, you come up with Ahmet Demir and Mehmet Yazıcıoğulları!

Let's look into it: who was it who took Ayten Öztürk from her home in Kepektaşı village in Mazgirt district on 27 July 1992 and killed her and then buried the body in Asri Cemetery in Elazığ? The poor girl thought that Yeşil's team were PKK people who were going to take her to the mountains."

Why did Ersever tell me about the murders committed by Yeşil and Mehmet Yazıcıoğulları, whom he'd been "serving" with for years? There was surely a reason for it.

The last things that Ersever related made the *Aydınlık* headlines on 25 and 26 August 1993. I hadn't given Ersever's name; I referred to him as a "contra guerilla officer". And what sort of reaction did it elicit?

The first person to phone us was Hıdır Öztürk, Ayten Öztürk's father. He was in tears on the telephone and he asked me what he could do. I told him to file a complaint and use the newspaper article as evidence. And I added that I would be very pleased to testify as a witness in court.

I received a letter from Dr. Hasan Kaya's brother Mahmut Kaya, who said that he had filed an application with the European Commission of Human Rights in connection with the murder of Kaya and Can. He said that the Commission was going to ask him to make a statement, and he asked me to forward him all the information and evidence I had. "You write at one point in your article that you talked for more than two hours with the special war officer," he wrote. "I reckon that you must have obtained more information in that interview than you published in your article. Can you please let me have any details you have which relate to the killing of my brother and his friend but which were not published in the newspaper?"

There was obviously no way that I could have given Mahmut Kaya Major Ersever's name. I informed him that I could not help him any further with information or documents but that I would be able to testify as a witness on any platform.

Ersever and I had talked very hurriedly about the killing of Metin Can and Hasan Kaya. I would have liked to obtain more detailed information about that incident.

On reading my news article, the President of the Tunceli Branch of the Human Rights Association, Mehmet Gülmez, and lawyer Ali Demir filed complaints first with the Ministry of Justice and then with the Elazığ and Tunceli Chief State Prosecution Departments concerning lawyer Metin Can and Dr. Hasan Kaya, who were taken from their homes in the Akpazar subdistrict of Tunceli province, and then tortured and killed under Dinar Bridge in Tunceli. We request that the necessary legal investigations be carried out and that the above-mentioned persons be punished."

"We interrogated the lawyer and the doctor in Elazığ security headquarters"

Pending the opening of the investigations, the KURD-HA reported in its bulletin of 14 October 1993 that the PKK had caught Metin Can and Hasan Kaya's killer. "It has been reported that the ARGK has caught a contra by the name of Orhan Öztürk in Mazgirt; Öztürk is one of the persons who killed the President of the Elazığ Branch of the Human Rights Association, lawyer Metin Can, and Dr. Hasan Kaya, who were abducted by contra guerillas in Elazığ and assassinated some time ago."

Was Orhan Öztürk a member of Yeşil's team? Orhan Öztürk, who had trained as a guerilla for some time in PKK camps, was subsequently caught and turned State's evidence. And this time confessor Orhan Öztürk was caught by PKK activists and confessed to the PKK about incidents where he had pulled the trigger!

Özgür Gündem published the story Orhan Öztürk had related in its issue of 18 November 1993, and his statements were confirmed by Major Ersever:

I carried out my action together with the Syrian İdris Ahmet from Kurdistan and Mesut Mehmetoğlu from Diyarbakır, both of whom had turned State's evidence. When we took lawyer Metin Can and Dr. Hasan Kaya from their homes, the person who had been referred to as Yeşil in various publications but whose real name was not known was waiting for us in a vehicle. Contra guerilla commander Yeşil was also involved with the Elazığ security police. Kaya and Can's interrogation was carried out at the Elazığ security headquarters. After torturing them we took them to the place under the bridge between Tunceli and Mazgirt. I killed them there. The Minister of the Interior and several State officials also knew about this action."

Orhan Öztürk also gave details about the murder of Dr. Kaya and lawyer Can:

"Syrian İdris Ahmet and I went to Dr. Hasan Kaya's home at 2.00 o'clock in the morning. İdris Ahmet is a mature fellow 1m65 tall with fair hair and hazel eyes, who carries out activities for the contra guerillas. We first took lawyer Metin Can from his home and then we went to the doctor's home. We presented ourselves as PKK people and told them that one of our people was injured and asked them to give treatment, as Yeşil had instructed us to do. They wouldn't come to begin with, but since we'd previously been in the party ranks, we convinced them through our behaviour. İdris Ahmet's behaviour was more convincing. We took those two men to a long shed two or three kilometres beyond the bus station.

Yeşil and two or three people from the Elazığ interrogation squad and İdris Ahmet tortured them. The torture session lasted for about half an hour. The lawyer and doctor's faces were smashed to pieces. We brought the men to the bridge between Tunceli and Mazgirt. There were a regiment and other military units like the gendarme station near the bridge. We were about 2 km from the gendarme station. I executed them there - I shot them in the head with a 16mm rifle. İdris Ahmet and confessor Mesut Mehmetoğlu from Diyarbakır were there with me. And Yeşil plus 3 other people from the Elazığ interrogation squad were there with us. They were waiting in Yeşil's car. The gendarme station heard the shots, but since they knew about what was going on they didn't come to the scene of the incident. It's said that Yeşil executed a lot of people under that bridge.

"A white landrover with an 06 number plate was used in the incident, but I can't remember the other number on the registration plate. Yeşil had been given the doctor and lawyer's addresses and telephone numbers by the Elazığ security headquarters as well as information about the patriots they associated with!"

"Go back home. Your husband will be coming."

Lawyer Metin Can and Dr. Hasan Kaya were abducted on 21 February 1993. Their bodies were found 6 days later, on 27 February 1993. Democratic mass organisations held protest demonstrations from the second day after Kaya and

Can's kidnapping onwards. Hundreds of people went on hunger strike in the SHP (Socialist People's Party) building in Elazığ to call for action to find Can and Kaya. Faxes were sent to President Süleyman Demirel and Justice Minister Seyfi Oktay. Lawyers carried out actions outside the Ankara courthouse.

The Human Rights Association reported the incident to the President of the Turkish Grand National Assembly, Hüsamettin Cindoruk, the Minister of the Interior and the Justice Minister. There was nobody who hadn't heard about the kidnapping. SHP leaders issued statements. In his interview with Metin Can's wife Fatma Can, Interior Minister Sevgin put his arms round her and told her to go home and sit down - her husband would be returning. Fatma Can went home with the Interior Minister's guarantee. There were frequent phone calls to Can's home at the time — from members of the "Turkish Revenge Brigade"! Can and Kaya's shoes were deposited at the entrance to the SHP District headquarters. How was it so easy for the kidnappers to operate? Because they apparently had no fear whatever of getting caught!... The incident had been communicated to the Prime Minister, the Minister of the Interior and the Minister of Justice. Yet the "Turkish Revenge Brigade" could go around unperturbed!!

Their power must have been far beyond that of the President of the Turkish Grand National Assembly, the Prime Minister and the Deputy Prime Minister for them to be able to shoot Can and Kaya in the head with a 9 mm MKE weapon.

What an apt title retired Colonel Talat Turhan has given his book: "The Contra guerilla Republic"...

Appendix B

Kaya v Turkey: Judgment of the European Court of Human Rights

EUROPEAN COURT OF HUMAN RIGHTS

FIRST SECTION

CASE OF MAHMUT KAYA v. TURKEY

(Application no. 22535/93)

JUDGMENT

STRASBOURG

28 March 2000

In the case of Mahmut KAYA v. Turkey,

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

Mrs E. Palm, *President*,
Mr J. Casadevall,
Mr L. Ferrari Bravo,
Mr B. Zupancic,
Mrs W. Thomassen,
Mr R. Maruste, *judges*,
Mr F. Gölcüklü, ad hoc *judge*,
and Mr M. O'Boyle, *Section Registrar*,

Having deliberated in private on 18 January and on 7 March 2000,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 8 March 1999, within the three-month period laid down by former Articles 32 § 1 and 47 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 22535/93) against the Republic of Turkey lodged with the Commission under former Article 25 by a Turkish national, Mr Mahmut Kaya, on 13 August 1993.

The Commission's request referred to former Articles 44 and 48 and to the declaration whereby Turkey recognised the compulsory jurisdiction of the Court (former Article 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 2, 10, 13, 14 and 18 of the Convention.

2. On 31 March 1999, the Panel of the Grand Chamber decided, pursuant to Article 5 § 4 of Protocol No. 11 to the Convention and Rules 100 § 1 and 24 § 6 of the Rules of Court, that the application would be examined by one of the Sections. It was, thereupon, assigned to the First Section.

3. The Chamber constituted within the Section included *ex officio* Mr R. Türmen, the judge elected in respect of Turkey (Article 27 § 2 of the Convention and Rule 26 § 1 (a) of the Rules of Court) and Mrs E. Palm, President of the Section (Rules 12 and 26 § 1 (a)). The other members designated by the latter to complete the Chamber were Mr J. Casadevall, Mr L. Ferrari Bravo, Mr B. Zupancic, Mrs W. Thomassen and Mr R. Maruste.

4. Subsequently Mr R. Türmen withdrew from sitting in the Chamber (Rule 28). The Government accordingly appointed Mr F. Gölcüklü to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

5. On 14 September 1999, the Chamber decided to hold a hearing.

6. In accordance with Rule 59 § 3 the President of the Chamber invited the parties to submit memorials. The Registrar received the applicants' and Government's memorials on 23 and 22 July 1999 respectively.

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 18 January 2000.

There appeared before the Court:

(a) *for the Government*
Mr S. Alpaslan, *Co-agent*,
Ms Y. Kayaalp,
Mr B. Çaliskan,
Mr S. Yüksel,
Mr E. Genel,
Ms A. Emüler,
Mr N. Güngör,
Mr E. Hoçaoglu,
Ms M. Gülsen, *Advisers*;

(b) for the applicant
Ms F. Hampson,
Ms R. Yalcindag,
Ms C. Aydin, *Counsel*.

The Court heard addresses by Ms Hampson and Mr Alpaslan.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Events preceding the disappearance of Hasan Kaya and Metin Can

8. Dr Hasan Kaya, the applicant's brother, practised medicine in south-east Turkey. From November 1990 to May 1992, he had worked in Sirnak. He treated demonstrators injured in Nevroz celebrations during clashes with security forces. Following this, he was transferred from Sirnak to Elazig. He had told Fatma Can, the wife of his friend Metin Can, that he had been threatened in Sirnak and placed under considerable pressure.

9. In Elazig, Hasan Kaya worked in a health centre. He met often with his friend Metin Can, who was a lawyer and President of the Elazig Human Rights Association (HRA). Metin Can had been representing persons suspected of being members of the PKK. He had told his wife Fatma Can that he had received threats and that an official had warned him that steps had been planned against him. According to Serafettin Ozcan who worked at the HRA, Metin Can had also been subject to threats because of the case he had taken to improve conditions in Elazig prison. The police had carried out a search at the Elazig HRA, as they had at other HRA offices in the south-east.

10. In December 1992, Bira Zordag, who had lived in Elazig until October 1992, was taken into detention by police officers in Adana and transferred to Elazig where he was interrogated to find out what he knew about the PKK. He was asked whether two doctors in Elazig, one of whom was Hasan Kaya, had been treating wounded members of the PKK. A threat was made that Hasan Kaya would be punished. He was also asked about lawyers, particularly Metin Can. On his release, Bira

Zordag visited the Elazig HRA and told Serafettin Ozcan and Metin Can what had occurred.

11. At Christmas 1992, Hasan Kaya told the applicant that he felt that his life was in danger. He believed that the police were making reports on him and keeping him under surveillance. Around the same time, Metin Can told the applicant that his house had been searched while he was out and that he thought that he was under surveillance.

12. On or about 20 February 1993, two men came to the apartment building where Metin Can lived. They rang the doorbells of Süleyman Tursum and Ahmet Oygen asking for Metin Can. When Metin and Fatma Can arrived home later that night, they received a telephone call. The callers said that they had been to the apartment earlier and wanted to come to see Metin Can immediately. Metin Can told them to come to his office the next day.

13. On 21 February 1993, after receiving a phone call at his office, Metin Can met two men in a coffee house. Serafettin Ozcan was also present. The men said that there was a wounded member of the PKK hidden outside town. Metin Can took the men back to his house and called Hasan Kaya on the telephone. Hasan Kaya arrived at the house. It was arranged that the two men would bring the wounded man to Yazikonak, a village outside Elazig and that they would call when they were ready. The two men left. At about 19.00 hours, there was a phone call. Metin Can left with Hasan Kaya, who was carrying his medical bag. Metin Can told his wife that they would not be long. They drove off in the car of Hasan Kaya's brother.

14. Metin Can and Hasan Kaya did not return that night. At about 12.00-13.00 hours on 22 February 1993, Fatma Can received a phone call. The speaker sounded like one of the men who had come to the house. He said that Metin and his friend had been killed. Fatma Can and Serafettin Ozcan went to the Security Directorate to report that Metin Can and Hasan Kaya were missing. Neither told the police about the meeting of Metin Can with the two men or the details of events preceding the disappearance. Nor did Fatma Can mention those details when she gave a statement to the public prosecutor that day.

B. Investigation into the disappearance

15. By notification of 22 February 1993, the Elazig governor informed all the other governors in the state of emergency region of the disappearance of Metin Can and Hasan Kaya and requesting that they and their car be located.

16. At about 18.00 hours on 22 February 1993, Hakki Ozdemir noticed a car parked suspiciously opposite his office in Yazikonak and reported it to the police. It was the car belonging to Hasan Kaya's brother. The police searched the car, fingerprinted and photographed it.

That evening, police officers took statements from the neighbours in Metin Can's apartment block.

17. Further strange calls were made to the Metin Can apartment. On 23 February 1993, Metin Can's nephew answered the phone. A person claimed Metin Can and Hasan Kaya were still alive and that they would release Metin. He said that Metin would not go to Europe and would continue the struggle.

18. On 23 February 1993, at about 22.00 hours, a bag was found outside the Social Democratic People's Party ("SHP") building in Elazig. It contained two pairs of old shoes. On 24 February 1993, one pair of shoes was recognised by Tekin Can as belonging to his brother Metin Can. Huseyin Kaya stated the other pair did not belong to his brother, Hasan Kaya.

On the same day, the public prosecutor obtained an order from the Elazig magistrates' court for the telephone at Metin Can's apartment to be monitored in order to identify the persons making threatening calls.

Ahmet Kaya lodged a petition with the Elazig governor that day requesting steps be taken to find his son Hasan Kaya.

19. On 22-23 February 1993, Fatma Can and Serafettin Ozcan travelled to Ankara, where they spoke to the Minister of the Interior appealing for her husband to be found. She returned to Elazig on 27 February 1993.

20. At about 11.45 hours on 27 February 1993, it was reported that two bodies had been found under the Dinar bridge, about 12 kilometres outside Tunceli. The bodies were identified as being those of Hasan Kaya and Metin Can. Two cartridges were found at the scene. The bodies did not have shoes on and there was not much blood on the ground. The applicant and other members of the family arrived at the location and saw the bodies.

C. Investigation into the deaths

21. An autopsy was carried out at about 16.25 hours on 27 February 1993 in Tunceli State Hospital morgue. The report noted that both men had been shot in the head and had their hands tied. No trace of violence or blow was observed on Hasan Kaya's body. As regarded Metin Can, it was noted that his nose had haemorrhaged, there was a wound in lip and teeth were missing, there were bruises round his neck, on the knees and on the torso and abdomen. Maceration was observed on the feet. It was noted that there was no trace of violence or a blow. An addendum was attached by the doctors carrying out the examination that a bruise on the right eyebrow might have been caused by a blow. It was estimated that death had occurred within the last 14-16 hours.

22. A second autopsy was carried out on 28 February 1993 at about 01.05 hours.

The applicant identified the body of his brother, Hasan Kaya. The report described the bullet entry and exit holes to the head. It stated that the right ear and adjacent area were marked with ecchymoses which could be explained by pressure on the body. There were ecchymoses around the nail bases on the left hand; circular marks round both wrists, which might have been caused by the hands being bound by wire; a 1 x 0.5 cm ecchymosis on the right knee, a 2 x 1 cm light yellow ecchymosis on the inner lower frontal region of the right knee; a 0.7 cm wide ecchymosis on the left ankle; 0.5 cm wide epidermal scratches on the left ankle; cyanosis in toe bases on both feet and athlete's foot on both feet, especially in soles and left regions, which was probably caused by remaining in water and snow for lengthy periods. The torso of the body was free from any blow, wound, burn, firearm injury save those noted above. Cause of death was brain damage and haemorrhage of the brain tissues due to the bullet wound. A classical autopsy was not necessary.

Hüseyin Can identified the body of his nephew Metin Can. The report described numerous marks and injuries to the body. These included bruises and scratches on the face and head, a tear in the lip, bruising around the neck, bone damage to the jaw and missing teeth, marks on the wrists indicative of being bound, bruises on the knees and cyanosis on both feet and toes. The bruises and scratches on the forehead, nose and under the right eye were thought to have been caused by blunt instruments (eg. stone, stick) and the lesions on the neck by string, rope or cable. This might have occurred immediately before the death and from application of force for short periods. These wounds would not have caused death. Death resulted from brain damage and brain haemorrhage.

Death was estimated as occurring within the last 24 hours.

23. On 1 March 1993, the Tunceli central provincial gendarme commander sent the Tunceli public prosecutor an incident report dated 27 February 1993 and a sketch map of the location of the bodies.

On 2 March 1993, the Tunceli public prosecutor sent the two cartridges found at the scene for ballistics examination.

On 8 March 1993, the Elazig public prosecutor took a further statement from Fatma Can concerning the disappearance of her husband. She mentioned that her husband had told her that he thought the police were following him and that their house had been searched when they were out. She said that her husband had been invited to Germany. She had asked him to resign as President of the HRA many times and he had said that he would.

24. On 11 March 1993, the Elazig public prosecutor issued a decision of withdrawal of jurisdiction, transferring the file to Tunceli where the bodies had been found.

25. On 18 March 1993, Ahmet Kaya sent a petition to the public prosecutor giving information which he had heard about events. This stated that his son had been seen being taken into custody at Yazikonak by police officers in civilian clothes carrying walkie-talkies. The car in which they travelled stopped at a petrol station, where the officers mentioned that they were taking the lawyer and doctor for interrogation. Further, during a conversation at Hozat involving a judge and a lawyer called Ismail, a police officer had said that Can and Kaya had been taken to Tunceli Security Directorate.

26. By a petition dated 19 March 1993 to Pertek public prosecutor, Ahmet Kaya recounted an incident which he had heard had occurred in Pertek beerhouse on 15 March 1993. At about 20.00 hours, during a programme on television discussing contra-guerrillas, a man called Yusuf Geyik, nicknamed Bozo, announced, "... We killed Hasan Kaya and the lawyer Metin Can." When the people in the beerhouse attacked him, he pulled out a gun. He called for help on his walkie-talkie and gendarmes came to take him away.

27. On 31 March 1993, the Tunceli public prosecutor issued a decision of withdrawal of jurisdiction concerning the killing of Hasan Kaya and Metin Can by unknown perpetrators. As he considered that the crime fell within the declaration of the state of emergency, he transferred the file to the Kayseri State Security Court prosecutor.

28. On 6 April 1993, following an enquiry by the Pertek public prosecutor summoning Yusuf Geyik, the Pertek police chief informed the prosecutor that there was no such person in their district.

29. On 12 April 1993, a statement was taken by the Hozat public prosecutor from a lawyer Ismail Keles, who denied that he had heard any police officer give information about the murder of Kaya and Can.

30. On 13 April 1993, Ahmet Kaya submitted a further petition to the Tunceli public prosecutor. He stated that Can and Kaya had been seen taken by police officers at Yazikonak and that the car had stopped at a petrol station where the petrol attendant had recognised and spoken to Can, who had said they were being taken somewhere by the officers. The petition pointed out that the two men had been taken 138 km through eight official checkpoints and the circumstances indicated that the Government were involved. It stated that a complaint was being made against the

Governor, chief of police and the Minister of the Interior.

31. A report dated 14 April 1993 by Hozat police informed the Hozat public prosecutor that Ahmet Kaya's allegation had been investigated. The investigation disclosed that no Hozat police officer had made a statement alleging that Can and Kaya had been held in Tunceli Security Directorate.

32. On 29 April 1993, the Pertek public prosecutor instructed the Pertek police chief to summon the managers of the beerhouse and requested information from the Pertek district gendarme command concerning the allegation that a non-commissioned officer (NCO) had taken Yusuf Geyik from the beerhouse.

33. On 4 May 1993, the Pertek police chief informed the public prosecutor that while it was reported that Yusuf Geyik had been seen in the area and had stayed at the district gendarmerie his whereabouts were unknown.

In a statement taken by the public prosecutor on 4 May 1993 from Hüseyin Kaykaç, who ran the Pertek beerhouse, it was stated that on 15 March a man he knew as Bozo made a claim that they had killed Can and Kaya. He had talked on the radio and a NCO had come to pick him up. He had not seen the other people in the beerhouse attacking Bozo or Bozo drawing a gun. In a statement also of 4 May 1993, Ali Kurt, a waiter at the beerhouse, agreed with the statement made by Hüseyin Kaykaç.

By letter dated 5 May 1993, the Pertek district gendarme commander informed the public prosecutor that he was not aware of the incident at the beerhouse and that no assistance had been requested from a beerhouse. No NCO had been involved.

34. On 22 July 1993, the Kayseri State Security Court prosecutor issued a decision of non-jurisdiction transferring the file to Erzincan State Security Court prosecutor.

35. On 3 September 1993, Mehmet Gülmez, President of the Tunceli HRA and Ali Demir, a lawyer, sent the Elazig public prosecutor a copy of an article in the *Aydinlik* newspaper issue of 26 August which stated that a special operations officer had identified the killers, *inter alia*, of Hasan Kaya and Metin Can as being Ahmet Demir known as "Sakalli" ("the Beard") and Mehmet Yaziciogullari, who were contra-guerrillas paid by the State responsible for most of the killings in the area.

When summoned to give further explanations, Ali Demir in a statement to the public prosecutor of 12 October 1993 stated that he did not personally know "Ahmet Demir" but between 1988 and 1992 when he was chairman of the SHP in Tunceli he had received complaints that "The Beard" was carrying out attacks and was associating with the security forces.

36. On 14 October 1993, the Tunceli public prosecutor, *inter alia*, instructed the police to locate and summon Mehmet Yaziciogullari. The police replied on 18 October 1993 that they could not find him.

37. Following the instruction of the Erzincan State Security Court prosecutor of 8 November 1993, the Pertek public prosecutor took a further statement from Ali Kurt on 17 November 1993 which confirmed that he had heard a man calling himself Bozo claim to have killed Can and Kaya. Bozo had spoken into a radio asking for the regiment commander and three men had taken him away. He explained that Hüseyin Kaykaç had moved to Tunceli.

On 6 April 1994, the Elazig public prosecutor took a statement from Hüseyin Kaykaç which

confirmed his earlier statement. It stated that Bozo had tried to contact the regiment commander on his radio and when he could not get through he had called the Pertek district gendarme headquarters asking for them to come and get him. He said two NCOs, Mehmet and Ali, had arrived with another NCO in civilian clothes whose name he did not know.

38. On 11 November 1993, the Tunceli public prosecutor had issued further instructions to the Tunceli police to bring Yaziciogullari and Ahmet Demir to his office. On 6 December 1993, the police reported that they had not found their addresses and they were not known in their jurisdiction.

39. On 31 January 1994, Hale Soysu, the editor of *Aydinlik*, lodged a petition with Istanbul public prosecutor, which was forwarded to the Tunceli public prosecutor. This identified Mahmut Yildirim as one of the perpetrators of the murder of Hasan Kaya and Metin Can as well as other killings. It was based on information received from a Major Cem Ersever which had been the basis of a series of articles in the newspaper from 19 to 30 January 1994.

40. On 2 February 1994, the Erzincan State Security Court prosecutor informed the Pertek public prosecutor that there were discrepancies in the information provided by the Pertek police and the Pertek gendarmes and that since the gendarmes might be implicated, the public prosecutor should conduct enquiries into the discrepancies himself.

41. On 2 February 1994, the Erzincan State Security Court prosecutor requested the tape and transcript of a Show TV programme be obtained, during which an *Aydinlik* correspondent had talked about Major Cem Ersever.

42. By petition dated 14 February 1994 to the Elazig public prosecutor, Ahmet Kaya referred to the *Aydinlik* newspaper, the Show TV programme and Soner Yalçin's book "The Confessions of Major Cem Ersever" as disclosing that Mahmut Yildirim was the planner and perpetrator of the Can and Kaya murders. He stated that Yildirim had been a state employee for 30 years and came from Elazig. In his statement to the public prosecutor that day, he said that he did not know Yildirim personally but in their district he was talked about as having been involved in such incidents.

43. On 14 February 1994, the Elazig public prosecutor requested the Elazig police to investigate the allegations made concerning Mahmut Yildirim.

44. By letter dated 17 February 1994, Pertek public prosecutor informed the Erzincan public prosecutor that Yusuf Geyik was known to have been a member of a Marxist-Leninist organisation and identified as involved in an armed attack on a van and a robbery. An arrest warrant had been issued against him on 28 March 1990, but withdrawn by the Erzincan State Security Court on 4 November 1991.

45. By petition dated 21 February 1994 to the Elazig public prosecutor, Anik Can, the father of Metin Can, filed a complaint against Mahmut Yildirim who was said in the press and in books to have killed his son. He stated that Yildirim's home address was No. 13 Pancarli Sokak and that he worked at Elazig Ferrakrom.

The police reported on 25 February 1994 that Mahmut Yildirim had left his address 15-20 days previously and his present whereabouts were unknown. In a further report dated 11 April 1994, the police stated that he was still not to be found at his address. The public prosecutor was so informed.

46. On 11 May 1994, the Erzincan State Security Court prosecutor received the tape and transcript

of the Show TV programme which recounted Soner Yalçin's interviews with Major Cem Ersever and included that journalist's claim that Ahmet Demir, known as "Yesil", who was well-known to the police and gendarmes, had killed Metin Can and Hasan Kaya.

47. On 25 May 1994, the Erzincan State Security Court prosecutor issued a decision of withdrawal of jurisdiction transferring the file to Malatya State Security Court, following the re-organisation of jurisdiction for Elazig and Tunceli.

48. On 13 March 1995, the Malatya State Security Court prosecutor sent instructions to the Bingöl, Diyarbakir, Elazig and Tunceli prosecutors for the location and arrest of Mahmut Yildirim; the location of Orhan Öztürk, Idris Ahmet and Mesut Mehmetoglu who had been named in newspaper articles as having been involved with "Yesil" in contra-guerrilla murders, including those of Can and Kaya; the location of Mehmet Yaziciogullari and Yusuf Geyik.

49. On 17 March 1995, the director of the Diyabakir E-Type prison provided the information about the three men, Orhan Öztürk, Idris Ahmet and Mesut Mehmetoglu, who had been members of the PKK, become confessors and had been detained in the prison for various periods. Orhan Öztürk had been released on 18 February 1993 and Idris Ahmet on 16 December 1992. Mesut Mehmetoglu had been released from prison on 8 January 1993 but redetained in the prison on 26 September 1994 on a charge of homicide related to an incident where Mehmet Serif Avsar had allegedly been taken from his shop by a group of men purporting to take him into custody and later found shot dead.

50. On 28 March 1993, a statement was taken from Mehmet Yaziciogullari, in which he denied that he had been involved in the killings of Metin Can and Hasan Kaya and that he did not know Mahmut Yildirim, Orhan Öztürk, Idris Ahmet or Mesut Mehmetoglu.

51. On 6 April 1995, Mesut Mehmetoglu made a statement in prison to a public prosecutor. He complained that the press which supported the PKK were targeting him and publishing biased articles against him. Around 21 February 1993, he had been in Antalya and on hearing that his grandfather had died, he had gone to Hazro for two months.

52. On 3 April 1995, the gendarmes reported that Yusuf Geyik was not to be found in his home village of Geyiksu. He had left 8 to 10 years before.

53. In a police report dated 7 April 1995, the police informed the Elazig public prosecutor, in response to a request to apprehend Mahmut Yildirim, that the address given for Mahmut Yildirim, No. 13 Panarli Sokak did not exist and the business address was not in their jurisdiction. In a report dated 28 April 1995, the gendarmes reported that they had investigated his address in their jurisdiction but that they had been unable to discover his whereabouts.

II. Material before the convention organs

A. Domestic investigation documents

54. The contents of the investigation file were provided to the Commission.

B. The Susurluk report

55. The applicant lodged with the Commission a copy of the so-called *Susurluk* report[1], produced at the request of the Prime Minister by Mr Kutlu Savas, Vice-President of the Board of Inspectors within the Prime Minister's Office. After receiving the report in January 1998, the Prime Minister made it available to the public, though eleven pages and certain annexes were withheld.

56. The introduction states that the report was not based on a judicial investigation and did not constitute a formal investigative report. It was intended for information purposes and purported to do no more than describe certain events which had occurred mainly in south-east Turkey and which tended to confirm the existence of unlawful dealings between political figures, government institutions and clandestine groups.

57. The report analyses a series of events, such as murders carried out under orders, the killings of well-known figures or supporters of the Kurds and deliberate acts by a group of "informants" supposedly serving the State, and concludes that there is a connection between the fight to eradicate terrorism in the region and the underground relations that formed as a result, particularly in the drug-trafficking sphere. The report made reference to an individual Mahmut Yildirim, also known as Ahmet Demir or "*Yesil*" detailing his involvement in unlawful acts in the south-east and his links with MIT (National Intelligence Organisation):

"... Whilst the character of Yesil, and the fact that he along with the group of confessors he gathered around himself, is the perpetrator of offences such as extortion, seizure by force, assault on homes, rape, robbery, murder, torture, kidnap etc. were known, it is more difficult to explain the collaboration of the public authorities with this individual. It is possible that a respected organisation such as MIT may use a lowly individual... it is not an acceptable practice that MIT should have used Yesil several times... Yesil, who carried out activities in Antalya under the name of Metin Günes, in Ankara under the name of Metin Atmaca and used the name Ahmet Demir, is an individual whose activities and presence were known both by the police and MIT... As a result of the State's silence the field is left open to the gangs (*page 26*)

... Yesil was also associated with JITEM, an organisation within the gendarmes, which used large numbers of protectors and confessors (*page 27*).

In his confession to the Diyarbakir Crime Squad, ... Mr G. ... had stated that Ahmet Demir[1] (*page 35*) would say from time to time that he had planned and procured the murder of Behçet Cantürk[2] and other partisans from the mafia and the PKK who had been killed in the same way... The murder of ... Musa Anter[3] had also been planned and carried out by A. Demir (*page 37*).

All the relevant State bodies were aware of these activities and operations. ... When the characteristics of the individuals killed in the operations in question are examined, the difference between those Kurdish supporters who were killed in the region in which a state of emergency had been declared and those who were not lay in the financial strength the latter presented in economic terms. These factors also operated in the murder of Savas Buldan, a smuggler and pro-PKK activist. They equally applied to Medet Serhat Yos, Metin Can and Vedat Aydin. The sole disagreement we have with what was done relates to the form of the procedure and its results. It has been established that there was regret at the murder of Musa Anter, even among those who approved of all the incidents. It is said that Musa Anter was not involved in any armed action, that he was more concerned with the philosophy of the matter and that the effect created by his murder exceeded his own real influence and that the decision to murder him was a mistake. (Information about these people is to be found in Appendix 9[4]). Other journalists have also been murdered (*page 74*)."

58. The report concludes with numerous recommendations, including the improvement of co-ordination and communication between different branches of the security, police and intelligence departments, the identification and dismissal of security force personnel implicated in illegal activities, limiting of the use of confessors, a reduction of the number of village protectors, the cessation of the use of the Special Operations Bureau outside the south-east region and its incorporation into the police outside that area, the opening of investigations into various incidents and steps to suppress gang and drugs smuggling activities, and the recommendation that the results of the Grand National Assembly Susurluk enquiry be forwarded to the appropriate authorities for the relevant proceedings to be undertaken.

C. The Parliamentary Investigation Commission Report 1993 10/90 No. A.01.1.GEC

59. The applicant provided this 1993 report into extra-judicial or unknown perpetrator killings by a Parliamentary Investigation Commission of the Turkish Grand National Assembly. The report referred to 908 unsolved killings, of which 9 involved journalists. It commented on the public lack of confidence in the authorities in the south-east region and referred to information that in the Batman region the Hizbollah had a camp where they received political and military training and assistance from the security forces. It concluded that there was a lack of accountability in the region and that some groups with official roles might be implicated in the killings.

D. Press and media reports

60. The applicant provided the Commission with a copy of Soner Yalçin's book, "The Secrets of Cem Ersever" (summarised in the Commission Report, Annex III) as well as articles from *Aydinlik* and other newspapers concerning contra-guerrillas (Commission Report, paras. 154-163).

E. Evidence taken by Commission Delegates

61. Evidence was heard from 11 witnesses by Commission delegates in two hearings held in Strasbourg and Ankara. These included the applicant, Fatma Can, the wife of Metin Can, Serafettin Ozcan, Bira Zordag, Hüseyin Soner Yalçin, a journalist, Süleyman Tutal, the public prosecutor from Elazig, Hayati Eraslan, the public prosecutor from Tunceli, Judge Major Ahmet Bulut, prosecutor at the Malatya State Security Court, Mustafa Özkan, Pertek police chief, Bülent Ekren, Pertek district gendarme commander and Mesut Mehmetoglu, an ex-member of the PKK who had become a confessor.

III. RELEVANT DOMESTIC LAW AND PRACTICE

62. The principles and procedures relating to liability for acts contrary to the law may be summarised as follows.

A. Criminal prosecutions

63. Under the Criminal Code all forms of homicide (Articles 448 to 455) and attempted homicide (Articles 61 and 62) constitute criminal offences. The authorities' obligations in respect of conducting a preliminary investigation into acts or omissions capable of constituting such offences that have been brought to their attention are governed by Articles 151 to 153 of the Code of Criminal Procedure. Offences may be reported to the authorities or the security forces as well as to public prosecutor's offices. The complaint may be made in writing or orally. If it is made orally, the authority must make a record of it (Article 151).

If there is evidence to suggest that a death is not due to natural causes, members of the security forces who have been informed of that fact are required to advise the public prosecutor or a criminal court judge (Article 152). By Article 235 of the Criminal Code, any public official who fails to report to the police or a public prosecutor's office an offence of which he has become aware in the exercise of his duty is liable to imprisonment.

A public prosecutor who is informed by any means whatsoever of a situation that gives rise to the suspicion that an offence has been committed is obliged to investigate the facts in order to decide whether or not there should be a prosecution (Article 153 of the Code of Criminal Procedure).

64. In the case of alleged terrorist offences, the public prosecutor is deprived of jurisdiction in favour of a separate system of State Security prosecutors and courts established throughout Turkey.

65. 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 Law of 1914 on the prosecution of civil servants, which restricts the public prosecutor's jurisdiction *ratione personae* at 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, to decide whether to prosecute. Once a decision to prosecute has been taken, it is for the public prosecutor to investigate the case.

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.

66. By virtue of Article 4, paragraph (i), of Legislative Decree no. 285 of 10 July 1987 on the authority of the governor of a state of emergency region, the 1914 Law (see paragraph 65 above) also applies to members of the security forces who come under the governor's authority.

67. If the suspect is a member of the armed forces, the applicable law is determined by the nature of the offence. Thus, if it is a "military offence" under the Military Criminal Code (Law no. 1632), the criminal proceedings are in principle conducted in accordance with Law no. 353 on the establishment of courts martial and their rules of procedure. Where a member of the armed forces has been accused of an ordinary offence, it is normally the provisions of the Code of Criminal Procedure which apply (see Article 145 § 1 of the Constitution and sections 9 to 14 of Law no. 353).

The Military Criminal Code makes it a military offence for a member of the armed forces to endanger a person's life by disobeying an order (Article 89). In such cases civilian complainants may lodge their complaints with the authorities referred to in the Code of Criminal Procedure (see paragraph 63 above) or with the offender's superior.

B. Civil and administrative liability arising out of criminal offences

68. Under section 13 of Law no. 2577 on administrative procedure, anyone who sustains damage as a result of an act by the authorities may, within one year after the alleged act was committed, claim compensation from them. If the claim is rejected in whole or in part or if no reply is received within sixty days, the victim may bring administrative proceedings.

69. Article 125 §§ 1 and 7 of the Constitution provides:

"All acts or decisions of the authorities are subject to judicial review...

The authorities shall be liable to make reparation for all damage caused by their acts or measures."

That provision establishes the State's strict liability, which comes into play if it is shown that in the circumstances of a particular case the State has failed in its obligation to maintain public order.

ensure public safety or protect people's lives or property, without it being necessary to show a tortious act attributable to the authorities. Under these rules, the authorities may therefore be held liable to compensate anyone who has sustained loss as a result of acts committed by unidentified persons.

70. Article 8 of Legislative Decree no. 430 of 16 December 1990, the last sentence of which was inspired by the provision mentioned above (see paragraph 59 above), provides:

"No criminal, financial or legal liability may be asserted against ... the governor of a state of emergency region **or by** provincial governors in that region in respect of decisions taken, or acts performed, by them in the exercise of the powers conferred on them by this legislative decree, and no application shall be made to any judicial authority to that end. This is without prejudice to the rights of individuals to claim reparation from the State for damage which they have been caused without justification."

71. Under the Code of Obligations, anyone who suffers damage as a result of an illegal or tortious act may bring an action for damages (Articles 41 to 46) and non-pecuniary loss (Article 47). The civil courts are not bound by either the findings or the verdict of the criminal court on the issue of the 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 principle, only bring an action against the 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. When an act is found to be illegal or tortious 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).

AS TO THE LAW

I. The court's assessment of the facts

72. The Court observes in the present case that the facts as established in the proceedings before the Commission are no longer substantially in dispute between the parties.

73. Before the Commission, the applicant argued that the facts supported a finding that his brother had been killed either by undercover agents of the State or by persons acting under their express or implied instructions and to whom the State gave support, including training and equipment. This assertion was denied by the respondent Government.

74. After a Commission delegation had heard evidence in Ankara and Strasbourg (see the Commission report of 23 October 1998, §§ 19, 21 and 28), the Commission concluded that it was unable to determine who had killed Dr Hasan Kaya. There was insufficient evidence to establish beyond reasonable doubt that State agents or persons acting on their behalf had carried out the murder (see the Commission report, cited above, §§ 312-336). It did however conclude that Dr Hasan Kaya was suspected by the authorities of being a PKK sympathiser, as was his friend Metin Can and that there was a strong suspicion, supported by some evidence, that persons identified as PKK sympathisers were at risk of targeting from certain elements in the security forces or those acting on their behalf, or with their connivance and acquiescence. Grave doubts arose in the

circumstances in this case which had not been dispelled by the official investigation.

In his memorial, and pleadings before the Court, the applicant invited the Court to make its own evaluation of the facts found by the Commission and find that these disclosed sufficient evidence to hold, beyond reasonable doubt, that persons acting with the acquiescence of certain State forces and with the knowledge of the authorities were responsible for the killing of Dr Hasan Kaya.

In their memorial and pleadings before the Court, the Government submitted that the testimony of the applicant, Fatma Can, Bira Zordag and Serafettin Ozcan were unreliable and invited the Court to discount any findings based on their evidence.

75. The Court reiterates its settled case-law that under the Convention system prior to 1 November 1998 the establishment and verification of the facts was primarily a matter for the Commission (former Articles 28 § 1 and 31). While the Court is not bound by the Commission's findings of fact and remains free to make its own assessment in the light of all the material before it, it is only in exceptional circumstances that it will exercise its powers in this area (see, among other authorities, Tanrikulu v. Turkey judgment of 8 July 1999, to be published in *Reports* 1999, § 67).

76. In the instant case the Court recalls that the Commission reached its findings of fact after a delegation had heard evidence on two occasions in Ankara and on one occasion in Strasbourg. It considers that the Commission approached its task of assessing the evidence before it with the requisite caution, giving detailed consideration to the elements which supported the applicant's allegations and to those which cast doubt on their credibility.

The Court observes that the Commission were aware of the applicant's strong feelings and were careful in placing any reliance on his evidence. However, the delegates who heard Fatma Can, Serafettin Ozcan and Bira Zordag found them to be sincere, credible and generally convincing. In assessing their evidence, the Commission gave consideration to the inconsistencies referred to by the Government but found that these did not undermine their reliability. While it accepted their evidence as to their part in events preceding the disappearance and discovery of the bodies, the Commission's overall conclusion was that there was insufficient evidence to support a finding beyond reasonable doubt that State officials carried out the killing of Hasan Kaya. The Court finds no elements which might require it to exercise its own powers to verify the facts. It accordingly accepts the facts as established by the Commission.

II. Alleged violations of article 2 of the convention

77. The applicant alleges that the State is responsible for the death of his brother Dr Hasan Kaya through the lack of protection and failure to provide an effective investigation into his death. He invokes Article 2 of the Convention, which provides:

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

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

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

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

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

78. The Government disputed those allegations. The Commission expressed the opinion that on the facts of the case, which disclosed a lack of effective guarantees against unlawful conduct by State agents and defects in the investigative procedures carried out after the killing, the State had failed to comply with their positive obligation to protect Hasan Kaya's right to life.

A. Submissions of those who appeared before the Court

1. The applicant

79. The applicant submitted, agreeing with the Commission's report and citing the Court's judgment in the Osman case (Osman v. the United Kingdom judgment of 28 October 1998, *Reports* 1998-VIII, p. 3124) that the authorities had failed to ensure the effective implementation and enforcement of law in the south-east region in or about 1993. He referred to the *Susurluk* report as strongly supporting to the allegations that unlawful attacks were being carried out with the participation and knowledge of the authorities. He relied on the defects in investigations into unlawful killings found by the Convention organs as showing that public prosecutors were unlikely to carry out effective enquiries into allegations against the security forces. He also pointed to the way in which the jurisdiction to investigate complaints against the security forces was transferred from the public prosecutors to administrative councils, which were not independent and to the use of State Security Courts, which were also lacking in independence due to the presence of a military judge, to deal with alleged terrorist crime.

80. These elements together disclosed a lack of accountability on the part of the security forces or those acting under their control or with their acquiescence which was, in the view of the applicant and the Commission, incompatible with the rule of law. In the particular circumstances of this case, the applicant submits that his brother was suspected of being a PKK sympathiser and disappeared with his friend Metin Can, who also was under heavy suspicion by the authorities and named in the Susurluk report as a victim of a contra-guerrilla killing. The way in which they were both transported from Elazig to Tunceli through official checkpoints and the evidence pointing to gendarme links with a suspect Yusuf Geyik as well as evidence about contra-guerrilla groups, showed that Hasan Kaya did not enjoy the guarantees of protection required by law and that the authorities were responsible for failing to protect his life as required by law.

81. The applicant, again relying on the Commission's report, further argued that the investigation into Hasan Kaya's death was fundamentally flawed. He referred to numerous failings, including a failure to conduct proper autopsies, a failure to conduct any forensic examination to determine whether the two victims had been killed on the spot or transported from elsewhere, a failure to investigate how the two men were transported from Elazig to Tunceli, a failure to respond expeditiously to lines of enquiry and to locate possible suspects and significant periods of inactivity in the investigation (eg. April 1994 to March 1995).

2. The Government

82. The Government rejected the Commission's approach as general and imprecise. They argued strongly that the so-called "*Susurluk* report" had no evidential or probative value and could not be taken into account in assessing the situation in south-east Turkey. The report was prepared for the sole purpose of providing information to the Prime Minister's Office and making certain suggestions. Its authors emphasised that the veracity and accuracy of the report were to be evaluated by that Office. Speculation and discussion about the matters raised in the report were rife and all based on the assumption that its contents were true. The State however could only be held liable on the basis of facts that have been proved beyond reasonable doubt.

83. As regards the applicant's and Commission's assertions that Hasan Kaya was at risk of unlawful violence, the Government pointed out that the State had been dealing with a high level of terrorist violence since 1984 which reached its peak between 1993-1994, causing the death of more than 30,000 Turkish citizens. The situation in the south-east was exploited by many armed terrorist groups, including the PKK and Hizbollah who were in a struggle for power in that region in 1993-1994. While the security forces did their utmost to establish law and order, they faced immense obstacles and as in other parts of the world, terrorist attacks and killings could not be prevented. Indeed, in the climate of widespread intimidation and violence, no-one in society could feel safe at that time. All state officials such as doctors could be said to be at risk, for example, not only Hasan Kaya.

84. As regards the investigation into the death of Hasan Kaya, this was carried out with utmost precision and professionalism. All necessary steps were taken promptly and efficiently, including scene examination, autopsy and taking of statements from witnesses. The public prosecutors could not be criticised for failing to investigate unsubstantiated rumours or for failing to interview journalists such as Soner Yalçin who were not witnesses of events themselves. The Government emphasised that the investigation was still continuing and would continue until the end of the twenty year prescription period.

B. The Court's assessment

1. The alleged failure to protect the right to life

(a) Alleged failure in protective measures

85. The Court recalls that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see L.C.B. v. the United Kingdom judgment of 9 June 1998, *Reports* 1998-III, p. 1403, § 36). This involves a primary duty on the State to secure the right to life by putting in place 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. It also extends in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual or individuals whose life is at risk from the criminal acts of another individual (see the Osman judgment, cited above, p. 3159, § 115).

86. Bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the scope of the positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Not every claimed risk to life therefore can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. For a positive obligation to arise, it must be 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 identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk (see the Osman judgment, cited above, pp. 3159-3160, § 116).

87. In the present case, the Court recalls that it has not been established beyond reasonable doubt that any State agent was involved in the killing of Hasan Kaya. There are however strong inferences that can be drawn on the facts of this case that the perpetrators of the murder were known to the authorities. The Court refers to the circumstance that Metin Can and Hasan Kaya

were transported by their kidnappers from Elazig to Tunceli over 130 kilometres through a series of official checkpoints. It notes also the evidence in the investigation file that a suspected terrorist who claimed involvement in the killing was seen by two witnesses to receive assistance from gendarmes in Pertek. It is striking that the oral testimony of Fatma Can and Serafettin Ozcan about the disappearance of Metin Can and Hasan Kaya was consistent with the account given to the journalist Soner Yalçin by the JITEM officer Cem Ersever who claimed knowledge of the targeting of a lawyer and doctor in Elazig by contra-guerrillas. Furthermore, the *Susurluk* report took the position that the murder of Metin Can, and therefore impliedly that of Hasan Kaya, was one of the extra-judicial executions carried out to the knowledge of the authorities.

The question to be determined by the Court is whether in the circumstances the authorities failed in a positive obligation to protect Hasan Kaya from a risk to his life.

88. It notes that Hasan Kaya believed that his life was at risk and that he was under surveillance by the police. He was, according to Bira Zordag, under suspicion by the police of treating wounded members of the PKK. His friend Metin Can, a lawyer who had acted for PKK suspects and for prisoners detained in Tunceli prison, as well as being President of the HRA which was regarded as suspect by the authorities, had also received threats and feared that he was under surveillance.

89. The Government have claimed that Hasan Kaya was not at more risk than any other person, or doctor, in the south-east region. The Court notes the tragic number of victims to the conflict in that region. It recalls however that in 1993 there were rumours current alleging that contra-guerrilla elements were involved in targeting persons suspected of supporting the PKK. It is undisputed that there were a significant number of killings which became known as the "unknown perpetrator killing" phenomenon and which included prominent Kurdish figures such as Mr Musa Anter as well as other journalists (see paragraph 57 above and the Yasa v. Turkey judgment, cited above, § 106). The Court is satisfied that Hasan Kaya as a doctor suspected of aiding and abetting the PKK was at this time at particular risk of falling victim to an unlawful attack. Moreover, this risk could in the circumstances be regarded as real and immediate.

90. The Court is equally satisfied that the authorities must be regarded as being aware of this risk. It has accepted the Commission's assessment of the evidence of Bira Zordag, who recounted that the police at Elazig questioned him about Hasan Kaya and Metin Can and made threats that they would be punished.

91. Furthermore, the authorities were aware, or ought to have been aware of the possibility that this risk derived from the activities of persons or groups acting with the knowledge or acquiescence of elements in the security forces. A 1993 report by a Parliamentary Investigation Commission (see paragraph 59) stated that it had received information that a Hizbollah training camp was receiving aid and training from the security forces and concluded that some officials might be implicated in the 908 unsolved killings in the south-east region. The *Susurluk* report, published in January 1998, informed the Prime Minister's Office that the authorities were aware of killings being carried out to eliminate alleged supporters of the PKK, including the murders of Musa Anter and Metin Can. The Government insisted that this report did not have any judicial or evidential value. However, even the Government described the report as providing information on the basis of which the Prime Minister was to take further appropriate measures. It may therefore be regarded as a significant document.

The Court does not rely on the report as establishing that any State official was implicated in any particular killing. The report does however provide further strong substantiation for allegations, current at the time and since, that "contra-guerrilla" groups involving confessors or terrorist groups were targeting individuals perceived to be acting against the State interests with the acquiescence, and possible assistance, of members of the security forces.

92. The Court has considered whether the authorities did all that could be reasonably expected of them to avoid the risk to Hasan Kaya.

93. It recalls that, as the Government submit, there were large numbers of security forces in the south-east region pursuing the aim of establishing public order. They faced the difficult task of countering the armed and violent attacks of the PKK and other groups. There was a framework of law in place with the aim of protecting life. The Turkish penal code prohibited murder and there were police and gendarmerie forces with the functions of preventing and investigating crime, under the supervision of the judicial branch of public prosecutors. There were also courts applying the provisions of the criminal law in trying, convicting and sentencing offenders.

94. The Court observes however that the implementation of the criminal law in respect of unlawful acts allegedly carried out with the involvement of the security forces discloses particular characteristics in the south-east region in this period.

95. Firstly, where offences were committed by State officials in certain circumstances, the public prosecutor's competence to investigate was removed to administrative councils which took the decision whether to prosecute (see paragraph 64). These councils were made up of civil servants, under the orders of the Governor, who was himself responsible for the security forces whose conduct was in issue. The investigations which they instigated were often carried out by gendarmes linked hierarchically to the units concerned in the incident. The Court accordingly found in two cases that the administrative councils did not provide an independent or effective procedure for investigating deaths involving members of the security forces (Güleç v. Turkey judgment of 27 July 1998, *Reports* 1998-IV, pp. 1731-33, §§ 77-82 and Ogur v. Turkey judgment of 20 May 1999, to be published in *Reports* 1999-, §§ 85-93).

96. Secondly, the cases examined by the Convention organs concerning the region at this time have produced a series of findings of failures by the authorities to investigate allegations of wrongdoing by the security forces, both in the context of the procedural obligations under Article 2 of the Convention and the requirement of effective remedies imposed by Article 13 of the Convention (see concerning Article 2, Kaya v. Turkey judgment of 19 February 1998, *Reports* 1998-I, §§ 86-92, Ergi v. Turkey judgment of 28 July 1998, *Reports* 1998-IV, §§ 82-85, Yasa v. Turkey judgment of 2 September 1998, *Reports* 1998-VI, §§ 98-108, Cakici v. Turkey judgment of 8 July 1999 § 87, and Tanrikulu v. Turkey judgment of 8 July 1999, §§ 101-111; concerning Article 13 of the Convention, see the previously-mentioned judgments and Aksoy v. Turkey judgment of 18 December 1996, *Reports* 1996-VI, pp. 2286-7, §§ 95-100, Aydin v. Turkey judgment of 25 September 1997, *Reports* 1998-VI, pp. 1895-8, §§ 103-109, Mentes and others v. Turkey judgment of 28 November 1997, *Reports* 1997-VIII, pp. 2715-6, §§ 89-92, Selçuk and Asker v. Turkey judgment of 24 April 1998, *Reports* 1998-II, pp. 912-4, §§ 93-98, Kurt v. Turkey judgment of 25 May 1998, *Reports* 1998-III, pp. 1188-90, §§ 135-142 and Tekin v. Turkey judgment of 9 June 1998, *Reports* 1998-IV, pp. 1519-1520, §§ 62-69).

A common feature of these cases is a finding that the public prosecutor failed to pursue complaints by individuals claiming that the security forces were involved in an unlawful act, for example not interviewing or taking statements from implicated members of the security forces, accepting at face-value the reports of incidents submitted by members of the security forces and attributing incidents to the PKK on the basis of minimal or no evidence.

97. Thirdly, the attribution of responsibility for incidents to the PKK has particular significance as regards the investigation and judicial procedures which ensue since jurisdiction for terrorist crimes has been given to the State Security Courts (see paragraph 38). In a series of cases, the Court has found that the State Security Courts do not fulfil the requirement of independence imposed by

Article 6 of the Convention, due to the presence of a military judge whose participation gives rise to legitimate fears that the court may be unduly influenced by considerations which had nothing to do with the nature of the case (see Incal v. Turkey judgment of 9 June 1998, *Reports* 1998-IV, pp. 1571-3, §§ 65-73).

98. The Court finds that these defects undermined the effectiveness of criminal law protection in the south-east region during the period relevant to this case. It considers that this permitted or fostered a lack of accountability of members of the security forces for their actions which, as the Commission stated in its report, was not compatible with the rule of law in a democratic society respecting the fundamental rights and freedoms guaranteed under the Convention.

99. Consequently, these defects removed the protection which Hasan Kaya should have received by law.

100. The Government have disputed that they could in any event have effectively provided protection against attacks. The Court is not convinced by this argument. A wide range of preventive measures would have been available to the authorities regarding the activities of their own security forces and those groups allegedly acting under their auspices or with their knowledge. The Government have not provided any information concerning steps taken by them prior to the *Susurluk* report to investigate the existence of contra-guerrilla groups and the extent to which State officials were implicated in unlawful killings carried out during this period, with a view to instituting any appropriate measures of protection.

101. The Court concludes that in the circumstances of this case the authorities failed to take reasonable measures available to them to prevent a real and immediate risk to the life of Hasan Kaya. There has, accordingly, been a violation of Article 2 of the Convention.

(b) Alleged inadequacy of the investigation

102. The Court reiterates that the obligation to protect life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention "to secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see, *mutatis mutandis*, the McCann and others v. the United Kingdom judgment of 27 September 1995, Series A no. 324, p. 49, § 161 and the Kaya v. Turkey judgment, cited above, § 105).

103. In the present case, the investigation into the disappearance was conducted by the public prosecutor at Elazig. It changed hands four times. The file was transferred to Tunceli when the bodies were discovered. The Tunceli public prosecutor ceded jurisdiction to the State Security Court at Kayseri considering the case to concern a terrorist crime. From Kayseri, the investigation was transferred to Erzincan State Security Court and finally to Malatya State Security Court, where it is still pending.

104. The investigation at the scene of discovery of the bodies involved two autopsies. The first was cursory and included the remarkable statement that there were no marks of ill-treatment on the bodies. The second autopsy was more detailed and did record marks on both bodies. It omitted however to provide explanations or conclusions regarding the ecchymoses on the nailbases and the knees and ankle or the scratches on the ankle. Bruises on the right ear and head area were attributed to pressure on the body without clear explanation as to what that might involve (see paragraph 22 above).

There was no forensic examination of the scene or report regarding whether the victims were

killed at the scene or how they were deposited at the scene. Nor was there any investigation concerning how the two victims had been transported from Elazig to Tunceli, which journey would have involved stopping at a series of official checkpoints along the 130 km route. The Court observes that there is no evidence in the investigation file to document any attempts to check custody records or to take statements from potential eyewitnesses at Yazikonak, where the car was found.

105. It is noticeable that the major, indeed the only, leads in the investigation concerned alleged contra-guerrilla and security force involvement and were provided by information from the relatives of the victims, Ahmet Kaya and Anik Can, who passed on what they had heard from others and from the press. Information was also provided by a Tunceli lawyer and the President of the Tunceli HRA when they read an article in the press concerning the alleged perpetrators of the killings. The *Aydinlik* editor submitted a petition, drawing attention to interviews published in the newspaper alleging contra-guerrilla and state security officer involvement. The public prosecutors concerned did take steps in response. However, these were often limited and superficial. For example, instructions were given to locate suspected contra-guerrilla Mahmut Yildirim. However, the reports by the police were contradictory - the first stated that he had left his address while the second claimed the address did not exist. No steps were taken to clarify this position (see paragraphs 45 and 53).

The information concerning the alleged sighting of a wanted terrorist Yusuf Geyik, who had claimed participation in the killings, with gendarme officers in Pertek, was also not pursued, in particular, the apparent report of the police officer confirming the eyewitness statements that Geyik had been staying at the district gendarme station. No further enquiry was made of the gendarmes, notwithstanding the fact that one of the eye-witnesses had given the first names of two gendarmes whom he had claimed to recognise.

The Government have disputed that the public prosecutor can be criticised for failing to contact the press concerning their sources of information, in particular the journalist Soner Yalçin who published interviews, and later a book, concerning information given to him by a JITEM officer, Cem Ersever, about the targeting of a lawyer and doctor in Elazig. It is correct that the information which he could have given may have been hearsay in nature. Yalçin's claims were however relevant to the investigation and could have provided other lines of enquiry.

106. The investigation was also dilatory. There were significant delays in seeking for statements from witnesses: for example, it took from 17 November 1993 to April 1994 to obtain a fuller and more detailed statement from Huseyin Kaykaç. There was no apparent activity between 5 May 1993 and September 1993 and no significant step taken from April 1994 until 13 March 1995.

107. The Court does not underestimate the difficulties facing public prosecutors in the south-east region at this time. It recalls that Judge Major Bulut who gave evidence to the Commission's Delegates explained that he had 500 other investigations under his responsibility. Nonetheless, where there are serious allegations of misconduct and infliction of unlawful harm implicating state security officers, it is incumbent on the authorities to respond actively and with reasonable expedition (see, *mutatis mutandis*, Selmouni v. France judgment of 28 July 1999, to be published in *Reports* 1999-, § 77).

108. The Court is not satisfied that the investigation carried out into the killing of Hasan Kaya and Metin Can was adequate or effective. It failed to establish significant elements of the incident or clarify what happened to the two men and has not been conducted with the diligence and determination necessary for there to be any realistic prospect of the identification and apprehension of the perpetrators. It has remained from the early stages within the jurisdiction of the State Security Court prosecutors who investigate primarily terrorist or separatist offences.

109. The Court concludes that there has been in this respect a violation of Article 2 of the Convention.

III. Alleged violation of article 3 of the convention

110. The applicant complained that his brother was tortured before his death. He had previously complained that the circumstances of his brother's disappearance and death also inflicted inhuman and degrading treatment on himself but does not pursue this claim before the Court. He invoked Article 3 of the Convention which provides:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

111. The applicant relies on the medical evidence of injury which could only have been sustained by his brother during the period of disappearance before his body was discovered. This included bruises on the nailbeds, marks on the wrists from wire, bruises and scratches on the body and the state of the feet, which showed long immersion in water or snow. The failure of the authorities to carry out an effective investigation was also alleged to disclose a breach of the procedural obligation under Article 3 of the Convention.

112. The Government denied that there was any sign of torture revealed by the autopsies. They also disputed any Government responsibility for the disappearance.

113. The Commission considered that the Government were responsible for the ill-treatment suffered by Hasan Kaya before his death on the basis of their finding of failure by the authorities to protect his life. They found, however, that the medical evidence revealed treatment which should be characterised as inhuman and degrading treatment.

114. The Court recalls that it has not found that any State agent was directly responsible for Hasan Kaya's death. It has concluded that in the circumstances of this case there was a failure to provide protection of his right to life by the defects in the criminal law preventive framework and by the failure of the authorities to take reasonable steps to avoid a known risk to his life.

115. The obligation imposed on High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals (see A. v. the United Kingdom judgment of 23 September 1998, *Reports* 1998-VI, p. 2692, para. 22). State responsibility may therefore be engaged where the framework of law fails to provide adequate protection (eg. A. v. the United Kingdom, cited above, § 24) or where the authorities fail to take reasonable steps to avoid a risk of ill-treatment which they knew or ought to have known (eg. *mutatis mutandis*, Osman v. the United Kingdom, §§ 115-116).

116. The Court finds that the authorities knew or ought to have known that Hasan Kaya was at risk of targeting as he was suspected of giving assistance to wounded members of the PKK. The failure to protect his life through specific measures and through the general failings in the criminal law framework placed him in danger not only of extra-judicial execution but also of ill-treatment from persons who were unaccountable for their actions. It follows that the Government is responsible for ill-treatment suffered by Hasan Kaya after his disappearance and prior to his death.

117. In determining whether a particular form of ill-treatment should be qualified as torture,

consideration must be given to the distinction, embodied in Article 3, between this notion and that of inhuman or degrading treatment. As noted in previous cases, it appears that it was the intention that the Convention should, by means of this distinction, attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering (see the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 66, § 167, and the Selmouni v. France judgment cited above, § 96). In addition to the severity of the treatment, there is a purposive element as recognised in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which came into force on 26 June 1987, which defines torture in terms of the intentional infliction of severe pain or suffering with the aim, *inter alia*, of obtaining information, inflicting punishment or intimidating (see Article 1 of the UN Convention).

118. The Court agrees with the Commission that the exact circumstances in which Hasan Kaya was held and received the physical injuries noted in the autopsy are unknown. The medical evidence available also does not establish that the level of suffering could be regarded as very cruel and severe. It is however in no doubt that the binding of Hasan Kaya's wrists with wire in such a manner as to cut the skin and the prolonged exposure of his feet to water or snow, whether caused intentionally or otherwise, may be regarded as inflicting inhuman and degrading treatment within the meaning of Article 3 of the Convention.

119. The Court concludes that there has been a breach of Article 3 of the Convention in respect of Hasan Kaya.

120. It does not deem it necessary to make a separate finding under Article 3 of the Convention in respect of the alleged deficiencies in the investigation.

IV. Alleged violation of article 13 of the convention

121. The applicant complained that he had not had an effective remedy within the meaning of Article 13 of the Convention, which provides:

"Everyone whose rights and freedoms as set forth in this 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."

122. The Government argued that in light of the conditions pertaining in the region, the investigation carried out was effective. They pointed out that the authorities were only informed of the disappearance 17 hours after it occurred. The investigation would continue until the end of the prescription period of 20 years. They perceived no problem arising concerning effective remedies.

123. The Commission, with whom the applicant agreed, was of the opinion that the applicant had arguable grounds for claiming that the security forces were implicated in the killing of his brother. Referring to its findings relating to the inadequacy of the investigation, it concluded that the applicant had been denied an effective remedy.

124. The Court reiterates that Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law, in particular in the sense that its exercise must

not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State (see the following judgments: Aksoy v. Turkey, cited above, p. 2286, § 95; Aydin v. Turkey, cited above, pp. 1895-96, § 103; and Kaya v. Turkey, cited above, pp. 329-30, § 106).

Given the fundamental importance of the right to protection of life, Article 13 requires, 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 deprivation of life and including effective access for the complainant to the investigation procedure (see the Kaya v. Turkey judgment cited above, pp. 330-31, § 107).

125. On the basis of the evidence adduced in the present case, the Court has not found it proved beyond reasonable doubt that agents of the State carried out, or were otherwise implicated in, the killing of the applicant's brother. As it has held in previous cases, however, that does not preclude the complaint in relation to Article 2 from being an "arguable" one for the purposes of Article 13 (see the Boyle and Rice v. the United Kingdom judgment of 27 April 1988, Series A no. 131, p. 23, § 52, and the Kaya and Yasa v. Turkey judgments, cited above, pp. 330-31, § 107 and p. 2442, § 113 respectively). In this connection, the Court observes that it is not in dispute that the applicant's brother was the victim of an unlawful killing and he may therefore be considered to have an "arguable claim".

126. The authorities thus had an obligation to carry out an effective investigation into the circumstances of the killing of the applicant's brother. For the reasons set out above (see paragraphs 100-106), no effective criminal investigation can be considered to have been conducted in accordance with Article 13, the requirements of which are broader than the obligation to investigate imposed by Article 2 (see the Kaya judgment cited above, pp. 330-31, § 107). The Court finds therefore that the applicant has been denied an effective remedy in respect of the death of his brother and thereby access to any other available remedies at his disposal, including a claim for compensation.

Consequently, there has been a violation of Article 13 of the Convention.

V. Alleged practice by the authorities of infringing articles 2, 3 and 13 of the convention

127. The applicant maintained that there existed in Turkey an officially tolerated practice of violating Articles 2, 3 and 13 of the Convention, which aggravated the breach of which he and his brother had been victims. Referring to other cases concerning events in south-east Turkey in which the Commission and the Court had also found breaches of these provisions, the applicant submitted that they revealed a pattern of denial by the authorities of allegations of serious human-rights violations as well as a denial of remedies.

128. Having regard to its findings under Articles 2, 3 and 13 above, the Court does not find it necessary to determine whether the failings identified in this case are part of a practice adopted by the authorities.

VI. Alleged violation of article 14 of the convention

129. The applicant submitted that his brother was kidnapped and killed because of his Kurdish origin and his presumed political opinion and that he was thus discriminated against, contrary to the prohibition contained in Article 14 of the Convention, which reads:

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any

ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

130. The Government did not address this issue at the hearing.

131. The Court considers that these complaints arise out of the same facts considered under Articles 2, 3 and 13 of the Convention, and does not find it necessary to examine them separately.

VII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

132. Article 41 of the Convention provides:

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

A. Pecuniary damage

133. The applicant claimed 42,000 pounds sterling (GBP) in respect of the pecuniary damage suffered by his brother who is now dead. He submitted that his brother, aged 27 at his death and working as a doctor with a salary of the equivalent of GBP 1,102 per month, can be calculated as having a capitalised loss of earnings of GBP 253,900.80. However, in order to avoid any unjust enrichment, the applicant claimed the lower sum of GBP 42,000.

134. The Government, pointing out that the applicant had failed to establish any direct State involvement in the death of his brother, rejected the applicant's claims as exaggerated and likely to lead to unjust enrichment. They disputed that his brother would have earned the sum claimed, which was an immense amount in Turkish terms.

135. The Court notes that the applicant's brother was unmarried and had no children. It is not claimed the applicant was in any way dependent on him. This does not exclude an award of pecuniary damages being made to an applicant who has established that a close member of the family has suffered a violation of the Convention (see Aksoy v. Turkey judgment of 18 December 1996, *Reports* 1996-VI, § 113, where the pecuniary claims made by the applicant prior to his death for loss of earnings and medical expenses arising out of detention and torture were taken into account by the Court in making an award of damages to the applicant's father who had continued the application). In the present case however, the claims for pecuniary damage relate to alleged losses accruing subsequent to the death of the applicant's brother. They do not represent losses actually incurred either by the applicant's brother before his death or by the applicant after his brother's death. The Court does not find it appropriate in the circumstances of this case to make any award to the applicant under this head.

B. Non-pecuniary damage

136. The applicant claimed, having regard to the severity and number of violations, GBP 50,000 in respect of his brother and GBP 2,500 in respect of himself for non-pecuniary damage.

137. The Government claimed that these amounts were excessive and unjustified.

138. As regards the claim made on behalf of non-pecuniary damage for his deceased brother, the

Court notes that awards have previously been made to surviving spouses and children and where appropriate, to applicants who were surviving parents or siblings. It has previously awarded sums as regards the deceased where it was found that there had been arbitrary detention or torture before his disappearance or death, such sums to be held for the person's heirs (see Kurt v. Turkey judgment, cited above, §§ 174-175, and Cakiçi v. Turkey judgment, cited above, § 130). The Court notes that there have been findings of violations of Articles 2, 3 and 13 in respect of the failure to protect the life of Hasan Kaya whose body was found bearing signs of serious ill-treatment after being held by his captors for six days. It finds it appropriate in the circumstances of the present case to award GBP 15,000, which amount is to be paid to the applicant and held by him for his brother's heirs.

139. The Court accepts that the applicant has himself suffered non-pecuniary damage which cannot be compensated solely by the findings of violations. Making its assessment on an equitable basis, the Court awards the sum of GBP 2,500 to the applicant, such sum to be converted into Turkish liras at the rate applicable at the date of payment.

C. Costs and expenses

140. The applicant claimed a total of GBP 32,781.74 for fees and costs incurred in bringing the application, less the amounts received by way of Council of Europe legal aid. This included fees and costs incurred in respect of attendance at the taking of evidence before the Commission's delegates at hearings in Ankara and Strasbourg and attendance at the hearing before the Court in Strasbourg. A sum of GBP 5,205 is listed as fees and administrative costs incurred in respect of the Kurdish Human Rights Project (the KHRP) in its role as liaison between the legal team in the United Kingdom and the lawyers and the applicant in Turkey, as well as a sum of GBP 3,570 in respect of work undertaken by lawyers in Turkey.

141. The Government regarded the professional fees as exaggerated and unreasonable and submitted that regard should be had to the applicable rates for the bar in Istanbul.

142. In relation to the claim for costs the Court, deciding on an equitable basis and having regard to the details of the claims submitted by the applicant, awards him the sum of GBP 22,000 together with any value-added tax that may be chargeable, less the 15,095 French francs (FRF) received by way of legal aid from the Council of Europe.

D. Default interest

143. According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 7.5% per annum.

FOR THESE REASONS, THE COURT

1. *Holds* by six votes to one that the Government failed to protect the life of Hasan Kaya in violation of Article 2 of the Convention;

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

circumstances of the death of Hasan Kaya;

3. *Holds* by six votes to one that there has been a violation of Article 3 of the Convention;

4. *Holds* by six votes to one that there has been a violation of Article 13 of the Convention;

5. *Holds* unanimously that it is unnecessary to examine whether there has been a violation of Article 14 of the Convention;

6. *Holds* by six votes to one that the respondent State is to pay the applicant in respect of his brother, within three months, by way of compensation for non-pecuniary damage, GBP 15,000 (fifteen thousand pounds sterling) to be converted into Turkish liras at the exchange rate applicable at the date of settlement, which sum is to be held by the applicant for his brother's heirs;

7. *Holds* unanimously that the respondent State is to pay the applicant, within three months, in respect of compensation for non-pecuniary damage, GBP 2,500 (two thousand five hundred pounds sterling) to be converted into Turkish liras at the exchange rate applicable at the date of settlement;

8. *Holds* unanimously that the respondent State is to pay the applicant, within three months, in respect of costs and expenses, GBP 22,000 (twenty two thousand pounds sterling), together with any value-added tax that may be chargeable, less FRF 15,095 (fifteen thousand and ninety five French francs) to be converted into pounds sterling at the exchange rate applicable at the date of delivery of this judgment;

9. *Holds* unanimously that simple interest at an annual rate of 7.5% shall be payable from the expiry of the above-mentioned three months until settlement of the above sums;

10. *Dismisses* unanimously the remainder of the applicant's claims for just satisfaction.

Done in English, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 28 March 2000.

Michael O'Boyle Elisabeth Palm
Registrar President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly dissenting opinion of Mr F. Gölcüklü is annexed to this judgment.

PARTLY DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

(*provisional translation*)

To my great regret, I am unable to agree with the majority on points 1, 3, 4 and 6 of the operative provisions of the Kaya judgment for the following reasons:

1. The Court reached the conclusion that the Government had violated Article 2 by failing to take the necessary measures to protect the life of Hasan Kaya.

There is not a shadow of doubt in any one's mind that south-east Turkey is a high-risk area for all its inhabitants. PKK and Hizbollah terrorists and members of the far left, encouraged and supported by foreign powers, seize every opportunity to perpetrate their crimes. Moreover, gangsters and rogues take advantage of the presence of these terrorist groups in the region. The Government have taken – and continue to take – all necessary measures within their power to combat these threats to life (see paragraph 86 of the judgment). The Court itself recognises that the positive obligation imposed on the State by the Convention is not absolute but merely one to use best endeavours.

Thus, surely it is for people living in the region who feel threatened to exercise greater care than others and to take their own safety precautions, rather than wait for the Government to protect them against those dangers?

Surely it was unwise and foolhardy of the deceased to leave with strangers for an unknown destination when, as the Commission found, he was aware of the risk he was running?

Unfortunately, no government is able to make security agents available to accompany persons who feel threatened or to provide them with personal protection in a high-risk area where perhaps hundreds or even thousands of people are in a like situation. Indeed, Hasan Kaya at no stage requested protection. The regional authorities and the deceased's family concealed the true circumstances of his disappearance from the investigating authorities, and may even have lied to them. In other words, they did not give any assistance whatsoever to the security agents (see paragraph 14 of the judgment in the instant case).

Consequently, I do not share the opinion that the Government failed, in breach of Article 2 of the Convention, in any duty it had to protect Hasan Kaya's life.

2. As regards the finding of a violation of Article 13 of the Convention, I refer to my dissenting opinion in the case of Ergi v. Turkey (see the judgment of 28 July 1998, *Reports of Judgments and Decisions* 1998–IV).
Thus I agree with the Commission that once the conclusion has been reached that there has been a violation of Article 2 of the Convention on the grounds that there was no effective investigation into the death that has given rise to the complaint, no separate question arises under Article 13. The fact that there was no satisfactory and adequate investigation into the death which resulted in the applicant's complaints, both under Article 2 and Article 13, automatically means that there was no effective remedy before a national court. On that subject, I refer to my dissenting opinion in the case of Kaya v. Turkey (see the judgment of 19 February 1998, *Reports* 1998) and the opinion expressed by the Commission with a large majority (see Aytekin v. Turkey, application no. 22880/93, 18 September 1997; Ergi v. Turkey, application no. 23818/94, 20 May 1997; Yasa v. Turkey, application no. 22495/93, 8 April 1997).

3. The Court awarded the applicant GBP 15,000 "in respect of his brother ... by way of compensation for non-pecuniary damage ... which sum is to be held by the applicant for his

brother's heirs".

The *actio popularis* is excluded under the Convention system, with all the consequences that logically follow. It is for that reason that the Court has up till now awarded compensation for non-pecuniary damage for individual violations only to very close relatives such as the surviving spouse or children of the deceased person or, exceptionally, when it has appeared equitable, the father or mother if an express claim has been made (see paragraph 105 of the judgment in the instant case and the Tanrikulu v. Turkey judgment, § 138).

It is completely alien and contrary to the Convention system and devoid of any legal justification for an abstract, anonymous and undefined group (perhaps very distant heirs) that has suffered no non-pecuniary damage as a result of the violations found to be awarded compensation.

Hasan Kaya was single. He had no companion or children and therefore no heirs deserving compensation for non-pecuniary damage. Yet, even more surprisingly, the Court awarded the applicant's brother the sum of GBP 2,500 for non-pecuniary damage (see paragraph 106 of the judgment in the instant case). As one of the deceased's heirs, that brother will also receive part of the award of GBP 15,000. He will thus receive two lots of compensation for the same loss, a fact that goes to highlight the inequitable nature of the Court's decision in this case.

4. Before closing, I feel bound to express my views on what I consider to be an important point. In cases where the presumed offender is a State agent, he may only be prosecuted if the administrative body ("administrative board") has given prior authorisation. However, that body is, by law, made up of public servants and is neither independent nor impartial. The Court, whose view I agree with entirely, has consistently criticised the Turkish government for that state of affairs.

However, the Court's inadmissibility decision of 5 October 1999 in the case of Grams v. Germany is instructive on the point. The case concerned the death of a presumed member of the Red Army Faction. The Court noted that the Schwerin Public Prosecutor's Office had decided to drop the prosecution on the ground that the police officers had fired in lawful self-defence and Grams had committed suicide by shooting himself in the head. In arriving at that conclusion, the public prosecutor's office had relied on a 210 page report (*Absclussvermerk*) in which the special unit responsible for the investigation of the case had set out its findings. What is interesting in this example – and it will be noted in passing that the application was not even communicated to the Government – is that the investigation was conducted not by a judicial body but by a special unit, that is to say a purely administrative body.

Appendix C

Kiliç v Turkey: Decision of European Commission of Human Rights

CONFIDENTIAL

COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

Or. English

EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 22492/93

Cemil KILIÇ
against
Turkey

Report of the Commission

(Adopted on 23 October 1998)

Strasbourg

EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 22492/93

Cemil Kılıç

against

Turkey

REPORT OF THE COMMISSION

(adopted on 23 October 1998)

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I. INTRODUCTION

1. The following is an outline of the case as submitted to the European Commission of Human Rights, and of the procedure before the Commission.

A. The application

2. The applicant is a Turkish citizen resident in Şanlıurfa and born in 1960. He is represented before the Commission by Professors K. Boyle and F. Hampson, both teachers at the University of Essex.

3. The application is directed against Turkey. The respondent Government were represented by their Agent, Mr. A. Gündüz.

4. The applicant alleges that his brother Kemal Kılıç was killed by or with the connivance of State agents and that there was no effective investigation, redress or remedy for his complaints. He alleges that his brother was threatened and killed because he was a journalist. He invokes Articles 2, 3, 10, 13 and 14 of the Convention.

B. The proceedings

5. The application was introduced on 13 August 1993 and registered on 20 August 1993.

6. On 11 October 1993, the Commission decided to communicate the application to the Turkish Government, who were invited to submit their observations on admissibility and merits before 4 November 1993.

7. On 10 March 1994, the Government submitted their observations, after one extension in the time-limit. The applicant's observations in reply were submitted on 11 May 1994.

8. On 9 January 1995, the Commission declared the application admissible.

9. The text of the Commission's decision on admissibility was sent to the parties on 19 January 1995 and they were invited to submit such further information or observations on the merits as they wished. They were also invited to indicate the oral evidence which they might wish to put before Delegates.

10. On 17 January 1995, the Government submitted supplementary information and on 22 May 1995, after two extensions in the time-limit for that purpose, observations on the merits.

11. On 7 July 1995, the Commission examined the state of proceedings. It requested that the Government provide documents and information relating to the proceedings against Hüseyin Güney allegedly charged with the killing of the applicant's brother and that the applicant provide comments on the Government's submissions concerning the trial.

12. By letter dated 11 September 1995, the applicant made submissions concerning the trial.

13. By letter dated 2 October 1995, the Secretariat of the Commission reminded the Government that the documents and information requested had not been provided.

14. On 29 November 1995, the Government provided the indictment in the trial and information concerning the proceedings.

15. On 2 December 1995, the Commission decided to take oral evidence in respect of the applicant's allegations. It appointed three Delegates for this purpose: Mr. G. Jörundsson, B. Conforti and N. Bratza. It notified the parties by letter of 12 December 1995, proposing certain witnesses and requesting the Government to identify the public prosecutors involved in various proceedings. The Government were also requested to provide the contents of the investigation files, in particular, the ballistic reports.

16. On 13 September 1995 and 6 November 1995, the Government submitted information identifying certain witnesses.

17. By letter of 29 January 1996, the applicant's representatives made proposals as to witnesses.

18. On 26 March 1996, the Government provided further documents.

19. By letter dated 20 December 1996, the Secretariat repeated the request for the Government to identify a public prosecutor for the purposes of the taking of evidence.

20. Evidence was heard by the delegation of the Commission in Ankara on 4-5 February 1997. Before the Delegates the Government were represented by Mr. S. Alpaslan and Mr. D. Tezcan, as co-Agents, assisted by Mr M. Özmen, Mr. F. Polat, Ms. M. Gülşen, Ms. N. Erdim, Mr. A. Kaya, Mr. A. Kurudal and Mr. O. Sever. The applicants were represented by Ms. F. Hampson, and Mr. O. Baydemir, counsel, assisted by Ms. A. Reidy and assisted by Ms. D. Deniz and Mr. M. Kaya, as interpreters. Further documentary material was submitted by the Government during the hearings. During the hearings, and later confirmed by letter of 19 February 1997, the Delegates requested the Government to provide certain documents and information concerning matters arising out of the hearings and providing explanations for the absence of certain witnesses.

21. By letter dated 3 March 1997, the Government provided further information.

22. On 1 March 1997, the Commission decided to take further oral evidence in the case and proposed recalling three witnesses.

23. On 2 April 1997, the Government provided documents concerning the trial of Hüseyin Güney.

24. Evidence was heard by the delegation of the Commission in Strasbourg on 4 July 1997. Before the Delegates, the Government were represented by Mr. A. Gündüz, Agent, assisted by Mr S. Alpaslan, Ms. M. Gülşen, Mr. A. Kaya, Mr. D. Karaca and Dr. Mustafa Bağrıaçık. The applicants were represented by Ms. F. Hampson and Ms. A. Reidy, counsel, assisted by Mr. M. Kaya as interpreter. Further documentary material was submitted by the Government during the hearings.

25. On 10 July 1997, the Commission decided to invite the parties to present their written conclusions on the merits of the case, following transmission to the parties of the verbatim record. The time-limit was fixed at 4 December 1997, after the verbatim record was corrected and finalised on 17 October 1997.

26. On 24 July 1997, the Government provided information concerning the non-attendance of Mr. Ziyaeddin Akbulut.

27. On 3 December 1997, the applicant submitted his final observations. On 3 December 1997, the Government requested an extension in the time-limit for submission of observations, which was granted until 5 January 1998. No observations have been received from the Government.

28. On 11 February 1998 and 20 February 1998, the applicant submitted information and extracts from the Susurluk report issued by the Prime Minister's Office.

29. By letter dated 23 April 1998, the Commission requested the Government to produce the pages and annexes of the Susurluk report which had not been made public.

30. By letter dated 5 June 1998, the Government declined to provide copies of the missing pages and annexes of the Susurluk report.

31. By letter of 6 July 1998, the Commission renewed its request to view the missing pages and annexes of the Susurluk report, subject to any necessary precautions to avoid prejudicing any ongoing domestic enquiries.

32. By letter dated 16 July 1998, the Government declined the Commission's request.

33. On 20 October 1998, the Commission decided that there was no basis on which to apply Article 29 of the Convention.

34. After declaring the case admissible, the Commission, acting in accordance with Article 28 para. 1 (b) of the Convention, also placed itself at the disposal of the parties with a view to securing a friendly settlement. In the light of the parties' reaction, the Commission now finds that there is no basis on which such a settlement can be effected.

C. The present Report

35. The present Report has been drawn up by the Commission in pursuance of Article 31 of the Convention and after deliberations and votes, the following members being present:

MM S. TRECHSEL, President
J.-C. GEUS
M.P. PELLONPÄÄ
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H. DANELIUS
Mrs G.H. THUNE
Mr C.L. ROZAKIS
Mrs J. LIDDY
MM L. LOUCAIDES
M.A. NOWICKI
I. CABRAL BARRETO
N. BRATZA
I. BÉKÉS
D. ŠVÁBY
G. RESS
A. PERENIČ
C. BÎRSAN
P. LORENZEN
E. BIELIŪNAS
E.A. ALKEMA
M. VILA AMIGÓ
Mrs M. HION
MM R. NICOLINI
A. ARABADJIEV

36. The text of this Report was adopted on 23 October 1998 by the Commission and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with Article 31 para. 2 of the Convention.

37. The purpose of the Report, pursuant to Article 31 of the Convention, is:

(i) to establish the facts, and

(ii) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.

38. The Commission's decision on the admissibility of the application is attached hereto as Appendix I and a summary of the Susurluk report attached as Appendix II.

39. The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the Commission.

II. ESTABLISHMENT OF THE FACTS

40. The facts of the case, particularly concerning events in or about 18 February 1993, are disputed by the parties. For this reason, pursuant to Article 28 para. 1 (a) of the Convention, the Commission has conducted an investigation, with the assistance of the parties, and has accepted written material, as well as oral testimony, which has been submitted. The Commission first presents a brief outline of the events, as claimed by the parties, and then a summary of the evidence submitted to it.

A. The particular circumstances of the case

a. Facts as presented by the applicant

41. The various accounts of events as submitted in written and oral statements by the applicant are summarised in Section B below. The version as presented in the applicant's final observations on the merits is summarised here.

42. The applicant's brother Kemal Kılıç worked for the newspaper Özgür Gündem in Şanlıurfa (also referred to as Urfa). He and other journalists, as well as newspaper distributors involved with that newspaper, had been threatened. On 23 December 1992, Kemal Kılıç made a written request to the Governor, referring to attacks, beatings and arson and asking for protection for people working at the Şanlıurfa offices, including himself.

43. On 30 December 1992, the Governor rejected the request, without any investigation having been conducted into the alleged threats.

44. On 5 January 1993, a newspaper shop burned down. Kemal Kılıç issued a press release criticising the Governor for failing in his duty to protect and suggesting that the fire was caused by arson. On 18 January 1993, the police took Kemal Kılıç briefly into custody on the basis of a complaint by the Governor about the criticisms made. An investigation file was opened, which was closed on 5 March 1993 after Kemal Kılıç's death.

45. Kemal Kılıç told his friends around this time that he was being followed in Urfa by undercover agents of the National Intelligence Agency (MİT). Villagers and shepherds from Külünçe where he lived also noticed a white Renault car in the vicinity of the village, while villagers working in Urfa noticed a white Renault arriving at the bus station at the same time as Kemal Kılıç did. Shortly after Kemal Kılıç was taken into custody on 18 January 1993, a white Renault came into the village at about midnight or 01.00 hours and people knocked on the door of the house where Kemal lived with his father, asking for Kemal to open it. They left when some wood started burning.

46. On 18 February 1993, at about 17.30 hours, Kemal Kılıç got on the bus which went from Urfa and passed Külünçe. Three cars overtook the bus on the road, one of which was a white Renault which turned up the untarmacked road to Külünçe, turned round and stopped with its engine stopped. Kemal Kılıç was the only person to get off the bus at the Külünçe road. The watchman, Ahmet Fidan, at a bridge construction site nearby, saw two people get out of the white Renault to meet Kemal Kılıç. He heard sounds of disagreement, a cry for help and two shots.

The white Renault, in which there were four people, drove off towards Urfa. Fidan saw Kemal Kılıç's body by the road and ran to the nearby petrol station to report the killing.

47. At the scene of the killing, the gendarmes made no attempt to investigate until the arrival of the public prosecutor. Items such as the tape binding Kemal Kılıç's mouth and the two cartridges found at the scene were handled without attention to preserve any fingerprint evidence. The investigation which followed did not include, inter alia, any fingerprint testing, testing of the piece of paper found at the scene or any follow up visit to the site during daylight hours. The killing was treated as an ordinary crime.

48. The background to, and circumstances of the killing of Kemal Kılıç, show that he was killed with the involvement or connivance of State agents, due to his involvement with Özgür Gündem, which was regarded by the authorities as a mouthpiece for the PKK.

49. The applicant and his family were not informed of the subsequent arrest of the alleged Hizbollah suspect Hüseyin Güney and were not called to give evidence although the indictment included the killing of Kemal Kılıç. The only evidence linking the suspect with killing was the ballistics evidence that the gun allegedly found in the vicinity of Güney at his arrest had been used in the killing of Kemal Kılıç and other persons. There was no evidence, or attempt to gain evidence, that Güney who came from Batman had ever been to Urfa or was linked to the killing in any other way. Güney had denied any involvement.

b. Facts as presented by the Government

50. The Government have made no submissions on the merits or with regard to the taking of evidence. From their previous submissions, their case is the following.

51. The Şanlıurfa public prosecutor began the investigation into the killing of Kemal Kılıç immediately. All necessary steps were taken in the investigation, including the collection of evidence. When a gun, found on Hüseyin Güney, a Hizbollah suspect, on his arrest in December 1993 in Diyarbakır, was subjected to ballistics examination, this revealed that the shells from the scene of Kemal Kılıç's murder had been fired from the same gun. Güney was charged and is currently being tried in relation to this killing as well as others. Hizbollah was a separatist terrorist organisation which carried out violent attacks on the PKK as well as the State. They refer to the intense terrorist activity in the region at that time and the daily violent acts that were occurring.

B. The evidence before the Commission

1) Documentary evidence

52. The parties submitted various documents to the Commission. The documents included domestic reports (eg. 1993 Parliamentary Commission report on "unknown perpetrator" killings and the Susurluk report) and external reports about Turkey (eg. Helsinki Watch "Free Expression in Turkey 1993: Killings, Convictions, Confiscations", August 1993, Vol. 5

Issue 17 and see also Amnesty International report "Turkey: walls of glass" November 1992, AI Index Eur 44/75/92), domestic case-law, statements from the applicant and other persons, and sketch maps.

53. The Commission had particular regard to the following documents:

a) Statement by the applicant dated 1 March 1993 taken by Yusuf Karataş

54. The applicant stated that his brother was killed because he was a journalist. He had received many death threats in regard to his work for the Özgür Gündem newspaper. He was also on the Management Committee of the Urfa Human Rights Association. For two months before he was killed, he was constantly being followed. Ten days before, he was followed by a vehicle said to be exactly like the white Renault registration 63 EO 443 in which his killers escaped after the murder. His brother had said that the persons following him were from the police, from the National Intelligence Agency. Because of this, the applicant's brother had made an application to the Governor for protection on 23 December 1993 which was refused. The Özgür Gündem newspaper could no longer be distributed in Urfa due to the threats at that time. The Urfa sales representative of United Press Distribution had been threatened so that they would not distribute the newspaper. Some newsagents had also been set on fire. His brother wrote a press statement calling on the Governor's office to carry out their duty. The Governor lodged a complaint in relation to this and the applicant's brother was detained at the police security headquarters on 18 January 1993.

55. On 18 February 1993, his brother left the newspaper office at 17.00 hours to go home. He boarded the Akçakale bus at Kuyubaşı as usual at 17.30 hours and got off at the turn-off to Külünçe where he lived. Fifty metres up the village road, he was intercepted by persons waiting in ambush. According to the only eye-witness, a building site watchman for Balaban construction, these persons argued with his brother for 15-20 minutes, and then taped up his mouth to kidnap him. They wanted to tie him up and apparently bit him on the left hand. When his brother resisted, they pulled his jacket over his head and shot him twice in the head, killing him.

56. The applicant learned of the shooting from villagers and went to the scene of the incident. The gendarmes were there. According to what was said, his brother was shot between 18.00 and 18.20 hours. The prosecutor came to the scene at 20.20 hours. In the examination of the scene, two empty 9mm cartridges were found and the tape was taken from his brother's mouth, without any care taken with regard to fingerprints. His opinion was that no efforts were made to find traces of the killers at the scene. The rope with which the men had tried to bind his brother was also just placed in a bag. It was unclear what had happened to a piece of paper found by a non-commissioned officer at the scene.

57. His brother had no enemies, nor his family. This was told to gendarmes who kept repeating the same and only question about whether they had enemies. The gendarmes called him and his father to the station five times. Gendarmes and security headquarters people came 5-6 times, the house was searched and his brother's private things looked through. It was as though they wanted to show the killing of his

brother to be a common criminal incident. He did not believe that the killers would be caught with their efforts. Four other reporters for Özgür Gündem had been killed and one paralysed from injuries received in an attack. He made this application to ensure that the files would not be closed as a murder with unknown perpetrators and that the killers would be caught.

b) Documents relating to Kemal Kılıç prior to his death

Undated transcription of a telephone conversation between Kemal Kılıç and a newsagent at the Özgür Gündem office

58. This recorded that a newsagent from Küçükoğlu Trade at Küçükoğlu market rang to inform the newspaper about a person who had made threats. He described the person and stated that he had received a telephone threat previously. He was wondering if it might be the police since they had come before and he had told them that he would sell whatever newspaper he liked. He sold Özgür Gündem.

Undated transcription of telephone conversations between Özgür Gündem journalist Bayram Balcı and the security headquarters

59. Balcı informed the officer at the Intelligence Centre that a person had been going round the newsagents in Urfa for two days, saying that he was from the Security Directorate and that they should not sell Özgür Gündem or other named newspapers or they would be bombed. When asked to specify from whom the complaints came, Balcı said that all the newsagents in Urfa had been complaining to the newspaper. The security officer said that he would send round a patrol to the newspaper offices to find out further information.

60. In a second call, Balcı informed another officer that journalists had been threatened. He was told to make a complaint at the nearest police station. When he said that a man was still going around threatening newsagents that morning and saying that he was from the Security Directorate, he was told that a patrol would be sent.

61. In a third call, when a patrol had not yet arrived, Balcı was told that he should make an application in writing at the nearest police station and then a patrol would be sent out to look for the man. The officer did not consider that it was an emergency requiring immediate response.

62. The document relates that persons went to the police station to make an application. A commissioner and an officer came to talk to them. Several days later, there was an arson attack on one of the newsagents who had been threatened.

Request to Şanlıurfa governor dated 23 December 1992 signed by Kemal Kılıç

63. The press release stated that due to death threats directed at the United Press Distribution representative carrying out the distribution of Özgür Gündem, distribution of the newspaper was being carried out by workers of the newspaper in Şanlıurfa under extremely unsafe conditions. The driver and the owner of the taxi used for the distribution were being threatened by unknown persons. As was known,

persons working for the newspaper had been killed and attacked and those involved in sale and distribution had been subject to arson and armed attacks and beatings.

64. Reference was made to the fact that in many provinces in the south-east, like Diyarbakır, Batman, Van, and Mardin, where attacks and threats had been made on the newspaper, security officers were protecting the offices, workers and distributors. It was respectfully requested that measures be taken to assign the necessary security officers to guarantee the safety of people working for the Şanlıurfa newspaper office, naming Bayram Balcı, Kemal Kılıç and Nazım Babaoğlu, Ali Dadir (distributor) and Hasan Yaktaş (driver).

Reply of the Governor's office dated 30 December 1992

65. The request for protection had been examined. No protection had been assigned to any distributors of newspapers anywhere in the province or districts nor had there been any question of attacks or threats on distributors anywhere in the area. The request was refused.

Press release dated 11 January 1993 signed by Kemal Kılıç

66. The press release stated that attacks aimed at newspaper distribution and sales in Urfa were continuing despite their persistent warnings to the authorities urging them to take measures. On 5 January 1993, there was an arson attack on the newsagent's stand belonging to Ahmet Divitçi, who was one of the persons repeatedly threatened by persons claiming to be the police because they were selling the Özgür Gündem newspaper. The Governor Ziyaeddin Akbulut had tried to conceal events by telling the Ministry of the Interior that no incidents were taking place and that the kiosk burned down due to a short circuit. He was thus supporting the actions of the hooligans threatening the newsagents. As a result of this irresponsible attitude, another newsagent's stand (no. 5) in the Akarbaşı district had been burned down the previous night. The main distributor in Ceylanpınar district, Aldülgaffar Ağar, had said that he would not continue to distribute Özgür Gündem since his safety could not be guaranteed. The Governor was condemned for not ensuring the free distribution of newspapers and he and the police authorities were called upon to fulfil their responsibilities.

Decision not to prosecute dated 5 March 1993

67. The decision refers to an offence committed by Kemal Kılıç on 11 January 1993 in respect of statements and insinuations broadcast in the form of a press release on the radio, which constituted an insult to the Governor. Since the accused had died, the prosecution was discontinued.

c) Documents relating to the investigation into the killing of Kemal Kılıç

Incident report dated 18 February 1993

68. This report drawn up by the gendarmes, and signed, inter alia, by NCO Taner Seçkin and counter-signed by the muhtar of Külünçe

village, states that on report by Ahmet Fidan, a watchman, that a murder had taken place at the entrance to Külünçe village at about 18.15 hours, a sufficient force was sent to the scene.

69. The report describes the body as being situated on the untarmacked road 500 metres from the village, and 100 metres from the E-24 Şanlıurfa-Akçakale road. A systematic investigation at the incident location disclosed, inter alia, that the victim's mouth was covered with four pieces of packaging tape, each 15 cm long and that there was a rope, 1 metre long, 0.5 cm wide, round his neck. One 9 mm cartridge was found under the left cheek and another under the right hand. The empty cartridges were given to the public prosecutor at the scene. The muhtar identified the victim as Kemal Kılıç.

Sketches dated 18 February 1993

70. There is a sketch map drawn by NCO Seçkin indicating the location of the body and the distances relevant to the main road, village road and bridge construction. The shed of the watchman is indicated as being 50 metres from the body, on the righthand side of the village road about 10 metres from the main city road.

71. There is sketch drawn by NCO Seçkin of the position of the body, together with positions of the rope, cartridges, tape.

Report of examination of the body dated 18 February 1993

72. This document signed, inter alia, by the public prosecutor and a medical doctor, describes the location, position and state of the body found near Külünçe village. An external examination was carried out by the medical expert who concluded that due to the location and light the body should be removed to the state hospital for procedures to be carried out.

Autopsy report dated 19 February 1993

73. The examination report, carried out by a medical doctor in the presence of the public prosecutor, states that there was a bullet entry in the right ear and another in the right temporal region, and two exit holes. There was an ecchymotic blow mark 1 cm long on the left eyebrow, a superficial graze on the left hand index finger and a semi-circular lesion on the outer left hand, like a bite mark. Five ecchymosis marks were found in the right lumbar region. The internal organs were examined. Cause of death was due to destruction of brain tissue and brain haemorrhage. Either bullet would have been fatal. No bullet was found in the body. The entry holes indicated firing took place from the same range and distance. The victim's coat had holes likely to be bullet holes and the large bloodstains indicated that it might have been used to cover the head before the killing took place.

Statement of Ahmet Fidan dated 18 February 1993

74. The statement, taken by NCO Seçkin, stated that the witness worked as a night guard at bridge works carried out by Balaban İnşaat construction company, in front of Külünçe village. On the night of 18 February 1993, he started work on building a shed for use in his night duty. Around 18.20 hours a white saloon Renault car came from the Şanlıurfa direction of the city road and entered the Külünçe village

road. After doing a U-turn, it parked facing the main road and switched off its headlights. About 15 minutes later, a man got off the Şanlıurfa Cesur coach and headed towards Külünçe village. The witness, busy with his own work, heard arguments and talking and looked towards where they were coming from. However it was dark and he could not see anything. He then heard a cry "Help!" and two pistol shots. He crouched down in fear. After this, the car turned into the road and escaped towards Şanlıurfa. The witness approached the incident location and using his torch saw the body of a dead man. There had been a fifteen minute gap between the passenger walking toward the village and the shots. He did not see the victim, the perpetrators or the vehicle because of the darkness. He said he had nothing else to add.

Statement of Mehmet Şerbetiçen dated 19 February 1993

75. The witness, whose statement was taken by NCO Seçkin, was the driver of the Şanlıurfa Cesur coach. He recalled leaving the Kuyubaşı district at about 17.30 hours, with 7-8 passengers. He remembered that having travelled about 14 km on the Şanlıurfa-Akçakale road, three cars overtook the coach, one of which was an old white Renault. The Renault turned into the Külünçe village road but he did not see if it stopped or went on to the village. He stopped the coach at the turning to Külünçe for a passenger to get off but did not see in which direction the passenger went.

Statement of İbrahim Şerbetiçen dated 19 February 1993

76. The witness, whose statement was taken by NCO Seçkin, was the driver's assistant on the Şanlıurfa Cesur coach. He did not see any cars overtaking the bus on 18 February 1993 after it left Kuyubaşı at 17.30 hours. A passenger got off at Külünçe turning and walked towards the village.

Statement of Mustafa Kılıç dated February 1993

77. The witness, whose statement was taken by NCO Seçkin, was the father of Kemal Kılıç. He stated, inter alia, that his son had no enemies, being very calm and quiet. He did not know what his son might have been investigating before his death. He himself had no ill-dealings with anyone and did not know why anyone would kill his son. He did not know what meetings his son attended or which party he was a member of.

Statement of Mahmut Kılıç dated February 1993

78. The witness, whose statement was taken by NCO Seçkin, was the brother of Kemal Kılıç. He stated, inter alia, that his brother had been working for Özgür Gündem for about a year and a half. As far as he knew, his brother had no problems with people at the paper, in the village or in Şanlıurfa. He had recently been working on an article about infant deaths in Şanlıurfa. If he was being followed or threatened, his brother would have told them. He never went outside provincial boundaries. He used to go frequently to the Human Rights Association and to HEP (People's Labour Party).

Statement of İbrahim Kılıç dated 22 February 1993

79. The witness, whose statement was taken by NCO Seçkin, was the brother of Kemal Kılıç. He stated, inter alia, that his brother had not told his father or any of his brothers that he had been followed or threatened or that he had argued with anyone. He did not know what meetings his brother attended or what party he sided with. He was quiet and calm and did not interfere.

Statement of Mehmet Cemil Kılıç dated 22 February 1993

80. The witness, whose statement was taken by NCO Seçkin, was the brother of Kemal Kılıç. He stated, inter alia, that his brother would have definitely told his family if he had been followed or threatened. He was not aware of his membership in any party or what he was investigating before he died.

Statement of Ali Eren undated

81. The witness, whose statement was taken by NCO Seçkin, was a teacher who used to travel on the Şanlıurfa Cesur bus. He knew Kemal Kılıç. On 18 February 1993, Kemal Kılıç got on the bus at the Kuyubaşı district, not the coach station. He did not notice if any cars overtook the bus before it stopped at Külünçe village. There was nothing extraordinary on the road or at the village junction.

Statement of Ömer Cavcan dated 19 February 1993

82. The witness, an infantry sergeant whose statement was taken by NCO Seçkin, stated that he got on the Şanlıurfa Cesur coach at 17.00 hours on 18 February 1993. Before the coach reached the Külünçe junction, he saw three cars overtake it. One of these cars was a white Renault but he did not remember in which direction it went.

Search report dated 26 February 1993

83. This report, signed inter alia by Captain Cengiz Kargılı, relates that a search took place, under a search warrant, at the house in which Kemal Kılıç lived, on 26 February 1993. It was carried out in the presence of Mehmet Kılıç, the village muhtar and lasted from 16.00 to 16.50 hours. The stated purpose was to gather evidence to shed light on the murder of Kemal Kılıç. It listed the books, papers, newspaper cuttings, a photograph and cassettes taken for examination.

Delivery report dated 26 February 1993

84. The report lists the items returned to Kemal Kılıç's father from the search. A photograph of three civilians with a rocket launcher and two Sony cassettes were kept for evidence and further use.

Investigation report 26 February 1993

85. This report lists in detail the books, materials, cassettes found amongst Kemal Kılıç's possessions during the search on this day, and sets out the transcript of conversations found on one of the tapes.

Letter dated 15 March 1993 from Captain Kargılı to the Şanlıurfa chief public prosecutor's office

86. The letter informs the public prosecutor of the search and encloses two tapes and a photograph of a person carrying a gun. It also refers to a scrap of paper found at the scene of the crime, which bore the letters U and Y and was stained with blood (1cm by 2cm) and stated that this paper, which press reports had stated had not been added to the enquiry documents, was preserved in acetate and submitted together with the documents. The investigation was continuing along many different avenues.

Decision to continue the investigation until expiry of statutory limitation period dated 12 August 1993

87. This decision, signed by the Şanlıurfa public prosecutor, states that it had not yet been possible to apprehend the perpetrator of the offence in which Kemal Kılıç was killed nor to discover his identity. It was decided to continue the search for the unknown perpetrator until the expiry of the 20 year limitation period and for a copy of the decision to be sent to the Office for Public Order of the Police Headquarters.

88. By letter dated 12 August 1993 to the Office for Public Order of Police Headquarters at Şanlıurfa, enclosing the above decision, the public prosecutor requested that information about the investigation should be forwarded every three months.

Letter dated 10 December 1993 from Ministry of Justice (General directorate of international law and foreign relations) to Şanlıurfa attorney general

89. This letter outlined the allegations made by the applicant in his application to the European Commission of Human Rights and requested the file documents be sent together with comments on the allegations made.

Letter dated 21 December 1993 from Siverek chief public prosecutor's office to Şanlıurfa chief public prosecutor's office

90. In answer to an enquiry, it was stated that according to a letter of 21 December 1993 from the Road Traffic Registration and Control Authority of Siverek police headquarters no vehicle had been registered with the number 63 EO 443 and that, since in Turkey the letters O and Ö were not used for that purpose, a registration plate with that number could not have been issued.

Report dated 22 December 1993 by Şanlıurfa public prosecutor

91. In reply to the request for comments, the public prosecutor outlined the steps taken in the investigation. It was stated that all necessary steps were taken. The allegation about the deceased being followed by a white Renault was investigated but it was shown that the car with number plate 63 EO 443 did not exist since O and Ö were not used in number plates. Despite allegations to the contrary, the incident location was examined thoroughly and completely. There was however no piece of paper found at the scene as alleged by the applicant. Efforts to apprehend the perpetrator continued.

Letter dated 2 January 1994 from Diyarbakır regional criminal police laboratory to Şanlıurfa Security Directorate

92. Referring to a request of 11 March 1993, the laboratory returned two 9 mm cartridges and reported that these had been found to have been fired by a Ceska 9 mm semi-automatic pistol submitted for examination by the Diyarbakır police. A copy of the ballistics report (see 103 below) was enclosed.

Letter dated 21 January 1994 from the Şanlıurfa Security Directorate to Şanlıurfa provincial gendarme command

93. The letter stated that suspect Hüseyin Güney had been apprehended by the Diyarbakır Directorate of Security with a 9mm Ceska pistol which had been found to have been used in the Kemal Kılıç murder incident. The ballistics report and interrogation minutes of Hüseyin Güney were enclosed.

Letter dated 8 February 1994 from Captain Kargılı to the Şanlıurfa public prosecutor

94. The letter stated that the Diyarbakır Security Directorate had carried out operations against the Hizbollah organisation in December 1993. The accused Hüseyin Güney had been identified as the perpetrator of the Kemal Kılıç murder incident. Reference was made to the ballistics match with a Ceska 9 mm pistol. The ballistics report and interrogation minutes of Hüseyin Güney were enclosed, as well as other file materials.

Decision of withdrawal of jurisdiction dated 16 February 1994 by the Şanlıurfa public prosecutor's office

95. The decision referred to the ballistics examination revealing that the Ceska pistol confiscated from the defendant Hüseyin Güney was used in the killing of Kemal Kılıç and states that this proves that this defendant killed the victim. It was concluded that the incident fell within the jurisdiction of the State Security Court prosecution and the preliminary file was to be transferred to Diyarbakır.

d) Documents relating to the proceedings against Hüseyin Güney

Incident investigation, apprehension and confiscation report dated 24 December 1993

96. An incident took place at the shop, Aydın Ticaret, Sağlıkocağı Caddesi, Diyarbakır, on 24 December 1993. The shop was attacked by five armed individuals, first by a stone being thrown, then by shots being fired. An employee at the shop was wounded. The suspects were followed by police teams. A 9mm Czech pistol serial no. 100545 was located in front of the apartment block entrance to which the suspects had been followed. The gun contained live bullets, and was ready to be fired, with the hammer poised and a bullet in the barrel. At this stage, Hüseyin Güney, registered in Batman and resident in the same location, was seen trying to escape by running up the stairs and was apprehended in a breathless, perspiring state. It was understood that this

individual had entered the apartment block and later returned to recover the pistol without wearing his coat (this sentence is obscurely constructed).

97. Further suspects were apprehended during a security check and search of the building. This included a wounded suspect, Abdullah Gülcan, hiding behind the elevator cabin. Another gun was found nearby, wrapped up in a grey duffle coat.

98. There are two hand drawn sketches, one showing the Aydın Ticaret shop, the positions of persons and the damage and another showing the immediate area, indicating the flight of the perpetrators of the attack along 64 Sokak ("64th Street"), and the locations where various weapons were found.

Identification record dated 24 December 1993

99. This records that an identification parade was held in which Hüseyin Güney and nine other suspects (seven of whom were later included with Güney in the indictment of 3 February 1994) were lined up at the police station for witnesses of the attack at Aydın Ticaret to identify the attackers. The witnesses had stated that there were five persons who carried out the attack and that they could identify them if they saw them again. The owner of the shop identified two of the suspects (Abdullah Gülcan and Abdurrahman Çelik). An employee of the shop identified the same two persons. The owner tentatively identified a third person (Abdülselam Elhaman) but was not sure.

Record of site showing dated 5 January 1994

100. This records that police officers took Abdullah Gülcan and Hüseyin Güney, who had stated that they had participated in the attack on Aydın Ticaret, to the location of the attack and asked them how they had carried it out. Gülcan stated that he had come to Diyarbakır from Batman at the request of Hasan, that he and others prepared for the attack, which began by Hasan throwing a grenade in the shop, following which the others opened fire with weapons. He was wounded as he ran away. Hüseyin Güney, codenamed Hakan, went with him up to the roof of the apartment block where they had been staying. Hüseyin went to get a taxi. Then the police arrived and arrested them. Hüseyin Güney stated that he agreed with the statement of Gülcan. He knew he had dropped the Ceska pistol as he entered the block of flats but did not know if it had been found or not.

101. There is a hand drawn sketch map showing where Gülcan and Hüseyin and other codenamed members of the group stood during the attack and the direction of their flight down street "64 Sokak".

Expert report dated 26 December 1993 Diyarbakır Regional Criminal Police Laboratory

102. The report refers to 14 swabs taken from the right hands of two suspects and from the right and left hands of six suspects, including Hüseyin Güney. These were tested by an atomic absorption spectrophotometer but no residues of firing a pistol could be found. It noted, inter alia, that if the hands used to fire were washed or

wiped after shooting, no residue or only a minimal residue would remain. Results vary also according to whether gloves were used, the type of weapon, the way it was held or how it fired.

Expert ballistics report dated 27 December 1993, Diyarbakır Regional Criminal Police Laboratory

103. The 9 mm Ceska semi-automatic pistol serial no. 100545, one cartridge clip and 10 rounds of bullets found on Hüseyin Güney were submitted for examination at the request of the Diyarbakır police. Following test firing, it was determined that the pistol had been used in 15 incidents: the Kemal Ekinci murder, 15 December 1992, Diyarbakır; the Kemal Kılıç murder, 18 February 1993, near Şanlıurfa; the Abdurrahman Akkamış murder 16 March 1993, Diyarbakır; the Abdullah Sapa(n) murder, 24 July 1993, Diyarbakır; the Cemal Burkay murder, 31 July 1993, Diyarbakır; the Abdülhalik Şaşmaz injury incident 18 August 1993, Diyarbakır; the Yaşar Çelik injury incident, 29 August 1993, Diyarbakır; the Abbas Demiroğlu murder, 18 September 1993, Diyarbakır; the minibus firing incident 22 September 1993, Diyarbakır; the Hüseyin Yıldırım murder, 29 September 1993, Diyarbakır; the Zeki Murat Yıldırım murder, 9 October 1993, Diyarbakır; the Abdülbekir Karakoç murder 14 October 1993; the Mahser Çelik murder, 27 October 1993, Diyarbakır; the Hasan Çarkanat injury incident, 23 November 1993, Diyarbakır; the Aydın Turmak murder, 24 November 1993, Diyarbakır.

Indictment dated 3 February 1994 No. 1994/238 issued by Diyarbakır State Security Prosecutor Cafer Tüfekçi

104. Hüseyin Güney appeared as the first of 17 defendants. The offence is described as membership of the outlawed Hizbollah organisation, carrying out activities with the intention to separate part of the country from the sovereignty of the State and to form a Kurdish state based upon Islamic principles, such offence being carried out from 1992-1993.

105. Hüseyin Güney was described as being a member of the Hizbollah organisation, Scientific Community Group, codenamed Hakan. He carried out various activities on behalf of the organisation and was caught after an armed attack on Aydın Ticaret on 24 December 1993. A Ceska 9mm calibre pistol was found on him. Laboratory examination showed that the weapon was used in fifteen incidents involving killing or injury(see para. 103 above), including the killing of Kemal Kılıç on 18 February 1993.

106. One of the other defendants, Mustafa Gezer, who was arrested on 17 December 1993 after a separate shooting incident, is stated to have had a Takarof pistol found on him. This weapon had been used in ten other shooting incidents in Diyarbakır, one of which involved the injury of Burhan Karadeniz, an Özgür Gündem journalist, on 5 August 1992.

Interrogation notes concerning Hüseyin Güney undated at the Security Directorate

107. The defendant stated that he was born in Batman in 1975. He was a member of the Hizbollah organisation (Scientific Community Group). He joined through a friend Hasan who visited him in Batman. Hasan told

him that when he was called he should go to Diyarbakır and the defendant said that he was ready and that whenever he was needed they should let him know. Fifteen days before his arrest, he arrived in Diyarbakır following a call from Hasan. He was told that they were to carry out a retaliation in response to attacks on their group. Hasan provided the weapons to the group, including a Ceska for the defendant. On the day of the incident, Hasan threw a handgrenade through the window of the Aydın ticaret shop and the defendant and the others started firing. After the attack, they ran away. He came to the apartment block where they were staying. He dropped the gun. He knocked on the door of the flat where they had been staying but no-one answered. He went downstairs again and took a wounded member of the group, Gülcan, up to the flat roof. He was going down the staircase to get a taxi when he was apprehended by the police. Later, they found the Ceska pistol that he had dropped. When asked about the previous incidents in which the gun had been used, including the killing of Kemal Kılıç, he stated that he did not want to answer anything about them.

Statement of Hüseyin Güney dated 6 January 1994 taken by a public prosecutor[1]

108. The defendant stated that he was not a member of Hizbollah or the Scientific Community Group. He did not know Abdullah Gülcan and he did not have a codename. He came to Diyarbakır from Batman to work as a central heating engineer. He was apprehended while trying to locate a colleague Servet, outside an apartment unknown to him. A pistol was not found on him and pistol 10045 was not his. He did not participate in any of the murders listed as connected with the gun. When his statement to the security forces was read out, he did not accept it. Nor did he accept that he had carried out any identification of the location. He refused their questions even when tortured. He had not had a coat on as he was a central heating fitter and the weather was warm.

Proceedings before the State Security Court No. 3

1. Undated. Güney denied his statement to the security forces or that he had had a pistol on him. The court, inter alia, ordered a continuation of detention.

2. 7 February 1994. The court ordered a continuation of detention; submission of the defendants' criminal records and registration etc.

3. 3 March 1994. The indictment was read out to the defendants, who were asked to answer. Hüseyin Güney denied the charges. His statements to the police and to the public prosecutor were read out. He stated that he was forced to sign the first and accepted the second as true. He denied that a pistol was found on him. The court ordered the immediate release of four other defendants. Güney was to be kept in detention with the remaining defendants. Orders were made for the obtaining of various documents and witnesses.

[1] In oral evidence, the public prosecutor Mr. Cafer Tüfekçi stated that the date of 6 January was an error, since the defendant was brought to them on 7 January 1994. He took the statement.

4. 10 May 1994. It was noted that Hüseyin Güney had a licence for a Rekart 7.65mm pistol. Materials from files relating to various killings were read out. Güney denied his involvement. Other defendants addressed the court. Several witnesses relevant to another defendant were heard. Various orders and summonses were issued.

5. 6 July 1994. Orders were made with respect to continued detention and the issue of summonses for witnesses and documents.

6. 1 September 1994. (Güney was absent.) Requests were made by defence lawyers for various reports or witnesses, as well as the release of their clients. Orders made with respect to continued detention and the issue of summonses for witnesses and documents.

7. 27 October 1994. In the absence of the defendants and their counsel, a number of police officers were called. They confirmed the incident investigation, capture and arrest records were correct and had nothing to add. Then, two defendants and two defence counsel took their places. Civilian witnesses concerning the attack on the Aydın Ticaret shop and the arrest of suspects were heard. Orders were made, inter alia, for the release for one defendant.

8. 20 December 1994.(Güney absent.) One defendant was questioned. Defence counsel requested the release of Hüseyin Güney on the basis that the only evidence against him was the statement taken by the security forces and a gun found upon the ground. Requests made for release. Defendants remanded in custody. Miscellaneous orders,

9.-12. 16 February 1995, 4 April 1995, 13 June 1995, 31 August 1995. Defendants remanded in custody. Miscellaneous orders.

13. 24 October 1995. (Defendants absent.) Counsel made requests for confrontation of witnesses. Miscellaneous orders.

14. 19 December 1995. A witness was heard. Hüseyin Güney requested his release as he had been in prison for two years and he had no connection with the crimes. His counsel submitted that no witness had made a statement identifying the defendant as a perpetrator, that Hüseyin Güney had not been identified when confronted for identification following the incident and that he should be released. The court, inter alia, ordered the detention to continue.

15.-18. 23 January 1996, 12 March 1996, 7 May 1996, 18 June 1996. Requests made for release. Defendants remanded in custody. Miscellaneous orders.

19. 14 August 1996. A witness statement was read out. Requests made for release. Defendants remanded in custody. Miscellaneous orders.

20. 17 October 1996. Requests made for release. Defendants remanded in custody. Miscellaneous orders.

21. 17 December 1996. Requests made for release. Defendants remanded in custody. Miscellaneous orders, including request for documents relating to the killing of Kemal Kılıç.

22. 25 February 1997. Requests made for release. Defendants remanded in custody. Miscellaneous orders.

23. 8 April 1997. Güney appeared, repeated that he had not been involved in any incidents and requested release. Defence counsel made applications for release. Defendants remanded in custody. Miscellaneous orders.

24. 10 June 1997. (Güney not present.) Witnesses heard. Miscellaneous orders.

e) Concerning reports of State involvement or responsibility for unknown perpetrator killings

Parliamentary Investigation Commission Report 1993 10/90 Number A.01.1.GEC

109. The applicant has provided extracts from the 1993 report into extra-judicial or unknown perpetrator killings by a Parliamentary Investigation Commission of the Turkish Grand National Assembly.

110. The report refers to statistics of 908 unsolved killings, of which 9 were the killings of journalists. It refers to an attitude of officials coming to the region (south-east) as seeing themselves as the final authority. A majority of positions in administration are identified as being filled by inexperienced people, including in the judicial system newly graduated judges and prosecutors. Comment is made that this blocks avenues of redress for citizens. Inexperienced officials have difficulties in using their authority, while certain people seek to prevent the few experienced judges and prosecutors from fulfilling their duties. Reference is made, with quoted statements from the judge concerned, to an incident in which a judge was attacked by members of the police and to other attacks on judicial personnel in the Diyarbakır courts of justice having occurred without any action being taken.

111. Reference is made also to the unsurprising lack of confidence in the authorities on the part of citizens and to a situation of confusion and chaos in which persons armed with guns by the State authorities or left to operate unhindered walk openly in the streets and carry out illegal activities. The report cites information derived from the Deputy Governor and police chief of Batman to the effect that the Hizbollah had a camp in the area, where they received political and military training and assistance from the military units there. It was noted that despite the further request for information by the Parliamentarians, no further enquiry into this allegation was made by the authorities in Batman.

112. The report concludes on the whole that the State is not responsible for unknown perpetrator killings though there was a lack of accountability or control of officials by democratically elected representatives and that some groups with official roles might be

implicated. It concludes with 29 recommendations, including, inter alia, the launching of investigations into allegations of official involvement in the killings.

The Susurluk report

113. This report was drawn up by Mr. Kutlu Savaş, vice president of the Committee for Co-ordination and Control, attached to the Prime Minister's Office, at the request of the Prime Minister. The report was issued in January 1998. The Prime Minister made the bulk of the report public, though certain pages and the annexes were omitted.

114. The report relates to concerns arising out of the so-called Susurluk incident, when in November 1996, there was a crash between a lorry and a Mercedes car at the town of Susurluk, and it was discovered that in the Mercedes car there were Sedat Bucak, member of Parliament and Kurdish clan chief from Urfa, Siverek district; Hüseyin Kocadağ, a senior police officer who was director of the İstanbul police college, founder of the special forces operating in the south east who had once been the senior police officer in Siverek; and Abdullah Çatlı, an former extreme right wing militant accused of killing seven students, at one time arrested by the French authorities for drug smuggling, extradited to and imprisoned in Switzerland from where he escaped and who was allegedly both a secret service agent and a member of an organised crime group.

115. In the preface of the report, it is stated that it is not an investigation report and that the authors had no technical or legal authority in that respect. It is stated that the report was prepared for the purposes of providing the Prime Minister's Office with information and suggestions and that its veracity, accuracy and defects were to be evaluated by the Prime Minister's Office.

116. The report is summarised in Appendix II to the Report. In brief, it analyses a series of events, such as murders carried out under orders, the killings of well-known figures or supporters of Kurds and deliberate acts by a group of "informants" supposedly serving the State and concludes that there was a connection between the fight to eradicate terrorism in the region and the underground relations that had been formed as a result, particularly in the drug trafficking sphere. References are made to unlawful activities having been carried out with the knowledge of the authorities and express mention is made of the blowing up of the Özgür Gündem building and the killing of Behçet Cantürk (one of the financiers of that newspaper), Musa Anter and other journalists. The page which followed (page 75) was not made public nor Appendix 9 which set out information about these matters.

117. On 23 April 1998, the Commission requested the Government to provide the pages (4, 68-71, 75, 77-80, 99, 103-104) and annexes of the Susurluk report which had not been made public. By letter dated 5 June 1998, the Government declined to provide copies of the missing pages and annexes of the Susurluk report, stating that the report, which concerned an internal investigation, was still confidential and the enquiry by the competent authorities into the allegations was in progress. It stated that giving the Commission a copy of the report at this stage might impede the investigations from progressing properly. Following a further request, the Government declined to make the missing extracts available subject to any necessary precautions to

avoid prejudicing domestic enquiries.

118. The applicants have referred to the Turkish newspapers, Milliyet, Hürriyet and Ülkede Gündem, published on 22 February 1998, which listed the journalists who were named in the missing page 75 of the Susurluk report. These state that the journalists named in the report were Cengiz Altun, Hafiz Akdemir, Yahya Orhan, İzzet Keser, Mecit Akgün, Çetin Abubay and Burhan Karadeniz. The Government have not denied the accuracy of these reports.

Ülkede Gündem newspaper article dated 29 January 1998

119. The applicant has submitted an article which reports on the Susurluk report as vindicating the newspapers such as Özgür Gündem, Özgür Ülke, Yeni Politika and Demokrasi, which had reported the killings by contraguerillas, confessors, village guards and special forces. The article alleges that, according to the report, journalists, reporters and distributors of newspapers reporting on these matters were systematically killed. Minister of State Eyüp Aşık is also quoted as confessing publicly that journalists in the Kurdish provinces had been killed by State officials. The article concludes that 29 named writers, reporters and distributors, including Kemal Kılıç, were killed or kidnapped by the State. The Government have denied that the Minister made any such statement.

2) Oral evidence

120. The evidence of four witnesses heard by the Commission's Delegates may be summarised as follows:

The applicant

121. The applicant was born in 1958 and resides in Şanlıurfa. He works for the Urfa City Council. He is the brother of the deceased Kemal Kılıç. He lived in the same village as his brother but in a separate house. His brother lived with their father.

122. The applicant stated that his brother sat on the executive board of the Human Rights Association as well as working as a journalist at the Özgür Gündem journal. His brother had been taken to the police station, threatened but then released.

123. His brother had also been receiving threats that he would be killed if he continued working as a journalist and did not cease his union activities. The applicant's brother had mentioned the threats to his father but the applicant only heard of them from his father some time after the murder. His brother had not told his father the source of these threats. The applicant had known that his brother had asked for a gun licence and protection from the security forces. These applications were refused. His brother had not told him any details about why he had taken these steps.

124. On the day that his brother was killed, the applicant arrived home at 17.30 hours. His brother generally left his work half an hour after he did. Some inhabitants of the village saw that his brother had been killed and one of them, a relative, came to tell him about the murder. When he and his father reached the site of the murder, there was no one else there. The body was lying at the edge of the road, 900

metres from the village. This was 500 metres from the first petrol station, a second petrol station being 300 metres further on. His brother's mouth was taped and there was a rope around his neck. He had been shot twice in the head.

125. The gendarmes had been called from the first petrol station, to which the nearby watchman had run after the shooting. They arrived at the scene five minutes after the applicant. There were gendarmes, an expert sergeant and soldiers, at the second petrol station. They called for reinforcements from the city. At the scene, which was cordoned off, the gendarmes picked up two cartridges and gave them to the prosecutor. They placed the rope in a plastic bag. It was dark. After half an hour, the public prosecutor arrived. He asked the applicant questions as he and his family mourned near the body. The applicant asked for the killers to be caught. The public prosecutor also talked to the watchman of a building site nearby who had heard gunfire and was close to the murder site. The watchman was taken away. The body was taken to the state hospital and handed back to the family the next day for burial. The gendarmes did not return to investigate the scene in daylight.

126. The following day, the applicant's father went to see the watchman. The watchman told him he had seen a white Renault car with the number 63 EO 443. The watchman had seen four people in the car. Two of them got out of the car and shook hands with the applicant's brother, talking to him. They then went under the bridge and once there, one of them attacked him with a rope from behind. When the applicant's brother resisted, others got out of the car and first tried to get him in the car. When the applicant's brother started shouting, they shot him and fled, driving in the direction of the city.

127. A white Renault car had been noticed on several occasions by the little canal or on the village roads by shepherds and villagers. They had noticed this car following the bus on which the applicant's brother travelled. This had happened over two or three months before the killing, but more frequently towards the end. On the evening of the murder, according to the shepherds, the car had overtaken the bus and parked under a bridge close to where the applicant's brother got off. The applicant's brother had told his friends about being followed by some car from National Intelligence without specifying any details. His friends told the applicant about this after his brother died. Villagers who had shops in the town said that they had seen a white Renault following the applicant's brother in Şanlıurfa also. The car was seen coming to the bus station when his brother arrived there. On the night of the killing, his brother got off the bus alone. If he had not been alone, the applicant considered that he would not have been killed.

128. On one occasion, the white Renault had come into the village. It had been seen by villagers. Men had knocked on the door of his father's house, where his brother lived, at about midnight or 01.00 hours, calling "Kemal" but his brother did not open the door. The car drove off again. His father told him of this incident.

129. The applicant, his father and two other brothers as well as the muhtar of the village went to the gendarme twice, morning and evening, on three consecutive days following the murder (18, 19 and 20 February). Each of them was questioned separately. He clarified that although he gave a statement to the gendarmes the day following the incident, the registration number of the suspected car did not figure

in this statement as he learned it later on. Neither himself nor his family were summoned again to the gendarmerie or the public prosecutor's office on any further occasion. His father's house was searched twice and some tapes in Kurdish were seized. They were given no information about any investigation.

130. The applicant stated that he neither went to the administrative court for compensation nor lodged any complaints with the public prosecutor's office.

131. The applicant confirmed that on 27 February he went to the Urfa Branch of the Human Rights Association and spoke to the director Yusuf Karataş who took a note of their statements and requests for their rights to be upheld. He went because he did not think that the gendarmes were investigating.

Cengiz Kargılı

132. The witness was born in 1960. From 17 July 1990 to 17 July 1994, he was provincial central district gendarmerie commander in Şanlıurfa.

133. The witness did not know the applicant or any of his family before the incident. On the night of the incident, it was reported to him by radio from Uğurlu station. When he arrived there, it was dark. NCO Taner from Uğurlu station was already at the scene, together with Specialist Sergeant Yarımçam. The gendarmes were the first on the scene. Because there had been a series of petrol station robberies, the witness had ordered a patrol along the Mardin road and for security measures to be reviewed. When the watchman arrived at the petrol station, a specialist sergeant happened to be there. He was the first on the scene and he sent the muhtar to fetch the station commander. When the witness arrived, there were also villagers present. Measures had been taken to keep the people from site to preserve the evidence. The witness had called the public prosecutor by radio but he arrived some time later. The witness took charge at the scene. His role was to preserve the evidence, eg. stop the body being moved until the prosecutor arrived, and to place any witnesses under protection.

134. The only witness to the incident was a watchman Ahmet Fidan whom he talked to before the prosecutor arrived. The watchman told him that a car came from the direction of Şanlıurfa and turned into the village road. After driving along for a while, it turned around and came back and stopped, switching off the engine. It was a white Renault but he had not seen the registration number of the car as it was dark and he did not know how many people were in it. He heard shouting, sounds of a quarrel, someone calling for help and then two shots. The watchman had been scared and knelt down inside his hut but judged from the headlights that the car drove off towards Şanlıurfa. He had not noticed any suspicious movement during the day. The watchman was placed under protection to await the arrival of the prosecutor. The watchman said the shooting occurred at 18.20 hours.

135. The witness had the scene of the incident photographed with the camera which he carried in his car at his own initiative. They used car headlights to illuminate the scene and he took photographs from several angles, inter alia, of the body, the positions of the hut, and the road and the village. He could not remember if the photographs came out clearly but thought that they were not such as to reveal fully the

evidence. They would still be at the station headquarters where he had worked.

136. When the prosecutor arrived, they examined the body together. He had been shot in the head and his mouth was taped. There were two empty cartridges immediately below the head, which the prosecutor picked up himself. The gendarmes looked at the cartridges after he had done so. The prosecutor took the cartridges for ballistics analysis, sent the body for an autopsy and left. The gendarmes looked around the immediate area for other cartridges but found nothing. The witness tried to examine for car tyre marks using headlights but could not see any. After the prosecutor left, he stayed and talked to the victim's relatives, to try to find a motive such as property disputes, or about a woman's honour. The family said that there were no such problems or disagreement. He asked how the victim travelled home and was told he came by bus.

137. The next day, the witness asked at the bus company offices for the driver of the bus the previous evening. When the driver was identified and found, the witness asked him if he had seen a white Renault in the vicinity. He had deduced that the people who killed the victim knew that he travelled home on the bus and would have had to be sure that he got on the bus rather than stay in the city. He specifically asked the driver if he had been overtaken on the road to the village. The driver remembered three vehicles overtaking, one of which was an old model white Renault, which had overtaken and turned into the Külünçe road. He did not remember the licence plates of the car. The driver's assistant however had not seen such a car. The bus, which left at 17.30 hours, on its 14-15 kilometre route from Şanlıurfa to the village made several stops. A passenger was picked up on the Akçakale road and the witness questioned the owner of the place that sold tickets there but he had not noticed a white Renault.

138. The witness found out that there were about seven to eight passengers on the bus and tried to find out their identities. The bus driver and his assistant did not know them. The Uğulur station commander told him of a teacher that used the bus and the witness questioned him. The teacher had not noticed anything suspicious. He found an infantry sergeant who had been on the bus, who also was unable to give any clues. The witness had been told by one of the victim's brothers that the victim always carried a notebook. He tried unsuccessfully to find the notebook at the victim's home but it was not there. He later obtained a search warrant to collect evidence at the house, in order to try to find a lead, for example, the victim might have taped threatening phone calls. During the search, they removed cassettes, books, notebooks. On examination, they revealed no clues and they were returned. On questioning by the applicant's representative, he added that a photograph showing a person with a rocket launcher and cassettes with Kurdish on them were sent to the prosecutor for examination. His family had not given him any information which would give the investigation a direction. He had asked the family, if the victim, who was a journalist, had enemies or received threats but they said that he had not.

139. The witness recalled going to the victim's house three or four times. He thought that during the period when persons made visits of condolence information might come to light of what people had noticed. He went to look for the watchman again, in case there had been things

which he had not remembered due to shock. The watchman had told him that he was scared. When he spoke to him again, the watchman did not remember anything else. He still did not remember the licence plate.

140. The day after the murder, in the evening, the witness went back to the scene, parking his car away from the watchman's hut. He noted that the chances of him seeing the registration were poor. He could not see the licence plate. The distance from the hut to where the car had been was about 50 metres. When asked if it would have been possible for the watchman to see the number plate if the car passed in daylight, he explained that the hut was parallel to the road and next to the bridge, that it would depend if the watchman had been looking in the right direction from the right position, but that he doubted that it would be possible.

141. The witness put all the documents in the file and sent it to the prosecutor's office. He maintained a crime file and sent updates every three months to the State Security Court. He had sent an order to all their stations requesting a monthly update. There was a prosecution progress form on the top of the file but in the ten months that followed no additional information was discovered. On or about 24 January 1994, he was informed that a Hizbollah suspect Hüseyin Güney had been caught in Diyarbakır and that ballistics examination of the gun found on him matched the shells taken from the scene of the Kılıç murder. Accordingly, he was told that the case had been solved and to close the file. The witness was curious about how the killing had been done but the perpetrator's statement only contained one sentence about it, stating that he did not wish to talk about it. He sent a copy of the statement and ballistics report to the public prosecutor and told the station commander to inform the family that the perpetrator had been caught. No fingerprint tests had been taken from the tape or empty cartridges since blood was all over them and they were not in a fit state.

142. The witness had never heard that the registration number of the white Renault car had been recorded. If he had been informed, it would have been the key to the case and he could immediately have continued the investigation. The family had never mentioned it to him, though he had spoken to them many times. He also had not heard that a villager had passed the scene and spotted the body first or that some men had come at night to the village in a white Renault.

143. The investigation continued under his supervision, though some tasks were undertaken by the station commander. He did not reach any conclusion about who might have killed Kemal Kılıç. The family had been very co-operative and he had not received the impression that they had been concealing anything.

144. The witness had never heard that journalists were under threat in his area. There were some problems with newspaper distribution and delivery, which might have concerned Aydınlık and Özgür Gündem. A newspaper van had been burned. He had formed a team which met the United Distribution's vans coming from Suruç district to escort them safely to Hilvan district on the Diyarbakır road. The measures had however concerned the delivery of all newspapers, not just the two mentioned. He could not remember whether this occurred in 1993 or 1994 or before the killing of Kemal Kılıç. The journalists who worked in the centre of town were outside his jurisdiction and he supposed they could

have complained to the police. When shown Kemal Kılıç's press release of 11 January 1993 concerning attacks on several newspaper distributors in Urfa, he recalled seeing it after the murder. Copies of the press release and the request for protection to the provincial governor's office were received by him from the police department and included in the file. He had heard stories in the press and contacted the police himself about it. He did not think he needed to investigate this and he did not read the documents as disclosing any personal threat against Kemal Kılıç.

145. There had been an incident in Urfa in which the district chairman of HEP had been killed and the police had caught four Hizbollah.

146. When asked by the Government Agent, he confirmed that Renault cars were quite common in the area and white a popular colour.

Cafer Tüfekçi

147. The witness was born in 1954 and from September 1992 to September 1996 was public prosecutor at the Diyarbakır State Security Court.

148. He stated that on 7 January 1994 the preliminary investigation file involving numerous defendants including Hüseyin Güney was received by the prosecution department at the State Security Court. The initial investigation into the death of Kemal Kılıç was carried out by the local security forces and the Şanlıurfa chief prosecution department. The cartridges picked up near the body of the victim had been sent to the Diyarbakır police criminal laboratory for ballistics analysis by the Şanlıurfa prosecution. This report was later sent to the witness who found that it revealed that the cartridges had been fired by the gun found on Hüseyin Güney who was in custody in relation to other matters. He interrogated Güney and ordered his arrest, the match of the cartridges with the gun constituting major material evidence. Following this, the Şanlıurfa prosecution issued a decision of lack of jurisdiction and sent the file to Diyarbakır State Security Court prosecution.

149. When he questioned Güney, he denied that he was involved in the killing of Kemal Kılıç, denied that he had been in the organisation or involved in its activities. He had initially stated when arrested by the police that the gun had been issued by the Hizbollah organisation but he denied that statement. The police records indicated that the gun had been found on his person. To the witness, Güney denied that he had been in possession of the gun. When shown Güney's statement of 6 January 1994, he confirmed that his own signature was on it. He stated that the date was wrongly recorded, the interview taking place on 7 January 1994. The content of the statement was accurate. He confirmed that there was no fingerprint evidence linking the gun with Güney but an official record drawn up by the security forces to the effect that Güney had thrown the gun away, fled and been caught shortly afterwards. No-one else could have thrown the gun there. It was a situation of pursuit. When asked if it was his understanding that Güney had been seen to throw the pistol on to the ground in front of the apartment door, the witness said that the record was to the effect that the weapon was obtained from the defendant and he had to trust to that. When asked, the witness did not mention any other evidence that linked Güney to the killing of Kemal Kılıç. When it was drawn to his attention

that the police incident report of 24 December 1993 referred only to the finding of a Ceska pistol in front of the apartment entrance door, he stated that later in the court proceedings it was confirmed by those who made the report that the weapon was recovered from Güney in the course of the pursuit. He agreed that the gun was not found on Güney's person and it was a mistake when it was written that the gun was found upon him. There was nothing which made him feel it necessary to take fingerprint evidence.

150. Once he had instigated the proceedings, drawing up the bill of indictment and referring it to the court within a month on 3 February 1994, he was no longer involved in the trial conducted before State Security Court No. 3 under registration no. 94/116. His colleague Yağlı attended.

151. The trial was to his knowledge still proceeding at this time. He referred to an interlocutory court judgment to the effect that the injured party and their eye-witness would be heard. There was a continuing investigation in Şanlıurfa also into the incident. He cited a letter of 24 January 1997 from the Şanlıurfa gendarmerie as indicating that the investigation was still continuing in respect of identifying any other suspects involved in the killing. There had been no evidence in the Şanlıurfa file linking the killing to the Hizbollah organisation.

152. As regards the Hizbollah, he agreed that in such an organisation weapons could change hands, though they would only be given to trained members. The other man arrested at the same time as Güney said that Güney's assumed name was "Hakan" and it transpired that Güney was a member of the "İlim Cemaati" faction of the Hizbollah organisation. He agreed that members of organisations would work within defined boundaries, appointing members to particular areas. In the Urfa area, for example, they operate in the "GAP province", inter alia, to obstruct State projects in which the State is working to develop the economic prosperity of the region. In that region, they appoint an official with duties and under that person, there are local divisions (eg. for collecting money, intimidating people, making bombs) with their own people. The high ranking officers move the members around and if there is a possibility that the security forces have been tipped off, they remove them to other areas. Thus, there are zones where activists and rank and file members operate for months or years.

153. The witness was not surprised that, according to the offences charged, Güney carried out fourteen offences in or around Diyarbakır and only one in Urfa. Diyarbakır was only one or two hours away, about 180 kilometres. Batman was 250 kilometres from Urfa. He confirmed that Güney had stated to the police that he had been in Batman until two weeks before he had moved to Diyarbakır. It would only take up to an hour and a half to go from Batman to Urfa.

154. The Hizbollah and the PKK had carried out actions against each other as well as against the security forces. The Hizbollah, based on an Islamic philosophy, had carried out more intensive activities in Urfa, which was recognised by some as the birth place of the Prophet. Kılıç worked for Özgür Gündem which was the press organ of the PKK, which was more Marxist-Leninist. The two organisations were mutually hostile and were in a struggle for power.

Mustafa Çetin Yağlı

155. The witness was born in 1951 and had been present as prosecutor in the court proceedings in which Güney was an accused until 18 June 1997 when he left Diyarbakır. When asked about why the proceedings had not been completed yet, he referred to there being 17 defendants charged with about 30 incidents and stated that it took time to assemble the documents, establish links with other files and find and hear the witnesses. The proceedings were in the final stages. Two files were still awaited from Security Courts Nos. 2 and 4, there being links between the cases and one accused had given names and addresses of witnesses in connection with another incident. Once the missing information had been completed, the case would reach the stage where the prosecutor gave his opinion on the merits of the case, unless he considered that there was still something needed in which case he could request an extension of the investigation. The prosecutor's opinion would then be served on the defendants who would be asked what they had to say in reply. The defendants could also ask for an extension in the investigation. Then the court would deliberate to reach a decision. It could take 18 months to two years after the prosecutor's opinion for the court to reach a decision. The prosecutor is under a duty to collect evidence for both the prosecution and the defence. It is not the prosecutor who decides the case, merely whether the evidence is such as to support a prosecution.

156. The witness stated that there had been an attack in Diyarbakır in which Güney was involved. He fled, dropping his gun. The gun was recovered from where he dropped it and sent for testing. The ballistics analysis established a link with the killing of Kemal Kılıç. This report was the basis for the prosecution as it showed the gun had been used in 15 incidents. The officials who apprehended Güney were heard as witnesses. There was no fingerprint evidence in the file. He agreed that it was a possibility that someone else had used the gun in the incident in which Kılıç had been killed months previously but it could equally be argued that Güney did use it then. No witnesses had been heard by the court as regarded the killing of Kılıç. No name of any witness had been given. He had not become aware of the night watchman witness until recently when the action file was transferred. There was no defence witness from Güney indicating where he was on 18 February 1993. Güney was represented by a lawyer. No step had been taken to investigate where Güney was on 18 February since he had not said that he was anywhere else but merely denied the accusations in their entirety. No eyewitness to the killing had been determined or come forward. He recalled that, in a decision of 17 December 1996, the court had asked for various action files and for witnesses to be heard, including the night watchman and members of the Kılıç family.

Other witnesses

157. The following witnesses were summoned but did not appear:

- Ahmet Fidan, the night watchman at the scene;
- Hüseyin Fidanboy, who was the public prosecutor at Şanlıurfa;
- M. Ziyaeddin Akbulut, the Governor of Şanlıurfa.

158. It appears that Ahmet Fidan could not be traced. At the hearing on 4 February 1997, the Government agent informed the delegates that Mr. Fidanboy's flight from Şanlıurfa had been cancelled due to snow

conditions. In respect of Mr. Akbulut who failed to appear at both the hearings of 4 February and 4 July 1997, the Government have provided a letter dated 24 January 1997 from Mr. Akbulut explaining that he could not attend on 4-5 February 1997 due to his annual leave and a letter of 12 June 1997 in which he stated, inter alia, that he had no recollection of being petitioned by Kemal Kılıç, that the applicant's allegations were false, that information about the matter could be obtained from the judicial authorities and that he could not attend the hearing on 4 July 1997 due to his annual leave.

C. Relevant domestic law and practice

159. The Commission has referred to submissions made by the parties in this and previous cases and had regard to the statements of domestic law and practice recited by the Court in previous, relevant cases (see eg. Eur. Court HR, Kurt v. Turkey judgment of 25 May 1998, paras. 56-62 and Tekin v. Turkey judgment of 9 June 1998, paras. 25-30, to be cited in Reports 1998).

1. State of Emergency

160. Since approximately 1985, serious disturbances have raged in the South East of Turkey between security forces and members of the PKK (Workers' Party of Kurdistan). This confrontation has, according to the Government, claimed the lives of thousands of civilians and members of the security forces.

161. Two principal decrees relating to the south-eastern region have been made under the Law on the State of Emergency (Law No. 2935, 25 October 1983). The first, Decree No. 285 (10 July 1987), established a State of Emergency Regional Governorate in ten of the eleven provinces of south-eastern Turkey. Under Article 4(b) and (d) of the Decree, all private and public security forces and the Gendarme Public Peace Command are at the disposal of the Regional Governor.

162. The second, Decree No. 430 (16 December 1990), reinforced the powers of the Regional Governor, for example to order transfers out of the region of public officials and employees, including judges and prosecutors, and provided in Article 8:

> "No criminal, financial or legal responsibility may be claimed against the State of Emergency Regional Governor or a Provincial Governor within a state of emergency region in respect of their decisions or acts connected with the exercise of the powers entrusted to them by this decree, and no application shall be made to any judicial authority to this end. This is without prejudice to the rights of an individual to claim indemnity from the State for damage suffered by them without justification."

2. Criminal law and procedure

163. The Turkish Criminal Code contains provisions dealing with unintentional homicide (sections 452, 459), intentional homicide (section 448) and murder (section 450).

164. For all these offences complaints may be lodged, pursuant to Articles 151 and 153 of the Code of Criminal Procedure, with the public prosecutor or the local administrative authorities. The public prosecutor and the police have a duty to investigate crimes reported to them, the former deciding whether a prosecution should be initiated, pursuant to Article 148 of the Code of Criminal Procedure. A complainant may appeal against the decision of the public prosecutor not to institute criminal proceedings.

3. Prosecution for terrorist offences and offences allegedly committed by members of the security forces

165. In the case of alleged terrorist offences, the public prosecutor is deprived of jurisdiction in favour of a separate system of State Security prosecutors and courts established throughout Turkey.

166. The public prosecutor is also deprived of jurisdiction with regard to offences alleged against members of the security forces in the State of Emergency Region. Decree No. 285, Article 4 § 1, provides that all security forces under the command of the Regional Governor (see paragraph 161 above) shall be subject, in respect of acts performed in the course of their duties, to the Law on the Prosecution of Civil Servants. Thus, any prosecutor who receives a complaint alleging a criminal act by a member of the security forces must make a decision of non-jurisdiction and transfer the file to the Administrative Council. These councils are made up of civil servants and have been criticised for their lack of legal knowledge, as well as for being easily influenced by the Regional Governor or Provincial Governors, who also head the security forces. A decision by the Council not to prosecute is subject to an automatic appeal to the Council of State.

4. Constitutional provisions on administrative liability

167. Article 125 of the Turkish Constitution provides as follows:

> "All acts or decisions of the Administration are subject to judicial review ...
> The Administration shall be liable for damage caused by its own acts and measures."

168. This provision is not subject to any restrictions even in a state of emergency or war. The latter requirement of the provision does not necessarily require proof of the existence of any fault on the part of the Administration, whose liability is of an absolute, objective nature, based on the theory of "social risk". Thus, the Administration may indemnify people who have suffered damage from acts committed by unknown or terrorist authors when the State may be said to have failed in its duty to maintain public order and safety, or in its duty to safeguard individual life and property.

169. Proceedings against the Administration may be brought before the administrative courts, whose proceedings are in writing.

5. Civil law provisions

170. Any illegal act by civil servants, be it a crime or a tort, which causes material or moral damage may be the subject of a claim for compensation before the ordinary civil courts. Pursuant to Article 41 of the Civil Code, an injured person may file a claim for compensation against an alleged perpetrator who has caused damage in an unlawful manner whether wilfully, negligently or imprudently. Pecuniary loss may be compensated by the civil courts pursuant to Article 46 of the Civil Code and non-pecuniary or moral damages awarded under Article 47.

III. OPINION OF THE COMMISSION

A. Complaints declared admissible

171. The Commission has declared admissible the applicant's complaints:

- that his brother, a journalist for Özgür Gündem, was killed by or with the connivance of State agents;

- that his brother was threatened and killed in order to deter the lawful exercise of his freedom of expression as a journalist;

- that there was no effective investigation, access to court, redress or remedy provided in respect of these matters; and

- that the applicant's brother has been subject to discrimination.

B. Points at issue

172. The points at issue in the present case are as follows:

- whether there has been a violation of Article 2 of the Convention;

- whether there has been a violation of Article 10 of the Convention;

- whether there has been a violation of Article 6 and/or Article 13 of the Convention;

- whether there has been a violation of Article 14 of the Convention in conjunction with any provision of the Convention.

C. The evaluation of the evidence

173. Before dealing with the applicant's allegations under specific Articles of the Convention, the Commission considers it appropriate first to assess the evidence and attempt to establish the facts, pursuant to Article 28 para. 1 (a) of the Convention. It would make a number of preliminary observations in this respect.

i. There have to date been no judicial findings of facts on the domestic level as regards the killing of Kemal Kılıç on 18 February 1993. While there are pending proceedings against the alleged perpetrator, these have been pending for more than four years since February 1994 without any sign of the first instance examination of the case terminating in the near future. The Commission has accordingly based its findings on the evidence given orally before its Delegates and submitted in writing in the course of the proceedings; in this assessment the co-existence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact and in addition the conduct of the Parties when evidence is being obtained may be taken into account (mutatis mutandis, Eur. Court HR, Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25 p. 65 para. 161).

ii. In relation to the oral evidence, the Commission has been aware of the difficulties attached to assessing evidence obtained orally through interpreters: it has therefore paid careful and cautious attention to the meaning and significance which should be attributed to the statements made by witnesses appearing before its Delegates.

iii. In a case where there are contradictory and conflicting factual accounts of events, the Commission particularly regrets the absence of a thorough domestic judicial examination or other independent investigation of the events in question. It is aware of its own limitations as a first instance tribunal of fact. The problems of language are adverted to above; there is also an inevitable lack of detailed and direct familiarity with the conditions pertaining in the region. In addition, the Commission has no compelling powers as regards witnesses. In the present case, while seven witnesses were summoned to appear, only four in fact gave evidence before the Commission's Delegates. Significantly, Mr. Akbulut, the Governor of Şanlıurfa, failed to appear, though summoned on two occasions, no satisfactory reason for his absence being provided by the Government. The Commission has therefore been faced with the difficult task of determining events in the absence of potentially significant testimony and evidence. It acknowledges the unsatisfactory nature of these elements which highlights forcefully the importance of Contracting States' primary undertaking in Article 1 to secure the rights guaranteed under the Convention, including the provision of effective remedies as under Article 13.

1. General background

174. Since approximately 1985, a violent conflict has been conducted in the south-eastern region of Turkey, between the security forces and sections of the Kurdish population in favour of Kurdish autonomy, in particular members of the PKK (Kurdish Workers' Party). According to the Government, the conflict by 1996 had claimed the lives of 4,036 civilians and 3,884 members of the security forces.

175. At the time of events in issue in this case, ten of the eleven provinces of south-eastern Turkey had been under emergency rule since 1987.

176. Kemal Kılıç was a journalist working for the Özgür Gündem newspaper in Şanlıurfa in the state of emergency area. He had worked there for about eighteen months before his death on 18 February 1993. Özgür Gündem was a daily newspaper which was published in İstanbul from 30 May 1992, with a national circulation of some thousand copies and a further international circulation. According to the representatives of the owners of the newspaper, it was a Turkish language publication, seeking to reflect Turkish Kurdish opinion. It had been subject to numerous prosecutions on grounds that it, inter alia, published the declarations of the PKK and disseminated separatist propaganda. On 3 December 1993, the police in İstanbul carried out an operation on the newspaper's headquarters, carrying out a search and taking the employees into detention. On 5 April 1994, an indictment was issued, charging 13 persons, including editors, journalists and workers at the newspaper, with being members of the PKK and rendering the PKK assistance and making propaganda on its behalf. In or about April 1994,

Özgür Gündem ceased publication, and was succeeded by another newspaper, Özgür Ülke. The Özgür Ülke's headquarters in İstanbul and its office in Ankara were bombed on 3 December 1994.

177. In application No. 23144/93 Ersöz and others v. Turkey, declared admissible on 20 October 1995, the applicants, who were editors and owners of Özgür Gündem, claim that the Government of Turkey, directly or indirectly, sought to hinder, prevent and render impossible the production and distribution of Özgür Gündem. This was allegedly carried, inter alia:

- by encouragement of or acquiescence to unlawful killings and forced disappearances;

- by failure and refusal to provide any or any adequate protection for journalists and distributors when their lives were clearly in danger, and despite requests to do so;

- by harassment and intimidation of journalists and distributors;

- by means of unjustified legal proceedings.

178. The Government deny these allegations.

179. The Commission recalls that, in the case of Yaşa v. Turkey (No. 22495/93 Comm. Rep. 8.4.97, Eur. Court HR, judgment of 2 September 1998, to be published in Reports 1998) which concerned the wounding of an applicant and the killing of his uncle who both were involved in the sale of the Özgür Gündem newspaper, it found that the owner of the newspaper, Yaşar Kaya, had petitioned on 12 November 1992 the Prime Minister, the deputy Prime Minister and the Minister responsible for the press alleging persecution against the newspaper, including the killing of various journalists and referring to the threats against the lives of distributors and sellers, particularly in the emergency region. It noted in the context of that case that the Government had not denied that any of the incidents referred to, namely, killings, injuries, disappearances of persons and damage to property connected to Özgür Gündem, had occurred (paras. 52-59 and also para. 106 of the Court's judgment, op. cit.). While many similar factual allegations raised in the Ersöz case are still being examined on the merits[2], the Commission notes that it is still not in dispute that a number of journalists who had worked for Özgür Gündem died as a result of unknown perpetrator killings.

180. The applicant submits that, against this background and in light of the facts of this case, the Şanlıurfa authorities were or should have been aware that persons working for Özgür Gündem, in particular journalists such as Kemal Kılıç, were at risk of attack. The Commission recalls that in his evidence before the Delegates Captain Kargılı stated that he had not heard that Kemal Kılıç had requested protection for newspaper workers until after Kemal Kılıç was killed nor had he heard that journalists were under threat. While he referred to protection being organised for the distribution of newspapers generally, he did recall at one point that certain newspapers, naming

[2]See the Commission's report on the merits adopted shortly after this report, Comm. Rep. 29.10.98.

Aydınlık and Özgür Gündem, were having difficulties. Further, according to the Government submissions in the Ersöz case, following a faxed message on 2 December 1992 from Merdan Yanardağ, the editor of Özgür Gündem to the Diyarbakır police requesting security measures for the distribution of Özgür Gündem, the employees of two companies (Birleşik Basın Dağıtım A.Ş. and Gameda A.Ş.) dealing with distribution were escorted by the security officers from the border of Şanlıurfa province to the distribution stores.

181. In his petition of 23 December 1992 (paras. 63-64), Kemal Kılıç brought to the attention of the Governor of Şanlıurfa the concerns of those working for Özgür Gündem in that city that they were at risk. The Government have also not denied that persons at the newspaper office in Şanlıurfa contacted the police at this time passing on information about threats being made to newsagents selling Özgür Gündem (see paras. 59-62). However, the request of Kemal Kılıç for protection for himself and other persons involved with the newspaper office was rejected by the Governor of Şanlıurfa who denied that any protection was being given to the newspaper elsewhere in the province or that there had been any question of attacks or threats on distributors anywhere. This response conflicts with the fact that from December 1992 the Diyarbakır police were, according to the Government, in consultation about measures of protection and also with Captain Kargılı's recollection of the situation.

182. The Commission also notes that in his press release of 11 January 1993 Kemal Kılıç made detailed allegations as to which newsstands had been subject to arson attacks and named persons who had been threatened. While Kemal Kılıç was subject to a charge for insulting the Governor in the course of that press release, it is not apparent that any step was taken to verify or investigate the serious claims that were being made. The Commission regrets that it did not have the opportunity to hear the testimony of Mr. Ziyaeddin Akbulut, the Governor of Şanlıurfa, who would have been able to shed light on what steps he took in response to the newspaper's claims and the information which was available to the authorities. This has hindered the Commission in its task of establishing the facts of this case. It is not satisfied with explanations for the Governor's failure to give evidence on two occasions before the Delegates (see para. 158). In this respect, the Commission considers that the Government have failed to comply with their obligation under Article 28 para. 1(a) to furnish the Commission with all necessary facilities for the ascertaining of the facts of the case. In the absence of this witness, the Commission also draws certain inferences supporting the applicant's allegations that no or no effective investigations were in fact made in response to Kemal Kılıç's claims.

183. The Commission finds that by February 1993 it was known to the authorities in Şanlıurfa that Özgür Gündem, and persons associated with it, considered that they were under harassment and threat of attack. It also finds that the claims made by Özgür Gündem at this time as regards attacks and incidents and the existence of a risk to personnel linked to the newspaper had a factual foundation.

2. Events related to the killing of Kemal Kılıç on 18 February 1993

184. The Commission recalls that, according to the applicant, Kemal Kılıç told his father that he had been threatened that he would be killed if he continued working as a journalist and did not cease his union activities. He also stated that his brother had told his friends that he was being followed by a car from the National Intelligence Agency. After his brother died, the applicant stated that villagers who had shops in the city of Şanlıurfa told him that they had seen a white car following his brother and that a white car had been seen coming to the bus station at the same time as his brother. There had also been, according to the applicant, an incident one evening when a white Renault had come into the village and men had knocked on the door of the applicant's father's house calling for his brother. It appears that these matters were not reported to the authorities at the time. The Government have not however disputed that Kemal Kılıç was subject to threats before his death or that he was being followed by persons using a white Renault.

185. The facts surrounding the events on the evening of 18 February are essentially not in dispute. In this respect, evidence was gathered by the authorities. It is established that at about 17.00 hours Kemal Kılıç left his work and at about 17.30 hours caught the Şanlıurfa-Akçakale coach from Kuyubaşı. Shortly before the coach reached the junction of the main road with the village road to Külünçe, the coach was overtaken by a white Renault car which turned into the village road, turned round and parked, with its headlights off. This was at about 18.20 hours. Kemal Kılıç was the only passenger to get off the bus at the Külünçe junction. The watchman Ahmet Fidan at a nearby construction site heard argument and a cry for help. There were two pistol shots. Then the white Renault car drove off in the direction of Şanlıurfa. The watchman found a body lying in the road and ran to the nearby petrol station to report the murder to the gendarmes.

186. The Commission recalls that the applicant has given further details of the incident, which he states that his father was told by Ahmet Fidan the day after the killing. In particular, he claims that Ahmet Fidan noted the registration number of the Renault car as 63 EO 443 and recalled that there were four persons in the Renault car, who tried to drag Kemal Kılıç into the car before they shot him. These details do not appear in the statement taken from Ahmet Fidan by the gendarmes on the evening of the incident. Indeed the statement indicates that it was dark and that he could not see much of what was happening. Captain Kargılı was also doubtful whether at that time of the evening the watchman would have been able to see the registration plate and emphasised that this was a crucial point which they had specifically put to the night watchman who had denied having any further information. The Commission is hampered by the fact that Ahmet Fidan did not appear before its Delegates to give his testimony. But in the absence of convincing first hand evidence to the contrary, it accepts the testimony of Captain Kargılı that the night watchman did not give this information to the authorities. Nor can it be regarded as established that the car in fact had this registration number. It notes the Government's contention based on a document in the investigation file that the number could not exist in Turkey (para. 90) as it contained an "O". As the applicant points out this is hard to reconcile, inter alia, with another document in the file which records

the car of the public prosecutor as 63 TO 679 (the autopsy report referred to at para. 73). The Commission is however unable to resolve these contradictions on the basis of the material before it.

187. The applicant has submitted that it was undercover security forces who were involved in the killing. He relies on a number of elements:

- the fact that the authorities regarded Özgür Gündem as the mouthpiece of the PKK;
- the evidence that, prior to the killing, persons stating that they were from the Security Directorate were going around threatening newspaper sellers (paras. 58-62);
- the fact that the persons following Kemal Kılıç acted openly and were able to move freely;
- the lack of any response by the police or Governor to complaints of harassment and the request for protection;
- the assertion that it was a matter of notoriety that white Renaults were used as unmarked vehicles by plain clothed forces;
- the publications by international and non-governmental organisations suggesting that extra-judicial killings took place in Turkey (para. 52) and domestic reports issuing from various Turkish authorities which also support allegations of unlawful actions by the security forces, including assassinations (paras. 109-119). In particular, the applicant relies on the Susurluk report (see summary at Annex II).

188. The Commission notes that the first four elements only constitute indications consistent with the allegation but do not involve any direct evidence linking any State official with the killing of Kemal Kılıç. As regards the fifth element, the applicant has not provided any evidence to support the assertion that white Renaults were used as unmarked police vehicles. As regards the last element, the Commission is aware that grave allegations about extra-judicial executions have been the subject of United Nations and NGO scrutiny and that Turkey has come under criticism from various organs. Even assuming that these reports could be regarded as disclosing the existence of a strong suspicion that extra-judicial killings had taken place, they do not provide any basis for the Commission to find that State agents or persons acting on their behalf or with their connivance had killed Kemal Kılıç in particular.

189. The Commission has examined carefully the report issued by the Turkish Grand National Assembly relied on by the applicant (paras. 109-112) and the Susurluk report (paras. 113-118). It observes that steps have been taken to investigate allegations of abuse of power and unlawful activities in the south-east and to make public the critical findings. While it is highly disquieting that these reports indicate that State agents and other individuals acted with impunity and outside the law in pursuit of their own interests and the perceived interests of the State, there is no concrete fact adverted to which could constitute proof of wrongdoing by a State agent in this particular case. The statement in the Susurluk report that implies that Musa Anter was killed with the knowledge or involvement of State officials and the statement that journalists also had been killed casts very strong suspicion on the case of Kemal Kılıç. However, the Commission considers that there is no evidence arising out of the circumstances of the killing of Kemal Kılıç or the reports referred to which would allow any

finding as to the identity of his killers to the requisite standard of proof beyond reasonable doubt.

3. Investigation by the authorities

i. Investigation into the killing at Şanlıurfa

190. As regards the investigation carried out by the authorities into the killing at Şanlıurfa, there are a number of disputes of fact.

191. The applicant alleges that the gendarmes were late at the scene of the crime arriving after him and his family; that the gendarmes were casual about the immediate investigation at the scene, inter alia, waiting until the public prosecutor arrived to take any steps; that they were careless in handling the evidence and that they did not seriously pursue the investigation. In particular, he disputes the evidence of Captain Kargılı that he took photographs of the scene or came back for further investigations of the scene the next day and submits that the concern of the gendarmes in searching the applicant's father's house seemed to be to find evidence that Kemal Kılıç was involved with the PKK.

192. The Commission finds that the gendarmes arrived at the scene of the killing shortly after it was reported to them. It notes that in his statement of 1 March 1993 the applicant stated that the gendarmes were there when he and others of his family arrived, a version with which Captain Kargılı concurred. In his oral testimony, the applicant said they arrived five minutes after he did. In any event, it is not apparent that there was any lack of expedition in the response to the report of the killing.

193. The Commission also finds no significant indication of negligence in the conduct of the investigation at the scene. There is nothing sinister in the apparent procedure of the gendarmes which was to wait for the arrival of the public prosecutor before taking physical steps in regard to the evidence eg. removing items on or near the body. The testimony of Captain Kargılı as to the necessity to preserve the scene and to act under the public prosecutor's instructions was on the whole convincing.

194. The Commission notes that the cartridges, the rope and tapes on the body and a piece of paper were taken as evidence from the scene. A forensic examination was however only carried out on the first. Captain Kargılı did not demur that no particular steps were taken as regarded preserving, or testing for fingerprint evidence on, the rope or pieces of tape, explaining that in his view the bloodstains rendered forensic examination useless. Sketches were made at the scene of the position of the body and the location. As regards the photographs, the Commission finds no basis on which to discount Captain Kargılı's evidence on this point. Similarly, it accepts his evidence that he made an unsuccessful effort to look for tyre marks and that he returned to the scene the next day for further investigation. The fact that no villager told the applicant that the Captain had been seen doing so does not undermine the reliability of the Captain's evidence on this point.

195. Efforts were also made by the gendarmes to locate possible witnesses. Statements were taken from a number of persons - the applicant's father and three of his brothers, the night watchman Ahmet Fidan, the bus driver and his assistant and two of the passengers on the bus. A search, carried out pursuant to a warrant, was conducted at the house where Kemal Kılıç had lived. The Commission notes that the search report recorded that the purpose of the search was to look for clues which might shed light on the killing. There is no evidence which would indicate that this was not the purpose. The fact that certain items - books, papers, a photograph of some-one holding a weapon and Kurdish cassettes - were taken for examination is not, in the Commission's opinion, indicative of any ulterior purpose but entirely consistent with investigating any links of Kemal Kılıç's which could be relevant to the killing.

196. It is not however apparent that any particular investigative steps relevant to the case were carried out in Şanlıurfa after 26 February 1993, notwithstanding the statement by Captain Kargılı in his letter of 15 March 1993 to the public prosecutor that the investigation was continuing along many different lines and the decision of the public prosecutor of 12 August 1993 to continue the search until the expiry of the statutory limitation period, both of which appear to repeat standard formulae.

197. The investigation also did not include any attempt to widen the enquiry to investigate any possible involvement of persons targeting journalists on behalf of the other State agencies. The Commission notes that the gendarme captain was not informed by the relatives of their suspicions directly, nor was he given vital information allegedly derived from the eye-witness Ahmet Fidan. However, the Commission finds that it cannot accept his claimed ignorance of Kemal Kılıç's own belief that Özgür Gündem was being deliberately targeted. The Captain did reluctantly admit to hearing that there had been some difficulties by various newspapers but initially denied having heard anything about journalists having been threatened. He did recall seeing Kemal Kılıç's press release and his request for protection to the Governor. This did not however lead him to any particular measures of investigation or enquiry. Indeed he stated that he saw no need to investigate these matters.

ii. The indictment and proceedings against Hüseyin Güney as the suspected perpetrator of the killing of Kemal Kılıç

198. Since the case was declared admissible, the Government have provided information that a suspect member of the Hizbollah organisation, called Hüseyin Güney, has been arrested, charged and is currently being tried in respect of incidents, which include the killing of Kemal Kılıç. It appears that Hüseyin Güney was taken into custody by the police on 24 December 1993 and on 3 February 1994 appeared on an indictment with 16 other defendants, in which the offence is described as membership of the outlawed Hizbollah organisation, carrying out activities intended to separate part of the country from the sovereignty of the State and form a Kurdish state based on Islam. Fifteen incidents of killings (including the killing of Kemal Kılıç) and injuries are listed under Hüseyin Güney's name on the basis of the forensic matching of a Ceska 9mm pistol allegedly found on him. The proceedings against Hüseyin Güney were still pending in July 1997 and the Commission has not been informed that they have

terminated. The public prosecutor in the case anticipated that the proceedings would last at least a further 18 months to two years from that point.

199. The Government rely on these proceedings as indicating that criminal justice is taking a normal and effective course in respect of the killing of Kemal Kılıç. The applicant submits that the evidence against Hüseyin Güney relies wholly on the ballistics evidence concerning a gun which it is not in fact established had anything to do with him and that the prosecution authorities have done nothing to seek to obtain any corroborative evidence, for example, linking him to the area of the killing at the relevant time. He points out that the court has not summoned any witness relevant to the killing of Kemal Kılıç even though the proceedings have been pending for more than four years. He states that the effect of the proceedings however ensures that no further steps are taken to identify any other suspect in respect of the killing.

200. The Commission notes that the evidence linking Hüseyin Güney with the killing of Kemal Kılıç is the ballistics report concerning the gun found at the time of his arrest and his statements to the police that he was a member of Hizbollah and admitting to having used the gun or thrown it away (paras. 103 and 107). In respect of the latter, the Commission notes that before the public prosecutor Hüseyin Güney denied having made the alleged confessions. Further, the statement to the police indicates that the gun was obtained from another member of the group "Hasan" a day before the incident. There is no material in his alleged confessions to support the contention that Hüseyin Güney used the gun in any incident save that of 24 December 1993. Indeed, his evidence was that until two weeks before the incident when he came to Diyarbakır he lived in Batman. It is noticeable that all the incidents in which the gun was used, save the killing of Kemal Kılıç near Şanlıurfa, took place in Diyarbakır.

201. As regards the reliance of the prosecution on the fact that the gun was found on Hüseyin Güney, it appears from the investigation and incident report drawn up by the police after the incident on 24 December 1993 (paras. 96-98) that the gun was found abandoned at the entrance to the apartment block in which Hüseyin Güney was later found and arrested. The statement in the report that it was understood that this was his gun is obscure. The public prosecutors who gave evidence before the Delegates appeared to take the view that the police assertions linking the gun with Güney arose out of a situation of hot pursuit and had to be trusted. However it is not stated in the report that the police witnessed Güney throw down the gun. Further, when police officers came before the court, they merely confirmed that the contents of the report were correct and that they had nothing to add. No further questions were put to them by the public prosecutor or members of the court, and from the text of the court minutes, it appears that the defendants and defence counsel were not present in the court room at this time. Hüseyin Güney maintained in his various appearances before the court that he had nothing to do with the gun. A forensic swab on his hands testing for traces of firing residue was negative. No step was taken by way of fingerprint evidence to establish whether he had handled the gun. The prosecutor Cafer Tüfekçi saw no reason to seek such evidence.

202. In any event, the Commission would comment that, whether or not the gun may be proved to the satisfaction of the State Security Court to have been used by Hüseyin Güney on 24 December 1993 in Diyarbakır, there is no other item of evidence linking him with the commission of any other of the crimes in which the gun was used, in particular that of the killing of Kemal Kılıç in Şanlıurfa. This absence is striking in view of the fact that the public prosecutor Cafer Tüfekçi confirmed to the Delegates that it was not unusual in terrorist groups for guns to be circulated amongst members.

203. Finally, the Commission notes that it was not until 17 December 1996 that the court made a request for the action file concerning the killing of Kemal Kılıç. While the prosecutor Yağlı informed the Delegates that on this date the court also ordered that witnesses relevant to the case, such as members of the family and the night watchman be summoned, his recollection on this point is not supported by the signed minutes of the court session. The Commission does not find it established therefore that any witnesses concerning the Kılıç case have been summoned or heard in the proceedings.

D. As regards Article 2 of the Convention

204. Article 2 of the Convention provides:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
>
> a. in defence of any person from unlawful violence;
>
> b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> c. in action lawfully taken for the purpose of quelling a riot or insurrection."

205. The applicant submits that his brother Kemal Kılıç was killed either by undercover agents of the State or by members of the Hizbollah, acting under express or implied instructions and to whom the State gave explicit or tacit support, including training and equipment. He was intentionally killed because of his work as a journalist with Özgür Gündem.

206. The applicant also submits that prior to his death his brother was subject to threats and requested protection in circumstances which indicated that there was a real and imminent risk that he would be killed. The failure to provide him with protection amounted to a wilful disregard of the obligation to protect his life.

207. Finally, the applicant submits that the Government failed to comply with the procedural requirements of Article 2 to provide an effective investigation into the circumstances of the killing. He submits that the investigation at the scene of the murder was negligent

in the way the evidence was handled and in that there was a failure to take important and necessary measures, such as testing for fingerprints and fibres, further analysis of the bite-mark, the taking of statements from newsagents identified as having been under threat prior to the incident, or from villagers or journalists who might have seen the white Renault on previous occasions. He points out that the investigation only really lasted for eight days before it was effectively left dormant. The applicant further submits in this context that there was no effort to investigate Kemal Kılıç's prior request for protection from the Governor, there being no evidence that he did anything in the face of serious allegations and a known background of a pattern of attacks against Özgür Gündem journalists, distributors and vendors.

208. The Government deny the applicant's complaints under Article 2. They appear to rely on the pending proceedings against Hüseyin Güney as indicating that the investigative processes were competently and efficiently handled and showing that the killing of Kemal Kılıç was carried out by a proscribed organisation in a part of Turkey, where separatist terrorist groups direct violent acts against each other as well as the State. No detailed submissions on the merits have been forthcoming.

As regards State responsibility for the killing of Kemal Kılıç

209. The Commission recalls its finding above (para. 189) that it is unable to determine who killed Kemal Kılıç. It is not established that it was a member of the security services or contra-guerilla agents acting on their behalf. Nor is there any direct evidence before the Commission linking Hüseyin Güney, an alleged member of the Hizbollah organisation, with the shooting of Kemal Kılıç (para. 202).

210. However, this does not exclude the responsibility of the Government. The Commission has examined in addition whether the circumstances disclose any failure on the part of the Government to fulfil any positive obligation under Article 2 to protect the right to life.

211. The Commission recalls that Article 2 of the Convention, which safeguards the right to life, ranks as one of the most fundamental provisions in the Convention, and together with Article 3 of the Convention enshrines one of the basic values of the democratic societies making up the Council of Europe. It must be interpreted in light of the principle that the provisions of the Convention must be applied so as to make its safeguards practical and effective (Eur. Court HR, McCann and others judgment of 27 September 1995, Series A no. 324, pp. 45-46, paras. 146-147).

212. Article 2 extends to but is not exclusively concerned with intentional killing resulting from the use of force by agents of the State. The first sentence of Article 2 para. 1 also imposes a positive obligation on Contracting States that the right to life be protected by law. In earlier cases, the Commission considered that this may include an obligation to take appropriate steps to safeguard life (see e.g. No. 7154/75, Dec. 12.7.78, D.R. 14 p. 31).

213. As a minimum, the Commission considers that a Contracting State is under an obligation to provide a framework of law which generally

prohibits the taking of life and to ensure the necessary structures to enforce these prohibitions, including the provision of a police force with responsibility for investigating and suppressing infringements. This does not impose a requirement that a State must necessarily succeed in locating and prosecuting perpetrators of fatal or life-threatening attacks. It does impose a requirement that the investigation undertaken be effective:

> "The obligation to protect the right to life under this provision, read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention', requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State." (Eur. Court HR, McCann and others, op.cit., p. 49, para. 161)

214. The Commission would emphasise that effective investigation procedures and enforcement of criminal law prohibitions in respect of events which have occurred provide an indispensable safeguard.

215. The Commission is also of the opinion that for Article 2 to be given practical force it must be interpreted as requiring preventive steps to be taken to protect life from known and avoidable dangers. However, the extent of this obligation will vary inevitably having regard to the source and degree of danger and the means available to combat it. Whether risk to life derives from disease, environmental factors or from the intentional activities of those acting outside the law, there will be a range of policy decisions, relating, inter alia, to the use of State resources, which it will be for Contracting States to assess on the basis of their aims and priorities, subject to these being compatible with the values of democratic societies and the fundamental rights guaranteed in the Convention.

216. The extent of the obligation to take preventive steps may also increase in relation to the immediacy of the risk to life. Where there is a real and imminent risk to life to an identified person or group of persons, a failure by State authorities to take appropriate steps may disclose a violation of the right to protection of life by law. In order to establish such a failure, it will not be sufficient to point to mistakes or oversights or that more effective steps might have been taken. In the Commission's view, there must be an element of gross dereliction or wilful disregard of the duties imposed by law such as to conflict fundamentally with the essence of the guarantee secured by Article 2 of the Convention (see No. 23452/94, Osman and Osman v. UK, Comm. Rep. 1.7.97, pending before the Court, paras. 88-92).

217. The Commission has therefore examined whether the State has in this case protected the right to life of Kemal Kılıç by the preventative and protective framework in place at the time of his death and by the investigative procedures implemented after his death.

a. The preventative and protective structures

218. The Commission observes that Turkish law prohibits murder and that there are police and gendarmerie forces which have functions to prevent and investigate crime, under the supervision of judicial branch

of public prosecutors. There are also courts which apply the provisions of the criminal law, in trying, convicting and sentencing offenders. However, where offences are committed by State officials, in certain circumstances the public prosecutor has no competence to proceed but decisions to prosecute are taken by administrative councils (see para. 166). Where it is considered that an offence is linked to terrorist or separatist elements, the jurisdiction of the ordinary courts is also removed and the cases determined by State Security Courts (para. 166).

219. The question remains whether this system functions in practice in respect of alleged killings perpetrated by State officials or by persons acting on their behalf.

220. The Commission recalls, firstly, that the administrative councils which have the jurisdiction to investigate allegations that killings have been committed by members of the security forces are comprised of civil servants (para. 166). In two cases, concerning alleged killings by the security forces, it has found that the members of the administrative councils who investigated the cases did not present the external signs of independence, that they were not safe from being removed and that they did not enjoy the benefit of legal guarantees protecting them against pressure from their superiors (see Nos. 21593/93, Güleç v. Turkey, Comm. Rep. 17.4.97, para. 226 and 21594/93 Oğur v. Turkey, Comm. Rep. 30.10.97, para. 136 pending before the Court). It noted in the Oğur case (op. cit., para. 140) that a member of an administrative council, who gave evidence before the Commission's Delegates, had stated that the members of the council had no effective freedom of decision and were bound to accept the views of the Governor. The Commission found in both cases that this procedure disclosed a breach of the State's duty to "protect the right to life by law", in that the investigations into the deaths were not carried out by independent bodies, were not thorough and took place without the party who had filed the criminal complaint being able to take part in them. In its judgment in the Güleç case (Eur. Court HR, judgment of 27 July 1998, paras. 80 and 82), the Court agreed that the administrative council did not provide an independent, investigative mechanism in respect of an alleged killing by the security forces.

221. The Commission has had careful regard in this context to the Susurluk report relied on by the applicant. It observes that this report, while expressly stated not to be an investigative or legal report, was drawn up under the instructions of the Prime Minister who has made the majority of it public. It is therefore a document of some significance. It does not purport to attribute responsibility or establish facts but describes and analyses certain problems brought to public attention. On this basis, it states that certain elements, particularly in the south-east, were operating outside the law and using methods which included extra-judicial executions of persons suspected of supporting the PKK. It also states that this was known to the relevant authorities. The report lends strong support to the allegations that State agencies, such as JİTEM[3], were implicated in the planned elimination of alleged PKK sympathisers, including Musa Anter and other journalists.

[3] A gendarme intelligence organisation. See references in the Susurluk report, Appendix II.

222. It is of considerable concern that, according to the report, the rule of law ceased to apply. The fact that the authorities were aware of and connived at unlawful acts, including murder, and that JİTEM and the groups acting under their auspices are described as operating outside the military hierarchy substantiates allegations that the persons who carried out these acts were unaccountable to the normal processes of criminal justice.

223. The Commission has investigated over forty cases relating to incidents in the south-east over the period 1992-1994. It has heard evidence from over 35 public prosecutors, over 29 police officers and over 64 gendarmes in fact-finding missions. In the investigated cases in which to date it has made findings on the merits, it is to be noted that no prosecutions have been brought in respect of alleged unlawful conduct by persons acting under the responsibility of the State. Problems of inadequate and superficial investigations have been a common feature, including a tendency for the authorities to attribute blame for killings, disappearances or damage to property on terrorist groups and to ignore complaints or evidence that security forces or State agents were incriminated in events. The Commission has repeatedly found that public prosecutors have failed to pursue investigations of complaints that members of the security forces have acted unlawfully, disclosing an attitude of restraint which gives the security forces a wide margin of unaccountability (see eg. Aydın v. Turkey, Comm. Rep. 7.3.96, para. 202, Eur. Court HR, judgment of 25 September 1997, Reports 1997-VI). Specific failings identified include the ignoring of visible evidence, failure to question officers named as suspects, failure to verify custody records, failure to identify security force members involved in incidents and the discounting of evidence which supports allegations of security force involvement.[4] The Commission has consistently observed a readiness on the part of the authorities to place the blame for unlawful acts on PKK terrorists, even where there was no substantiated evidence as to PKK responsibility (see eg. Eur. Court HR, Kurt v. Turkey judgment of 25 May 1998, to be cited in Reports 1998, para. 141, Comm. Rep. 5.12.96, para. 228).

224. The Commission recalls in particular that in four cases where there have been allegations that security forces have used lethal force, there have been findings of violations, both regarding the failure to comply with the procedural requirements under Article 2 of the Convention to carry out effective investigations and the lack of effective remedy under Article 13 of the Convention. In Mehmet Kaya v. Turkey, the Commission noted that the authorities took it for granted that the applicant's brother had been killed by the PKK and did not seriously consider any other alternative (Eur. Court HR, judgment of 19 February 1998, Reports 1998-I, Comm. Rep. 24.10.96, para. 195 - see also the Court's judgment at para. 108). In Ergi v. Turkey, where the Commission found that the applicant's sister had been killed during an operation by the security forces which failed, through adequate planning and control, to respect the right to life, it noted that no independent enquiry had been made by the public prosecutor into the

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[4] See Eur. Court HR, Aksoy judgment of 18 December 1996, Reports 1996-VI, p. 2287, para. 99 and Comm. Rep. 23.10.95 para. 189; Tekin v. Turkey judgment of 9 June 1998, Reports 1998, para. 67 and Comm. Rep. 17.4.97, paras. 192-194, 238; Selçuk and Asker v. Turkey, judgment of 24 April 1998, Reports 1998-II, para. 97 and Comm. Rep. 28.11.96, para. 196; Çakıcı v. Turkey, No. 23657/94, Comm. Rep. 12.3.98, para. 284; Oğur v. Turkey, No. 21549/93, Comm. Rep. 30.10.97, paras. 137-139, pending before the Court.

circumstances of the death, which had been attributed on the basis of no substantiated evidence to the PKK (Eur. Court HR, judgment of 28 July 1998, to be cited in Reports 1998, Comm. Rep. 20.5.97, paras. 152-154 -see also Court's judgment paras. 82-85). In Güleç v. Turkey, where the applicant's son was killed during a demonstration, the Commission found that the investigation was inadequate, ignoring evidence that the son had been hit by bullets fired from an armoured vehicle of the security forces (Eur. Court HR, judgment of 27 July 1998, to be cited in Reports 1998, Comm. Rep. 17.4.97, paras. 227 and 237 - see also Court's judgment at paras. 79-80). In Oğur v. Turkey, where the applicant's son was killed by security forces at a mine, the Commission found the authorities failed to seek to identify the members of the security forces involved in the incident or make enquiry from the security personnel as to what occurred (No. 21549/93, Comm. Rep. 30.10.97, paras. 137-139, pending before the Court).[5]

225. The Commission concludes that during the period relevant to this application, namely, during and about 1993, there was a consistent disregard of allegations made of involvement of security forces or State agents in unlawful conduct. Public prosecutors appeared unwilling, or unable, to pursue enquiries about matters involving the police or gendarmerie, with the result, inter alia, that assertions by the security forces attributing deaths or disappearances or destruction of property to the PKK, were accepted without seeking independent verification or substantiation.

226. The Commission observes that the functioning of the court system also gives rise to legitimate doubts as regards the independence and impartiality of the State Security Courts, which have jurisdiction to try offences purported to be carried out by terrorists. In practice, it appears that some killings by unknown perpetrators have been considered as falling under their jurisdiction also.[6] The main distinguishing feature of these courts which were set up pursuant to the Constitution to deal with offences affecting Turkey's territorial integrity and national unity, its democratic regime and its State security, is that, although they are non-military courts, one of their judges is always a member of the Military Legal Service. In finding a breach of Article 6 of the Convention in İncal v. Turkey (Eur. Court HR, judgment of 9 June 1998, to be cited in Reports 1998), the Court held that in cases concerning civilians the participation of a military member may give rise to legitimate fears that the State Security Court might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case. This discloses a significant procedural defect which potentially applies to the numerous cases in

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[5] Violation of procedural obligations under Article 2 and failure to provide an effective remedy under Article 13 were also found, most recently, in the case of a case of a killing and wounding by an unknown perpetrator in Yaşa v. Turkey (Eur. Court HR judgment of 2 September 1998, to be reported in Reports 1998). See also the Commission's report in Tanrikulu v. Turkey, No. 23763/94, Comm. Rep. 15.4.98, pending before the Court, where the Commission found that the investigation into the killing of the applicant's husband by unknown persons was so inadequate and ineffective as to amount to a failure to protect the right to life.

[6] See Tanrikulu, supra, where the Silvan public prosecutor issued a decision of lack of jurisdiction referring the killing of the applicant's husband by two unknown perpetrators to the prosecutor's office at the State Security Court. Also Mahmut Kaya v. Turkey, No. 22535/93, Comm. Rep. 23.10.98, pending before the Court, where the killing of Metin Can and Dr Hasan Kaya by unknown perpetrators were considered as falling under the jurisdiction of the State Security Court.

which suspects of alleged terrorist and separatist offences have been tried by the State Security Courts.

227. Having regard to the above factors, the Commission finds that the legal structures in the south-east of Turkey during the relevant period in this case, namely, in or about 1993, operated in such a manner that security force personnel and others acting under their control or with their acquiescence were often unaccountable for their actions. It considers that this situation was incompatible with the rule of law which should apply in a democratic state respecting fundamental human rights and freedoms.

228. This finding is not however sufficient by itself to found a violation of Article 2 of the Convention, which requires that an applicant demonstrate that he is himself a victim of the breach alleged. There must be a direct connection between the general failings above and the particular circumstances of the case.

229. The Commission notes in this case the following:

- its finding above that the applicant's brother fell into a category of people who were at risk from unlawful violence (para. 183);
- its finding that there is strong suspicion, supported by some evidence, to substantiate the allegations that risk derived from targeting by State officials or those acting on their behalf or with their connivance or acquiescence (para. 189);
- its finding that the applicant had requested protection for himself as well as others working for Özgür Gundem (para. 181);
- its finding that the authorities in Şanlıurfa were aware that the applicant's brother and those working for Özgür Gündem considered that they were at risk and required protection (para. 183);
- its finding that the authorities took no steps to investigate the extent of the alleged risks to Özgür Gündem personnel (para. 182).

230. The Commission consequently concludes that the applicant's brother fell into a category of people who were at risk from unlawful violence from targeting by State officials or those acting on their behalf or with their connivance or acquiescence. In respect of this risk, the applicant's brother did not enjoy the guarantees of protection required by the rule of law. In the absence of information as to the nature or extent of the threat to the newspaper or its staff, the Commission does not consider the authorities can be held to have omitted any particular, necessary protective measures. This however highlights the fact that without effective investigation into the attacks no adequate or appropriate preventive measures could be taken. It is to be remarked that, while allegations of State-sanctioned contra-terrorist groups, the misuse of confessors and the implication

of State officials in unknown perpetrator killings were current from an early stage, the responsible State authorities ignored or discounted them, consistently laying the blame on PKK or other terrorist groups.[7]

b. The investigation after the killing of Kemal Kılıç

231. The Commission notes that the investigation included the necessary, initial measures and that the gendarme captain showed a responsible attitude to seeking eye-witnesses and other direct evidence at the scene of the crime (see paras. 193-195). However, it notes that the investigation was active for less than one month (18 February to 15 March 1993). It also did not include any attempt to widen the enquiry to investigate any possible involvement of persons targeting journalists by or on behalf of State agents.

232. The Commission is also not satisfied that the prosecution of a suspect in respect of the killing compensates for these shortcomings but casts further doubt on the efficacy of the investigation and judicial processes. It notes the length of the trial, which has not come to a conclusion after more than four and a half years. It recalls its finding (para. 202) that there is no direct evidence in the investigation file provided to the Commission which links the suspect currently on trial with the use of the gun on 18 February 1993 in Şanlıurfa. While the public prosecutor Cafer Tüfekçi referred the Delegates to a letter of 24 January 1997 from the Şanlıurfa gendarmes, who stated that the investigation was continuing in respect of identifying any other suspects involved in the killing, the Commission recalls that Captain Kargılı had no hesitation in stating that on receiving the news of the arrest of a suspect he closed the file. There is no evidence before the Commission concerning any investigative steps being taken after that time. The Commission accordingly finds that the prosecution of Hüseyin Güney has had the practical result of closing the investigation in the case.

233. The Commission finds that in light of these fundamental defects the investigation and judicial proceedings cannot be regarded as providing effective procedural safeguards under Article 2 of the Convention.

c. Concluding findings

234. The Commission finds on the facts of this case, which disclose a lack of effective guarantees against unlawful conduct by State agents, that the State, through their failure to take investigative measures or otherwise respond to the concerns of Kemal Kılıç about the apparent pattern of attacks on persons connected with Özgür Gündem and through the defects in the investigative and judicial procedures carried out after his death, did not comply with their positive obligation to protect Kemal Kılıç's right to life.

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[7] Eg. No. 22535/93, Mahmut Kaya v. Turkey, op. cit., in which case the killings of Dr Hasan Kaya and Metin Can by unknown perpetrators were investigated as terrorist crime, notwithstanding widespread allegations of involvement of confessors and Yeşil (see Susurluk report, Appendix II concerning his links with State agencies). See also Yaşa v. Turkey, Eur. Court HR judgment of 2 September 1998, to be reported in Reports 1998, para. 105, where despite a total lack of progress in the investigation, the Government asserted that the shooting of the applicant and the killing of his uncle by unknown perpetrators were the acts of terrorists.

CONCLUSION

235. The Commission concludes, unanimously, that there has been a violation of Article 2 of the Convention in relation to the death of Kemal Kılıç.

E. As regards Article 10 of the Convention

236. Article 10 provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

237. The applicant alleges that his brother was killed because he was a journalist. This discloses an interference with the functioning of the press which raises issues under Article 10. He refers to the concerted attacks and measures implemented by the State against the newspaper Özgür Gündem and the pro-Kurdish press as disclosing a practice of interference with the freedom of expression. He cites the report of the Human Rights Foundation of Turkey to the effect that 13 journalists were killed in 1992, 52 victims of physical attacks and many others detained or arrested. He submits that the State authorities have failed to provide protection against attack or to properly investigate the incidents.

238. The Government have made no submissions addressing the issues alleged to arise under Article 10.

239. The Commission has not found it established that the killing of the applicant's brother was carried out by a member of the security forces or other State agent. It has found that the circumstances of the case disclose a failure by the State to protect his right to life. While it has noted as part of its reasoning that the applicant's brother's role as a journalist for Özgür Gündem placed him within a category of persons at risk of attack in the south-east, it does not consider that this raises separate issues under Article 10 of the Convention. Insofar as the applicant complains that the attacks disclose a policy of suppression of the Özgür Gündem newspaper, the Commission considers that it is not called upon in this individual application to assess whether there has been an unjustified interference with the freedom of expression of the newspaper or its

freedom to impart information as guaranteed under Article 10, such complaints pending examination in Application No. 23144/93 Ersöz and others v. Turkey (declared admissible on 20 October 1995).

CONCLUSION

240. The Commission concludes, by 25 votes to 3, that no separate issue arises under Article 10 of the Convention.

F. As regards Articles 6 and 13 of the Convention

241. Article 6 of the Convention provides in its first sentence:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

242. Article 13 of the Convention provides as follows:

> "Everyone whose rights and freedoms as set forth in this 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."

243. The applicant complained in his application of both a lack of access to court contrary to Article 6 of the Convention and a lack of effective remedies in respect of his complaints under Article 13 of the Convention. In his observations on the merits, the applicant's submissions concern solely his complaints under Article 13. He argues that there was no effective investigation into the killing of his brother. He submits that the system in the south-east fails to satisfy the requirements of Article 13 due to the lack of judicial officials with the independence and willingness to contemplate the possibility that agents of the State had violated human rights. He alleges that there are basic problems disclosed in official attitudes and practical inadequacies. In particular, as in this case, there is an assumption that anyone connected with Özgür Gündem was associated with the PKK. The applicant further submits, relying on the findings of lack of effective remedies in other cases, that violation of Article 13 occurs as a matter of practice in the south-east and thus he is a victim of an aggravated violation of this provision.

244. The Government have denied that there is any problem with remedies, relying on the pending criminal proceedings in this case.

245. Having regard to the findings of the Court in previous cases (eg. Eur. Court HR, Aydın v. Turkey judgment of 25 September 1997, Reports 1997, para. 102, Kaya v. Turkey judgment of 19 February 1998, to be reported in Reports 1998, para. 105), the Commission has found it appropriate to examine the applicant's complaints about remedies under Article 13 of the Convention alone.

246. The Commission recalls that in concluding that there was a violation of Article 2 of the Convention, it found that the system of criminal justice in the south-east disclosed serious problems of accountability of members of the security forces and that in the

particular circumstances of the case the investigation into the applicant's brother's death was inadequate. It recalls however that the Court has held that the requirements of Article 13 are broader than the procedural requirements of Article 2 to conduct an effective investigation (Eur. Court HR, Kaya v. Turkey judgment of 19 February 1998, to be cited in Reports 1998, para. 107). Where relatives have an arguable claim that the victim has been unlawfully killed in circumstances engaging the responsibility of the State, the notion of Article 13 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 and including effective access for the relatives to the investigatory procedure (see also, Eur. Court HR, Ergi v. Turkey, op. cit., paras. 96-98)

247. The Commission recalls its findings above on the inadequacies of the investigation, in particular, the failure to pursue any enquiry into any other possible cause of the death of Kemal Kılıç (paras. 196-197). Having regard to the fact that the investigation has effectively terminated with the institution of the proceedings against Hüseyin Güney, the apparent lack of evidence incriminating Güney in the killing of Kemal Kılıç, the length of time of those proceedings and the failure to call any of the members of his family or other witnesses over that period, the Commission also finds that the applicant has been denied an effective remedy against the authorities in respect of the death of his brother, and thereby access to any other available remedies at his disposal, including a claim for compensation.

248. In light of its findings above, the Commission finds it unnecessary to examine the applicant's complaints as regards an alleged practice of failure to provide effective remedies under Article 13.

CONCLUSION

249. The Commission concludes, unanimously, that there has been a violation of Article 13 of the Convention.

G. As regards Article 14 of the Convention

250. Article 14 of the Convention provides as follows:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

251. The applicant maintains that the killing of his brother discloses discrimination in the enjoyment of his right to life and freedom of expression, since he was killed because he was a journalist of Kurdish origin working for a pro-Kurdish newspaper. This discloses discrimination on grounds of race or ethnic origin. He also submitted in his application that the discrimination suffered by his brother was such as to disclose inhuman and degrading treatment contrary to Article 3 of the Convention.

252. The Government have denied the factual basis of the substantive complaints and that there has been any discrimination.

253. The Commission has examined the applicant's allegations in the light of the evidence submitted to it and in the context of Article 14 of the Convention. However, in light of its findings above (paras. 234-5), it considers that no separate issue arises under Article 14 in conjunction with Articles 2, 3 and/or 10 of the Convention.

CONCLUSION

254. The Commission concludes, unanimously, that no separate issue arises under Article 14 of the Convention.

H. Recapitulation

255. The Commission concludes, unanimously, that there has been a violation of Article 2 of the Convention (para. 235 above).

256. The Commission concludes, by 25 votes to 3, that no separate issue arises under Article 10 of the Convention (para. 240 above).

257. The Commission concludes, unanimously, that there has been a violation of Article 13 of the Convention (para. 249 above).

258. The Commission concludes, unanimously, that no separate issue arises under Article 14 of the Convention (para. 254 above).

M. DE SALVIA
Secretary
to the Commission

S. TRECHSEL
President
of the Commission

(Or. French)

CONCURRING OPINION OF MR I. CABRAL BARRETO

Je me rallie à la conclusion selon laquelle l'Etat turc a manqué à son obligation de prendre des mesures pour empêcher l'assassinat du frère du requérant.

Le 23 décembre 1992, moins de deux mois avant son décès, la victime avait fait part au gouverneur de Sanliurfa des menaces proférées contre ceux qui travaillaient au magazine Özgur Gundem, et avait demandé protection.

La réponse fut négative.

Or, aux termes de la première phrase de l'article 2, l'Etat a l'obligation de prendre des mesures nécessaires à la protection de la vie. S'il est vrai que l'on ne saurait déduire de cette disposition une obligation positive pour empêcher toute possibilité de violence (voir N° 9348/81, déc. du 28.2.83, D.R. 32, p. 190, et N° 22998/93, déc. du 14.10.96, D.R. n° 87-A, p. 24), il me semble que, lorsque quelqu'un demande protection pour sa vie, l'Etat a l'obligation d'évaluer les circonstances et de prendre, par voie de conséquence, des mesures adéquates.

En l'espèce, le fait que l'Etat n'a rien fait ne me paraît pas justifié.

(Or. English)

**DISSENTING OPINION OF Mr L. LOUCAIDES
JOINED BY MM. S. TRECHSEL AND M.A. NOWICKI**

I am unable to agree with the majority that in this case no separate issue arises under Article 10 of the Convention. I believe the facts are such as to justify a separate finding of a breach of the right to freedom of expression.

According to the evidence before the Commission it is clear that the killing of Kemal Kılıç was due to the expression of his views as a journalist working for Özgür Gündem, a pro-kurdish newspaper considered by the authorities to support the PKK.

The Commission has found it established that Kemal Kılıç fell into a category of people who were at risk for unlawful violence from targeting by state officials or those acting on their behalf or with their connivance or acquiescence, because he was a journalist for Özgür Gündem. The authorities were aware that Kemal Kılıç and those working for Özgür Gündem considered that they were at risk and required protection but took no steps to investigate the extent of the alleged risks.

The Commission found that through their failure to take investigative measures or otherwise respond to the concerns of Kemal Kılıç about the apparent pattern of attacks on persons connected with Özgür Gündem and through the defects in the investigative and judicial procedures carried out after his death, the state authorities did not comply with their positive obligation to protect Kemal Kılıç's right to life.

I believe that the obligation of the state to take the investigative measures and other steps mentioned above did not stem solely from their positive obligation to protect the right to life of Kemal Kılıç but also, from their distinct obligation to secure the right to freedom of expression of the same person who was at risk from unlawful violence because of the expression of his views as a journalist. In other words, the positive obligation of the state to safeguard the life of Kemal Kılıç had, in the light of the particular facts of this case, two dimensions. The first related to the right to life of the person in question under Article 2 of the Convention and the second to the right of freedom of expression under Article 10 of the Convention.

Therefore the failure of the state to take the investigative measures and other steps mentioned above amounted not only to a violation of Article 2 of the Convention but also to a violation of Article 10 of the Convention.

APPENDIX I

DECISION OF THE COMMISSION

AS TO THE ADMISSIBILITY OF

Application No. 22492/93
by Cemil Kılıç
against Turkey

The European Commission of Human Rights sitting in private on 9 January 1995, the following members being present:

MM. H. DANELIUS, Acting President
C.L. ROZAKIS
F. ERMACORA
E. BUSUTTIL
G. JÖRUNDSSON
S. TRECHSEL
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
Mrs. G.H. THUNE
Mr. F. MARTINEZ
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
D. ŠVÁBY
E. KONSTANTINOV
G. RESS

Mr. M. DE SALVIA, Deputy Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 13 August 1993 by Cemil Kılıç against Turkey and registered on 20 August 1993 under file No. 22492/93;

Having regard to:

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 10 March 1994 and the observations in reply submitted by the applicant on 11 May 1994;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, a Turkish citizen of Kurdish origin, was born in 1960 and lives at Külünçe köyü - Şanlıurfa.

The applicant is represented before the Commission by Professor Kevin Boyle and Ms. Françoise Hampson, both university teachers at the University of Essex.

The facts as submitted by the parties may be summarised as follows.

A. The particular circumstances of the case

The applicant claims that the following events occurred.

The applicant's brother Kemal Kılıç had been a journalist at Urfa for two years. He was also the Urfa representative of the newspaper Özgür Gündem (Free Agenda). In addition, he was on the management board of the Urfa branch of the Human Rights Association.

The applicant's brother had received many death threats as a result of his work with Özgür Gündem. During the two months prior to his death, he was constantly followed. This led him to make an application for protection for himself and other employees of the newspaper to the Governor's Office on 23 December 1992. On 30 December 1992, the Assistant Governor rejected his request. At that time, Özgür Gündem could not be distributed in Urfa because of threats made to the Urfa sales representative of the United Press Distribution. As a result, they would not distribute or sell the paper. Some newsagents in the province had been set alight in arson attacks. On account of those attacks, the applicant's brother wrote a press statement calling upon the Governor's Office to carry out its duty. In response to this complaint, the Governor of Urfa (Ziyaeddin Akbulut) lodged a complaint with the prosecutor and the police of the security headquarters took the applicant's brother into custody and brought him before the prosecutor on 18 January 1993. Proceedings were commenced against him on 19 January 1993 for defamation in relation to the statements which he had made in relation to the Governor.

Ten days before he was killed, the applicant's brother was followed by a vehicle said to be exactly like the white Renault in which those who killed him escaped. Its registration number was 63 EO 443. The applicant's brother told those with him at the time that those following him were police from the National Intelligence Service.

On 18 February 1993 the applicant's brother left the newspaper office on Atatürk Caddesi to return home at 17.00. He boarded the Akçakale bus of Urfa Cesur Travel at the area known as Kuyubaşı and got off the bus at the turn-off for Külünçe village (about 13 km from Urfa), where he lived.

At about 18.20, a watchman for "Balaban" construction company noticed a white Renault car turn from the main road, from the Urfa direction, into the road leading to Külünçe village. At about 90 metres from the shelter which the watchman was making for himself to keep an eye on the construction company's bridge, the car was turned round, parked, stopped and the lights were turned off. The watchman, in his

statement, says that he regards the turning round of the car as suspicious. About 15 minutes later the watchman noticed a man get off the S. Urfa Cesur bus and walk towards Külünçe village. The watchman heard the sounds of argument and voices. He looked in the direction of the car but because it was dark and the headlights had been turned off, he could not see anything. He then heard the cry "Help" and the sound of two shots from a pistol. The watchman believes that about 15 minutes elapsed between the applicant's brother disembarking from the bus and the sound of the shots. He squatted down where he was, in fear. Straight after this, the car drove off and turned into the main road, heading in the direction of Urfa. When he approached the scene of the incident with his torch, he found the body of the applicant's brother. He went to a petrol station in the vicinity and informed the gendarmes. The watchman's statement was taken by the police at Uçurlu Gendarme station.

On the basis of the evidence at the scene and of the autopsy report, the applicant states that the person(s) who detained his brother taped up his mouth, apparently in order to kidnap him. They seem to have wanted to bind his hands; they bit his left hand but were unable to bind his hands. The applicant's brother appears to have resisted, whereupon they seem to have pulled his jacket over his head and fired two shots into his head.

The applicant was told of the killing by villagers. It was not far away. When he reached the scene of the killing, gendarmes were there. They said that his brother had been killed between 18.00 and 18.20. The prosecutor reached the scene of the incident at 20.20.

The applicant states that the police handled evidence at the scene of the killing with great carelessness, without regard to the possibility of obtaining fingerprints. Two empty 9 mm cartridges were picked up and the tape was removed from his brother's mouth. The rope used in an attempt to bind his brother's hands was just placed in a carrier bag. The applicant noticed a small piece of paper but does not know what became of it. The statement from the police refers to a "bloodstained piece of paper, thought probably to be from a piece of newspaper, of dimensions 1 x 2 cm ...". It appears to have been submitted to the prosecutor.

The applicant states that the security forces are trying to define the killing of his brother as a common murder. The gendarmes called the applicant and his father to the police station five times. People have come from Uğurlu gendarmerie and security headquarters five or six times and searched their home. The applicant believes that his brother was killed because he was a journalist, a representative of Özgür Gündem and a reporter for Yeni Ülke. He also finds it interesting that his brother was killed exactly one month after he had been taken for questioning at Security Headquarters. The applicant believes that the police and security forces are only going through the gestures of conducting an investigation, as evidenced by their carelessness in handling evidence at the scene of the killing and their apparent insistence on only treating the killing as common murder. The applicant states that his brother had no personal enemies and was, indeed, much liked.

According to a Helsinki Watch report, 12 journalists were assassinated in Turkey in 1992 while a further 4 were killed in the

first seven months of 1993. These included 6 journalists from Özgür Gündem: Musa Anter killed in 1992; Hafiz Akdemir who was shot on 8 June 1992 in Diyarbakır, Yahya Orhan who was shot and killed in the street in Gercüş near Batman on 31 July 1992, Hüseyin Deniz shot on 9 August 1992 in Ceylanpınar and died from injuries, Kemal Kılıç killed on 18 February 1993 and Ferhat Tepe, kidnapped by persons unknown and his body found on 3 August 1993 (Helsinki Watch "Free Expression in Turkey 1993: Killings, Convictions, Confiscations", August 1993, Vol. 5 Issue 17 and see also Amnesty International report "Turkey: walls of glass" November 1992, AI Index Eur 44/75/92).

The respondent Government state the following.

A preliminary investigation was commenced by the public prosecutor of Şanlıurfa into the death of Kemal Kılıç. In the course of this investigation, a visit was made to the deceased's home, and all elements of the case were scrupulously examined. In this context, the allegation that the car seen at the incident belonged to the National Intelligence Service was established as being without foundation. The inquiry into the death is still in progress.

Concerning the allegations of a fire in a newspaper kiosk in Şanlıurfa, the Government state that an investigation revealed that the cause of the fire was a failure to comply with the requisite electrical installation standards. The allegations by Kemal Kılıç that the State was responsible were found on inquiry to be based on no concrete proof.

No complaints have been lodged by newspaper vendors with regard to the alleged incidents of intimidation.

B. Relevant domestic law and practice

Civil and administrative procedures

Article 125 of the Turkish Constitution provides as follows:

(translation)

"All acts or decisions of the Administration are subject to judicial review ...

The Administration shall be liable for damage caused by its own acts and measures."

The Government asserts that this provision is not subject to any restrictions even in a state of emergency or war. The latter requirement of the provision does not necessarily require proof of the existence of any fault on the part of the Administration, whose liability is of an absolute, objective nature, based on a theory of "social risk". Thus the Administration may indemnify people who have suffered damage from acts committed by unknown or terrorist authors when the State may be said to have failed in its duty to maintain public order and safety, or in its duty to safeguard individual life and property.

The principle of administrative liability is reflected in the additional Article 1 of Law 2935 of 25 October 1983 on the State of Emergency, which provides:

(translation)

"... actions for compensation in relation to the exercise of the powers conferred by this law are to be brought against the Administration before the administrative courts."

Proceedings before the administrative courts are in writing.

Any illegal act by a civil servant, be it a crime or tort, which causes material or moral damage may be the subject of a claim for compensation before the ordinary civil courts and the administrative courts. Damage caused by terrorist violence may be compensated out of the Social Help and Solidarity Fund.

Criminal procedures

The Turkish Criminal Code makes it a criminal offence to subject some-one to torture or ill-treatment (Article 243 in respect of torture and Article 245 in respect of ill-treatment, inflicted by civil servants). As regards unlawful killings, there are provisions dealing with unintentional homicide (Articles 452, 459), intentional homicide (Article 448) and murder (Article 450).

For criminal offences, complaints may be lodged, pursuant to Articles 151 and 153 of the Code of Criminal Procedure, with the public prosecutor or the local administrative authorities. The public prosecutor and the police have a duty to investigate crimes reported to them, the former deciding whether a prosecution should be initiated, pursuant to Article 148 of the Code of Criminal Procedure. A complainant may appeal against the decision of the public prosecutor not to institute criminal proceedings within fifteen days of being notified (Article 165 of the Code of Criminal Procedure).

If the alleged author of a crime is a State official or civil servant, permission to prosecute must be obtained from local administrative councils. The local council decisions may be appealed to the State Council; a refusal to prosecute is subject to an automatic appeal of this kind.

Emergency measures

Articles 13 to 15 of the Constitution provide for fundamental limitations on constitutional safeguards.

Provisional Article 15 of the Constitution provides that there can be no allegation of unconstitutionality in respect of measures taken under laws or decrees having the force of law and enacted between 12 September 1980 and 25 October 1983. That includes Law 2935 on the State of Emergency of 25 October 1983, under which decrees have been issued which are immune from judicial challenge.

Extensive powers have been granted to the Regional Governor of the State of Emergency by such decrees, especially Decree 285, as amended by Decrees 424 and 425, and Decree 430.

Decree 285 modifies the application of Law 3713, the Anti-Terror Law (1981), in those areas subject to the state of emergency, with the effect that the decision to prosecute members of the security forces

is removed from the public prosecutor and conferred on local administrative councils.

Article 8 of Decree 430 of 16 December 1990 provides as follows:

(translation)

"No criminal, financial or legal responsibility may be claimed against the State of Emergency Regional Governor or a Provincial Governor within a state of emergency region in respect of their decisions or acts connected with the exercise of the powers entrusted to them by this decree, and no application shall be made to any judicial authority to this end. This is without prejudice to the rights of an individual to claim indemnity from the State for damages suffered by them without justification."

COMPLAINTS

The applicant complains of violations of Articles 2, 3, 6, 10, 13 and 14 of the Convention.

As to Article 2, he alleges that his brother was killed in circumstances suggesting that undercover agents of the State were involved or in violation of the State's obligation to protect his right to life. He also complains of the lack of any effective system for ensuring protection of the right to life and of the inadequate protection of the right to life in domestic law.

As to Article 3, he refers to discrimination on grounds of race or ethnic origin.

As to Article 6, he complains of the failure to initiate proceedings before an independent and impartial tribunal against those responsible for the killing of his brother, as a result of which he cannot bring civil proceedings arising out of the killing, which means that he is denied effective access to court.

As to Article 10, the applicant alleges that his brother was threatened and killed in order to deter the lawful exercise of freedom of expression. He also considers that there is an administrative practice of violation of Article 10, referring to the attacks made on journalists, distributors and sellers as well as raids and arson attacks on newspaper kiosks and editorial offices.

As to Article 13, he refers to the lack of any independent national authority before which his complaints can be brought with any prospect of success.

As to Article 14, he considers that there has been discrimination on grounds of race and/or ethnic origin in the enjoyment of Convention rights under Articles 2, 6, 10 and 13.

In support of his allegation that his brother was killed by undercover agents of the State, the applicant refers to the following elements:

- the fact that his brother had previously been under surveillance,
- the fact that he had asked for protection on 23 December 1992, a request which had been rejected on 30 December 1992,
- the fact that he was brought before the prosecutor on 18 January 1993 upon the complaint of the Governor, following a press statement calling upon the Governor's office to do its duty,
- the fact that the killers escaped in a white Renault car, such a car having been used in the surveillance of the applicant's brother,
- the carelessness with which the evidence at the scene of the incident was handled,
- the failure of the authorities to treat the killing as anything else than common murder,
- the fact that no one has been charged with the killing,
- the number of journalists from papers such as Özgür Gündem who have been killed in circumstances which have led Reporters Sans Frontières, in a very cautious and meticulous report, to conclude that they were attacked by the police or security forces.

The applicant considers that there is no requirement that he should pursue alleged domestic remedies, since any alleged remedy is illusory, inadequate and ineffective. He states in this respect that:

- there is an administrative practice of non-respect of the rule which requires the provision of effective domestic remedies (Article 13),
- there is an administrative practice of unlawful killing of journalists at the hands of the undercover forces of the Turkish security forces in South-East Turkey,
- whether or not there is an administrative practice, domestic remedies are ineffective in this case, owing to the failure of the legal system to provide redress,
- whether or not there is an administrative practice, the situation in the South-East of Turkey is such that potential applicants have a well-founded fear of the consequences, should they pursue alleged remedies.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 13 August 1993 and registered on 20 August 1993.

On 11 October 1993, the Commission decided to communicate the application to the Government and to ask for written observations on the admissibility and merits of the application.

The Government's observations were submitted on 10 March 1994 after one extension in the time-limit and the applicant's observations in reply were submitted on 11 May 1994.

THE LAW

The applicant complains that his brother was killed in circumstances which involve the responsibility of the State through the actions of their agents and/or a failure to protect his brother from the threat to his life. The applicant invokes Article 2 of the Convention (the right to life), Article 3 (the prohibition on inhuman and degrading treatment), Article 6 (the right of access to court), Article 10 (freedom of expression), Article 13 (the right to effective national remedies for Convention breaches) and Article 14 (the prohibition against discrimination).

The Government argue that the application is inadmissible for the following reasons:

i. the applicant failed to exhaust domestic remedies;

ii. the application is an abuse of the right of petition.

Exhaustion of domestic remedies

The Government argue that the application is inadmissible since the applicant has failed to exhaust domestic remedies as required by Article 26 of the Convention before lodging an application with the Commission. They contend that the applicant had a number of remedies at his disposal which he did not try.

The Government point out that there is an ongoing investigation by the public prosecutor of Şanlıurfa into the death of the applicant's brother. If the public prosecutor should reach a decision to close the investigation, the applicant would be able to challenge the decision within 15 days following the notification (Article 165 of the Code of Criminal Procedure). Since the investigation has yet to be completed, the Government submit that internal domestic remedies have not been exhausted in this regard.

Further, in respect of damage or loss of life alleged to have been caused by or with the responsibility of the State or its agents, the Government submit that the applicant has the possibility of introducing an action against the administration for compensation in accordance with, inter alia, Article 125 of the Constitution or Article 8 of Decree 430.

The applicant maintains that there is no requirement that he pursue domestic remedies. Any purported remedy is illusory, inadequate and ineffective since, inter alia, the operation in question in this case was officially organised, planned and executed by agents of the State. He refers to an administrative practice of unlawful killings and of not respecting the requirement under the Convention of the provision of effective domestic remedies.

Further, the applicant submits that, whether or not there is an administrative practice, domestic remedies are ineffective in this case, having regard, inter alia, to the situation in South-East Turkey which is such that potential applicants have a well-founded fear of the consequences; the lack of genuine investigations by public prosecutors and other competent authorities; positive discouragement of those attempting to pursue remedies; an official attitude of legal

unaccountability towards the security forces; and the lack of any prosecutions against members of the security forces for alleged extra-judicial killings or torture.

In respect of the investigations by the public prosecutor of Şanlıurfa referred to by the Government, the applicant submit that the prosecutor has had adequate time to complete his investigation and that the file is simply being left open with no ongoing inquiries being conducted.

The Commission recalls that Article 26 of the Convention only requires the exhaustion of such remedies which relate to the breaches of the Convention alleged and at the same time can provide effective and sufficient redress. An applicant does not need to exercise remedies which, although theoretically of a nature to constitute remedies, do not in reality offer any chance of redressing the alleged breach. It is furthermore established that the burden of proving the existence of available and sufficient domestic remedies lies upon the State invoking the rule (cf. Eur. Court HR, De Jong, Baljet and Van den Brink judgment of 22 May 1984, Series A no. 77, p. 18, para. 36, and Nos. 14116/88 and 14117/88, Sargın and Yağcı v. Turkey, Dec. 11.05.89, D.R. 61 p. 250, 262).

The Commission does not deem it necessary to determine whether there exists an administrative practice on the part of Turkish authorities tolerating abuses of human rights of the kind alleged by the applicant, because it agrees with the applicant that it has not been established that he had at his disposal adequate remedies under the state of emergency to deal effectively with his complaints.

While the Government refers to the pending inquiry by the public prosecutor of Şanlıurfa into the death of the applicant's brother on 18 February 1993, the Commission notes that the investigation has not been completed almost two years after the killing took place and the Commission has not been informed of any significant progress having been made. In view of the delays involved and taking into account the serious nature of the crime, the Commission is not satisfied that the inquiry could be considered as furnishing an effective remedy for the purposes of Article 26 of the Convention.

The Commission also considers that in the circumstances of this case the applicant was not required to pursue any legal remedy in addition to the public prosecutor's inquiry (see eg. No. 19092/91, Yağız v. Turkey, Dec. 11.10.93, to be published in D.R.75). The applicant should therefore be considered to have complied with the domestic remedies rule laid down in Article 26 of the Convention and the application cannot be rejected for non-exhaustion of domestic remedies under Article 27 para. 3 of the Convention.

Abuse of the right of petition

The Government maintain that the application, being devoid of any sound judicial basis, has been lodged for purposes of political propaganda against the Turkish Government. Accordingly the application constitutes an abuse of the right of petition which discredits the legal nature of the Convention control mechanism.

The applicant rejects the Government's submission, contending that his complaints relate to alleged violations of the Convention.

The Commission considers that the Government's argument could only be accepted if it were clear that the application was based on untrue facts. However, this is far from clear at the present stage of the proceedings, and it is therefore impossible to reject the application on this ground.

As regards the merits

The Government have not commented on the substance of the applicant's complaints beyond asserting that they are under investigation by the public prosecutor of Şanlıurfa.

The applicant maintains his account of events.

The Commission considers, in the light of the parties' submissions, that the case raises complex issues of law and fact under the Convention, the determination of which should depend on an examination of the merits of the application as a whole. The Commission concludes, therefore, that the application is not manifestly ill-founded, within the meaning of Article 27 para. 2 of the Convention. No other grounds for declaring it inadmissible have been established.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION ADMISSIBLE, without prejudging the merits of the case.

Deputy Secretary to the Commission — Acting President of the Commission

(M. DE SALVIA) — (H. DANELIUS)

APPENDIX II

Summary of the Susurluk report (see paras. 113-116 of the Commission's Report)

1. The report contains, inter alia, the following information and extracts relevant to this case.

2. The first section of the report, which describes general matters and general aspects of the situation, included the following extracts:

> (page eight)
> The bombing of the newspaper Özgür Gündem in İstanbul, the murder of Behçet Cantürk, the murder of the writer Musa Anter in Diyarbakır, the action concerning Tarık Ümit in İstanbul ..... the trillions of credits in the banks are in reality various aspects of the incident which occurred in Ankara."
>
> (page nine)
> While the continuation of the fighting in the region and the attacks of the PKK resulted in a reaction spreading out to the region in the West as well, it is possible to understand and excuse, some of the attitudes of martyrs[8], the reactions, the anger and attitudes of the State forces who fought the PKK and lived in the State of Emergency region. It is in fact inevitable..."

3. On pages 10-24, there is a description of various concerns arising out of the personnel and operations of the General Directorate of Security, including the Special Operations Bureau.

4. On pages 25-27, there is a description of the development and involvement of the National Intelligence Organisation (MİT). References are made to a person known as Mahmut Yıldırım, sometimes known as Ahmet Demir or under the codename "Yeşil":

> - (page 26) "Whilst the character of Yeşil, and the fact that he, along with the group of confessors he gathered around himself, is the perpetrator of offences such as extortion, seizure by force, assault on homes, rape, robbery, murder, torture, kidnap etc were known, it is more difficult to explain the collaboration of the public authorities with such an individual.
> It is possible to understand that a respected organisation such as MİT may use a lowly individual... it is not an acceptable practice that MİT should have used Yeşil several times...
> Yeşil, who carried out activities in Antalya under the name of Metin Güneş, in Ankara under the name of Metin Atmaca, Ahmet Demir, is an individual whose activities and presence were known both by the police and by the MİT...As a result of the State's silence the field is left open to the gangs."
> - (page 27) Yeşil was also associated with JİTEM, an organisation within the gendarmes, which used large numbers of protectors and confessors;

5. On page 28, there is a description of the role and functioning of the gendarmes, including a reference to JİTEM. JİTEM is described as being used

[8] Persons, working for the State, who died in the struggle against terrorism.

to co-ordinate the special teams. They carried out work mostly without the knowledge of the local gendarmes. It is stated that due to the large number of confessors and protectors in its ranks, the number of offences increased. Due to their mobility and independence, the special teams developed practices outside their duty and developed a tendency to tolerate those who committed offences.

6. On pages 29-32, there is a description of Cem Ersever, the gendarme officer who formed and administered JİTEM, the intelligence unit of the gendarmes and the allegations arising out of his killing by an unknown perpetrator after he had made public criticisms of affairs in the south east.

7. From page 34 to 44, records are cited principally from MİT which state that from 1989 Yeşil took part in operations with the security forces in the Nazımiye and Ovacık districts under the command of Tunceli gendarme regimental command (check Turkish); that as a result of this work he was withdrawn to Diyarbakır where he carried out rural activities under the command of the gendarme public order commanding officer in Diyarbakır; that on 27 May 1993 he murdered five PKK suspects apprehended in Muş; that as Ahmet Demir he planned the kidnap of Bayram Kanat who was found dead on 6 April 1994; that he murdered Major Cem Ersever in November 1994; that he raped and tortured Zeynap Baba and Şükran Mizgin, the latter found dead near Muş; that with Alaattin Kanat, Mesut Mehmetoğlu and others he planned and carried out the murder of Mehmet Sincar (Batman member of Parliament); that he personally planned and executed the murders of Vedat Aydın and Musa Anter. His relationship with MİT is stated as ending on 30 November 1993.

8. From page 45 to 59, there is a description of the activities of a powerful "mafioso" style leader, Ömer Lütfi Topal, his business connections, his connections with the various officials and authorities and his killing, allegedly conducted with the acquiescence or connivance of State authorities, in which Abdullah Çatlı was implicated.

9. From page 59 to 67, there is a description of gang leader Mehmet Ali Yaprak and his kidnap incident, in which Abdullah Çatlı was implicated.

10. Information is set out concerning Behçet Cantürk(pp. 72-73). He is described as one of the financiers of Özgür Gündem from 1992 and as having been involved in drugs smuggling and terrorist action, handing over drugs money to the PKK. It is stated that:

> "Although it was obvious who Cantürk was and what he did, the State was unable to cope with him. Legal avenues were insufficient and as a result, "the newspaper Özgür Gündem was blown up with plastic explosives and when Cantürk moved to set up a new establishment ... it was decided by the Turkish Security Organisation to kill him and the decision was carried out."
>
> By doing so one individual was dropped from the "list of businessmen financing the PKK" as the Prime Minister of the time referred to it..." (page 73)

11. Comment is made that the situation arose where a chaotic system permitted, inter alia, a person like Yeşil to operate and Abdullah Çatlı, working under the orders of the State, to carry out smuggling and to spread fear around him and to take advantage of this to allow others a share in the protection money. The acquiescence in these activities permitted a group of individuals, civilians and public officials to turn from the service of the

nation to their own personal advantage (page 73). It is stated that all the relevant bodies of the State were aware of these affairs and actions (page 74). Reference is made to these factors applying to the murder of Savaş Buldan, a PKK supporter, Medet Serhat Yöş, Metin Can, Vedat Aydın and Musa Anter and other journalists. Comment is made on page 74:

> "Those who act against the unity and sovereignty of the State deserve a heavy punishment. Our only disagreement with what was done relates to the form of procedure and its results."

After commenting on the fact that there was regret at the killing of Musa Anter, even by those who supported the incidents, the page ends with the sentence, "There are other murdered journalists." Page 75 is not published.

12. On page 76, a statement by an unspecified person is continued:

> "... an illegal formation was carried out under the umbrella of JİTEM. We had the authority to execute almost anybody whom we suspected of having a relationship with the PKK. We used the method of apprehending these individuals, establishing their offences, and instead of handing them over to justice, murdered them in a way which ensured the perpetrator would remain unknown. This was required from us and we were receiving instructions in that fashion."

13. Pages 81-82 appear to continue a description of Abdullah Çatlı's activities and his connections with State officials and various authorities.

14. On pages 83-88, there is a description of the organisation and significance of the Bucak tribe headed by Sedat Bucak, who is described as arming his tribe with the close collaboration of the security forces. There were 1000 village protectors in Siverek and Hilvan receiving a salary from the State, as well as voluntary village protectors who carried weapons with the State's permission. Following their success in scoring blows against the PKK, they were accorded privileges, including official tolerance to smuggling and their shows of strength (firing their guns into the air). The local security forces also tended to leave the planning and execution of operations to the tribe. There were indications that the tribe was getting out of control, incidents occurring, for example, of individuals being interrogated without the knowledge of security officials, of a PKK supporter Hasan Taşkaya being killed. The tribe's rivalry with the PKK was not based on ideology but on rivalry for power and control. They marketed their struggle with the PKK to the State and used it to disguise their own illegal behaviour.

15. On pages 89-96, there is a description of the gangs, in particular the Kocaeli, Söylemezler and Yüksekova gangs. Police and security forces officers are named as being implicated in various incidents. MİT is named as intervening to extend the residence permits of persons involved in drugs trafficking who were threatened with deportation. MİT also stalled the proposed deportation of an arms dealer involved in illegal activities.

16. On pages 96-98, there is a description of various disquieting developments in public banks, including the grants of loans to certain groups, holdings and companies of amounts greater than they were capable of repaying. Some banks acted as if they were the banks of certain companies. They concentrated investments on a few companies increasing their risks. While the banks made losses, companies receiving credit were placed in advantageous positions.

17. In the report's final evaluation, page 100-109, the report seeks to describe the connections between illegal elements and the security forces. It describes how the JİTEM grew and expanded with southeastern situation which was its reason for existence. The confessors and local elements employed by it however became loose and free. The intelligence staff were also left outside the military hierarchy and even higher ranking officers such as Major Cem Ersever acted independently. Officers returning from the south east maintained contacts and used what they had learned. The harshness of the tools applied and the cruelty of the methods used by the PKK caused those who fought against them to use similar methods.

18. From pages 110-118, the report makes numerous recommendations, including the limiting of the use of confessors, the reduction in the number of village protectors, the cessation of the use of Special Operations Bureau outside the south east and its incorporation into the police structure outside that area, the taking of steps to investigate various incidents and to suppress gang and drugs smuggling activities.

Appendix D

Kiliç v Turkey: Judgment of the European Court of Human Rights

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

CASE OF KILIÇ v. TURKEY

(Application no. 22492/93)

JUDGMENT

STRASBOURG

28 March 2000

This judgment is subject to editorial revision before its reproduction in final form in the official reports of selected judgments and decisions of the Court.

In the case of KILIÇ v. Turkey,

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

Mrs E. PALM, *President*,
Mr J. CASADEVALL,
Mr L. FERRARI BRAVO,
Mr B. ZUPANČIČ,
Mrs W. THOMASSEN,
Mr R. MARUSTE, *judges*,
Mr F. GÖLCÜKLÜ, ad hoc *judge*,
and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 18 January and on 7 March 2000,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 8 March 1999, within the three-month period laid down by former Articles 32 § 1 and 47 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 22492/93) against the Republic of Turkey lodged with the Commission under former Article 25 by a Turkish national, Mr Cemil Kılıç, on 13 August 1993.

The Commission's request referred to former Articles 44 and 48 and to the declaration whereby Turkey recognised the compulsory jurdisdiction of the Court (former Article 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 2, 10, 13, 14 and 18 of the Convention.

2. On 31 March 1999 the Panel of the Grand Chamber decided, pursuant to Article 5 § 4 of Protocol No. 11 to the Convention and Rules 100 § 1 and 24 § 6 of the Rules of Court, that the application would be examined by one of the Sections. It was, thereupon, assigned to the First Section.

3. The Chamber constituted within the Section included *ex officio* Mr R. Türmen, the judge elected in respect of Turkey (Article 27 § 2 of the Convention and Rule 26 § 1 (a) of the Rules of Court) and Mrs E. Palm, President of the Section (Rules 12 and 26 § 1 (a)). The other members designated by the latter to complete the Chamber were Mr J. Casadevall, Mr L. Ferrari Bravo, Mr B. Zupančič, Mrs W. Thomassen and Mr R. Maruste.

4. Subsequently Mr Türmen withdrew from sitting in the Chamber (Rule 28). The Government accordingly appointed Mr F. Gölcüklü to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

5. On 14 September 1999 the Chamber decided to hold a hearing.

6. In accordance with Rule 59 § 3 the President of the Chamber invited the parties to submit memorials on the issues in the application. The Registrar received the applicants' and Government's memorials on 23 and 22 July 1999 respectively.

7. In accordance with the Chamber's decision, a hearing took place in public in the Human Rights Building, Strasbourg, on 18 January 2000.

There appeared before the Court:

(a) *for the Government*
Mr Ş. ALPASLAN, *Agent*,
Ms Y. KAYAALP,
Mr B. ÇALIŞKAN,
Mr S. YÜKSEL,
Mr E. GENEL,
Ms A. EMÜLER,
Mr N. GÜNGÖR,
Mr E. HOÇAOĞLU,
Ms M. GÜLŞEN, *Advisers*;

(b) for the applicant
Ms F. HAMPSON,
Ms R. YALÇINDAĞ,
Ms C. AYDIN, *Counsel*.

The Court heard addresses by Ms Hampson, Ms Yalçındağ and Mr Alpaslan.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. Kemal Kılıç, the applicant's brother, was a journalist working for the newspaper *Özgür Gündem* in Şanlıurfa.

Özgür Gündem was a daily newspaper, with its main office in Istanbul. Its owners described the newspaper as seeking to reflect Turkish Kurdish opinion. It was published between 30 May 1992 and April 1994. By the time it ceased publication, there had been numerous prosecutions brought on the grounds, *inter alia*, that it had published the declarations of the PKK and disseminated separatist propaganda. Following a search and arrest operation at the *Özgür Gündem* office in Istanbul on 10 December 1993, charges were brought against, *inter alia*, the editor, manager and owner of the newspaper, alleging that they were members of the PKK and had rendered the PKK assistance and made propaganda. On 2 December 1994 the Istanbul office, which had been taken over by *Özgür Gündem*'s successor, the newspaper *Özgür Ülke*, was blown up by a bomb.

9. Kemal Kılıç, who was unmarried, lived at home with his father in the village of Külünçe, outside Şanlıurfa. Besides working as journalist, he was a member of the Şanlıurfa Human Rights Association.

10. On 23 December 1992, Kemal Kılıç sent a press release to the Şanlıurfa Governor. This stated that death threats had been made against the United Press Distribution representative carrying out the distribution of *Özgür Gündem*, and against the driver and owner of the taxi used for distribution. It stated that it was known that persons working for *Özgür Gündem* had been killed and attacked and that those involved in the sale and distribution had been victims of arson attacks and assaults. Reference was made to the fact that in other provinces in the south-east security officers were protecting the offices, workers and distributors. A request was made for measures to be taken to protect the safety of people working for the Şanlıurfa office, naming himself, another journalist and the newspaper's distributor and driver.

11. By letter dated 30 December 1992, the Governor's office replied that Kemal Kılıç's request for protection had been examined. No protection had been assigned to distributors of newspapers in any of the provinces nor had there been any attacks on, or threats to, distributors in the area. His request was refused.

12. On 11 January 1993 Kemal Kılıç issued a press release. This stated that attacks aimed at the sale and distribution of *Özgür Gündem* in Şanlıurfa were continuing, despite urgent requests for protective measures. Details were given of an arson attack on a news stand on 5 January 1993 and on another news stand on 10 January 1993. The statement condemned the Governor for not ensuring the safe distribution of the newspaper and called upon him and the police to fulfil their responsibilities.

13. Following a complaint by the Governor, Kemal Kılıç was charged with insulting the Governor through the publication and broadcasting of the press release. He was taken into detention at the Şanlıurfa Security Directorate on 18 January 1993 and released the same day.

14. At around 17.00 hours on 18 February 1993, Kemal Kılıç left the newspaper office in the centre of Şanlıurfa and walked to the bus station. At about 17.30 hours, he caught the Şanlıurfa Akçale coach from Kuyubaşı. Before the coach reached the junction of the main road with the road to Külünçe, it was overtaken by a white Renault car, which turned into the village road, turned around and parked, with its headlights off. The car was noticed at about 18.20 hours by Ahmet Fidan, a night watchman, at a nearby construction site. Kemal Kılıç was the only passenger to leave the coach when it stopped at the junction. He walked up the road towards the village. Ahmet Fidan heard voices arguing and a cry for help, followed by two gunshots.

15. The incident was reported to the gendarmes who arrived on scene quickly. Kemal Kılıç's body was discovered with two bullet wounds in the head. The applicant and other members of his family came from the village to see what had happened.

16. Captain Kargılı, the central district gendarme commander, took charge of the investigation at the scene. Two cartridges were found and given to the public prosecutor when he arrived at the location. The victim's mouth was found to have been covered with four pieces of packaging tape and there was a rope round his neck. A piece of paper bearing the letters U and Y, stained with blood, was also discovered. A sketch map of the scene was drawn up. Captain Kargılı took photographs with his own camera and looked, unsuccessfully, for tyre marks. A statement was taken by the gendarmes from Ahmet Fidan, the night watchman, who stated that because of the darkness he had not seen the victim, the assailants or the car.

17. An examination of the body was carried out by a doctor in the presence of the public prosecutor on 19 February 1993. The report found that two bullets had entered the head and noted the mark of a blow to the right temple, a graze on the right hand, bruising on the back and a semi-circular lesion on the left hand, which resembled a bite-mark. It concluded that Kemal Kılıç had died due to destruction of brain tissue and brain haemorrhage.

18. On 19 February, statements were taken by the gendarmes from the driver of the Şanlıurfa coach and his assistant. The gendarmes also took statements between 19 and 23 February from the applicant, his father and three of his brothers and two passengers on the bus.

19. On 26 February 1993, Captain Kargılı carried out a search, with a warrant, of the house where Kemal Kılıç had lived, removing, *inter alia*, books, newspaper cuttings, a photograph and two cassettes for further examination.

20. On 15 March 1993, Captain Kargılı informed the public prosecutor of the search, enclosing several of the items removed from the house and other documents concerning the investigation.

21. On 12 August 1993 the public prosecutor issued a decision to continue the investigation, which stated that it had not been possible to identify or apprehend the perpetrators of the killing and that the search should continue until the expiry of the 20 year limitation period.

22. On 24 December 1993 an armed attack was carried out on the shop Aydın Ticaret in Diyarbakır. The suspected perpetrators were pursued by police from the scene and a number of persons arrested. The police incident report dated 24 December 1993 stated that the suspect Hüseyin Güney had been seen trying to escape by running up the stairs of an apartment block and was apprehended in a breathless, perspiring state. It was understood that he was returning to recover the Czech 9mm pistol located in front of the building.

23. A ballistics report dated 27 December 1993 reported that the Czech pistol had been used in 15 other shooting incidents, including the killing of Kemal Kılıç. In an indictment dated 3 February 1994, concerning 16 other defendants, Hüseyin Güney was charged with offence of membership of the outlawed Hizbollah organisation and carrying out activities with the intention of separating part of the country from the sovereignty of the State and to form a Kurdish state based upon Islamic principles. These activities were described as including the attack on Aydın Ticaret and the fifteen incidents in which the Czech pistol had been used.

24. In the undated interrogation notes taken at the Diyarbakır Security Directorate, Hüseyin Güney was recorded as admitting his membership of Hizbollah and his participation in the attack on Aydın Ticaret. He denied participation in the killing of Kemal Kılıç and stated that he had been given the Czech pistol by another member of the group. In his statement of 6 January 1994 to the public prosecutor, Hüseyin Güney stated that his confessions to the police had been obtained by torture and denied that he had joined Hizbollah or attacked Aydın Ticaret.

25. The trial of Hüseyin Güney, with other defendants, was conducted before the Diyarbakır State Security Court No. 3 between February 1994 and 23 March 1999. On 3 March 1994 Hüseyin Güney denied his involvement in any of the incidents. In the hearing on 27 October 1994, the

police officers who apprehended him confirmed the incident report of 24 December 1993 without adding anything further. On 17 December 1996 the court issued a request for documents relating to the killing of Kemal Kılıç to be obtained.

26. In its judgment of 23 March 1999, the court convicted Hüseyin Güney of being a member of a separatist organisation, the Hizbollah. The court noted that he had been found trying to escape near the vicinity of the Czech 9 mm pistol and that though he later denied it, he had admitted to the police that he was a member of Hizbollah and participated in the attack on the shop. It noted however that pistols belonging to the organisation could have been used by different individuals and that the defendants had stated that the guns had been given to them by other members of the group before the attack. It was found that though Hüseyin Güney had participated in the attack on the shop he could not be held responsible for any other actions. Hüseyin Güney was sentenced to the life imprisonment.

27. Following the court's decision, the Diyarbakır State Security Court chief public prosecutor has opened an investigation file into the killing of Kemal Kılıç (no. 1999/1187). By letter dated 20 December 1999, the prosecutor has instructed the Şanlıurfa gendarme command to report to him every three months concerning any evidence obtained about the Kılıç murder.

II. MATERIAL BEFORE THE CONVENTION ORGANS

A. Domestic investigation documents and court proceedings

28. The contents of the investigation file compiled by the gendarmes and public prosecutor at Şanlıurfa as well as the minutes from hearings in the trial of Hüseyin Güney in Diyarbakır State Security Court no. 3 from February 1994 to June 1997 were submitted to the Commission. The Government provided the Court with the judgment of the Diyarbakır State Security Court no. 3 of 23 March 1999.

B. The Susurluk report

29. The applicant lodged with the Commission a copy of the so-called *Susurluk* report[1], produced at the request of the Prime Minister by Mr Kutlu

1. Susurluk was the scene of a road accident in November1996 involving a car in which a member of parliament, a former deputy director of the Istanbul security services, a notorious far-right extremist, a drug trafficker wanted by Interpol and his girlfriend had been travelling. The latter three were killed. The fact that they had all been travelling in the same car had so shocked public opinion that it had been necessary to start more than sixteen judicial investigations at different levels and a parliamentary inquiry.

Savaş, Vice-President of the Committee for Co-ordination and Control attached to the Prime Minister's Office. After receiving the report in January 1998, the Prime Minister made it available to the public, though eleven pages and certain annexes were withheld.

30. The introduction states that the report was not based on a judicial investigation and did not constitute a formal investigative report. It was intended for information purposes and purported to do no more than describe certain events which had occurred mainly in south-east Turkey and which tended to confirm the existence of unlawful dealings between political figures, government institutions and clandestine groups.

31. The report analyses a series of events, such as murders carried out under orders, the killings of well-known figures or supporters of the Kurds and deliberate acts by a group of "informants" supposedly serving the State, and concludes that there is a connection between the fight to eradicate terrorism in the region and the underground relations that formed as a result, particularly in the drug-trafficking sphere. The passages from the report that concern certain matters affecting radical periodicals distributed in the region are reproduced below.

> "... In his confession to the Diyarbakır Crime Squad, ... Mr G. ... had stated that Ahmet Demir[1] (*page 35*) would say from time to time that he had planned and procured the murder of Behçet Cantürk[2] and other partisans from the mafia and the PKK who had been killed in the same way... The murder of ... Musa Anter[3] had also been planned and carried out by A. Demir (*page 37*).
>
> ...
>
> Summary information on the antecedents of Behçet Cantürk, who was of Armenian origin, are set out below (*page 72*).
>
> ...
>
> As of 1992 he was one of the financiers of the newspaper *Özgür Gündem*. ... Although it was obvious who Cantürk was and what he did, the State was unable to cope with him. Because legal remedies were inadequate *Özgür Gündem* was blown up with plastic explosives and when Cantürk started to set up a new undertaking, when he was expected to submit to the State, the Turkish Security Organisation decided that he should be killed and that decision was carried out (*page 73*).

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1. One of the pseudonyms of a former member of the PKK turned informant who was known by the code name "Green" and had supplied information to several State authorities since 1973.
2. An infamous drug trafficker strongly suspected of supporting the PKK and one of the principal sources of finance for *Özgür Gündem*.
3. Mr Anter, a pro-Kurdish political figure, was one of the founding members of the People's Labour Party ("the HEP"), director of the Kurdish Institute in Istanbul, a writer and leader writer for, *inter alia*, the weekly review *Yeni Ülke* and the daily newspaper *Özgür Gündem*. He was killed at Diyarbakır on 30 September 1992. Responsibility for the murder was claimed by an unknown clandestine group named "*Boz-Ok*".

...

All the relevant State bodies were aware of these activities and operations. ... When the characteristics of the individuals killed in the operations in question are examined, the difference between those Kurdish supporters who were killed in the region in which a state of emergency had been declared and those who were not lay in the financial strength the latter presented in economic terms. ... The sole disagreement we have with what was done relates to the form of the procedure and its results. It has been established that there was regret at the murder of Musa Anter, even among those who approved of all the incidents. It is said that Musa Anter was not involved in any armed action, that he was more concerned with the philosophy of the matter and that the effect created by his murder exceeded his own real influence and that the decision to murder him was a mistake. (Information about these people is to be found in Appendix 9[1]). Other journalists have also been murdered (*page 74*)."

32. The report concludes with numerous recommendations, including the improvement of co-ordination and communication between different branches of the security, police and intelligence departments, the identification and dismissal of security force personnel implicated in illegal activities, limiting of the use of confessors, a reduction of the number of village protectors, the cessation of the use of the Special Operations Bureau outside the south-east region and its incorporation into the police outside that area, the opening of investigations into various incidents and steps to suppress gang and drugs smuggling activities, and the recommendation that the results of the Grand National Assembly Susurluk enquiry be forwarded to the appropriate authorities for the relevant proceedings to be undertaken.

C. The Parliamentary Investigation Commission Report 1993 10/90 No. A.01.1.GEC

33. The applicant provided this 1993 report into extra-judicial or unknown perpetrator killings by a Parliamentary Investigation Commission of the Turkish Grand National Assembly. The report referred to 908 unsolved killings, of which 9 involved journalists. It commented on the public lack of confidence in the authorities in the south-east region and referred to information that in the Batman region the Hizbollah had a camp where they received political and military training and assistance from the security forces. It concluded that there was a lack of accountability in the region and that some groups with official roles might be implicated in the killings.

D. Evidence given before the Commission's delegates

34. A delegation from the Commission heard evidence from four witnesses: the applicant, Captain Cengiz Kargılı, the gendarme in charge of

1. The appendix is missing from the report.

the investigation into the killing of Kemal Kılıç, Mr Cafer Tüfekçi, public prosecutor at the Diyarbakır State Security Court who had initiated the proceedings against Hüseyin Güney and Mr Mustafa Çetin Yağlı, public prosecutor at the Diyarbakır State Security Court who had acted in the trial against Hüseyin Güney.

35. Three other witnesses did not appear. Ahmet Fidan, the watchman, could not be traced. Mr Hüseyin Fidanboy, the Şanlıurfa public prosecutor, was due to attend but his flight to Ankara was cancelled due to snow. Mr Ziyaeddin Akbulut, the Şanlıurfa Governor at the relevant time, was asked to attend at the hearings on 4 February and 4 July 1997 but did not appear. After the first hearing, the Government Agent provided the explanation that Mr Akbulut had been taking his annual leave. Regarding the second hearing, the Government submitted a letter from Mr Akbulut which stated that he could not remember being petitioned by Kemal Kılıç, the allegations made were false and that he could not attend due to his annual leave.

III. RELEVANT DOMESTIC LAW AND PRACTICE

36. The principles and procedures relating to liability for acts contrary to the law may be summarised as follows.

A. Criminal prosecutions

37. Under the Criminal Code all forms of homicide (Articles 448 to 455) and attempted homicide (Articles 61 and 62) constitute criminal offences. The authorities' obligations in respect of conducting a preliminary investigation into acts or omissions capable of constituting such offences that have been brought to their attention are governed by Articles 151 to 153 of the Code of Criminal Procedure. Offences may be reported to the authorities or the security forces as well as to public prosecutor's offices. The complaint may be made in writing or orally. If it is made orally, the authority must make a record of it (Article 151).

If there is evidence to suggest that a death is not due to natural causes, members of the security forces who have been informed of that fact are required to advise the public prosecutor or a criminal court judge (Article 152). By Article 235 of the Criminal Code, any public official who fails to report to the police or a public prosecutor's office an offence of which he has become aware in the exercise of his duty is liable to imprisonment.

A public prosecutor who is informed by any means whatsoever of a situation that gives rise to the suspicion that an offence has been committed is obliged to investigate the facts in order to decide whether or not there should be a prosecution (Article 153 of the Code of Criminal Procedure).

38. In the case of alleged terrorist offences, the public prosecutor is deprived of jurisdiction in favour of a separate system of State Security prosecutors and courts established throughout Turkey.

39. 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 Law of 1914 on the prosecution of civil servants, which restricts the public prosecutor's jurisdiction *ratione personae* at 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, to decide whether to prosecute. Once a decision to prosecute has been taken, it is for the public prosecutor to investigate the case.

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.

40. By virtue of Article 4, paragraph (i), of Legislative Decree no. 285 of 10 July 1987 on the authority of the governor of a state of emergency region, the 1914 Law (see paragraph 39 above) also applies to members of the security forces who come under the governor's authority.

41. If the suspect is a member of the armed forces, the applicable law is determined by the nature of the offence. Thus, if it is a "military offence" under the Military Criminal Code (Law no. 1632), the criminal proceedings are in principle conducted in accordance with Law no. 353 on the establishment of courts martial and their rules of procedure. Where a member of the armed forces has been accused of an ordinary offence, it is normally the provisions of the Code of Criminal Procedure which apply (see Article 145 § 1 of the Constitution and sections 9 to 14 of Law no. 353).

The Military Criminal Code makes it a military offence for a member of the armed forces to endanger a person's life by disobeying an order (Article 89). In such cases civilian complainants may lodge their complaints with the authorities referred to in the Code of Criminal Procedure (see paragraph 37 above) or with the offender's superior.

B. Civil and administrative liability arising out of criminal offences

42. Under section 13 of Law no. 2577 on administrative procedure, anyone who sustains damage as a result of an act by the authorities may,

within one year after the alleged act was committed, claim compensation from them. If the claim is rejected in whole or in part or if no reply is received within sixty days, the victim may bring administrative proceedings.

43. Article 125 §§ 1 and 7 of the Constitution provides:

> "All acts or decisions of the authorities are subject to judicial review...
>
> The authorities shall be liable to make reparation for all damage caused by their acts or measures."

That provision establishes the State's strict liability, which comes into play if it is shown that in the circumstances of a particular case the State has failed in its obligation to maintain public order, ensure public safety or protect people's lives or property, without it being necessary to show a tortious act attributable to the authorities. Under these rules, the authorities may therefore be held liable to compensate anyone who has sustained loss as a result of acts committed by unidentified persons.

44. Article 8 of Legislative Decree no. 430 of 16 December 1990, the last sentence of which was inspired by the provision mentioned above (see paragraph 43 above), provides:

> "No criminal, financial or legal liability may be asserted against ... the governor of a state of emergency region or by provincial governors in that region in respect of decisions taken, or acts performed, by them in the exercise of the powers conferred on them by this legislative decree, and no application shall be made to any judicial authority to that end. This is without prejudice to the rights of individuals to claim reparation from the State for damage which they have been caused without justification."

45. Under the Code of Obligations, anyone who suffers damage as a result of an illegal or tortious act may bring an action for damages (Articles 41 to 46) and non-pecuniary loss (Article 47). The civil courts are not bound by either the findings or the verdict of the criminal court on the issue of the 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 principle, only bring an action against the 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. When an act is found to be illegal or tortious 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).

AS TO THE LAW

I. THE COURT'S ASSESSMENT OF THE FACTS

46. The Court observes in the present case that the facts as established in the proceedings before the Commission are no longer substantially in dispute between the parties.

47. Before the Commission, the applicant argued that the facts supported a finding that his brother had been killed either by undercover agents of the State or by members of the Hizbollah, acting under express or implied instructions and to whom the State gave support, including training and equipment. This assertion was denied by the respondent Government.

48. After a Commission delegation had heard evidence in Ankara and Strasbourg (see the Commission report of 23 October 1998, §§ 20 and 24), the Commission concluded that it was unable to determine who had killed Kemal Kılıç. There was insufficient evidence to establish beyond reasonable doubt that State agents or persons acting on their behalf had carried out the murder. It also found that there was no direct evidence linking the suspect Hüseyin Güney with that incident (see the Commission report, cited above, paragraphs 187-189, 201-203).

In their memorials, and pleadings before the Court, the applicant and Government accepted the Commission's conclusions.

49. The Court reiterates its settled case-law that under the Convention system prior to 1 November 1998 the establishment and verification of the facts was primarily a matter for the Commission (former Articles 28 § 1 and 31). While the Court is not bound by the Commission's findings of fact and remains free to make its own assessment in the light of all the material before it, it is only in exceptional circumstances that it will exercise its powers in this area (see, among other authorities, Tanrıkulu v. Turkey judgment of 8 July 1999, to be published in *Reports* 1999, § 67).

50. Having regard to the parties' submissions, and the detailed consideration given by the Commission in its task of assessing the evidence before it, the Court finds no elements which might require it to exercise its own powers to verify the facts. It accordingly accepts the facts as established by the Commission.

51. In addition to the difficulties inevitably arising from a fact-finding exercise of this nature, the Commission found that it was hindered in its task of establishing the facts by the failure of Mr Ziyaeddin Akbulut, the Governor of Şanlıurfa at the relevant time, to appear to give evidence. The Government were requested to obtain the attendance of Mr Akbulut on two occasions. The Commission considered that the evidence of Mr Akbulut was of importance in shedding light on what steps were taken by the authorities in regard to the claims that Kemal Kılıç and others working for *Özgür Gündem* in Şanlıurfa were at risk and concerning the information which was available to the authorities (Commission report, cited above, paragraph 182).

52. The Court would observe that it is of the utmost importance for the effective operation of the system of individual petition instituted under former Article 25 of the Convention (now replaced by Article 34) not only that applicants or potential applicants should be able to communicate freely with the Convention organs without being subject to any form of pressure from the authorities, but also that States should furnish all necessary facilities to make possible a proper and effective examination of applications (see former Article 28 § 1 (a) of the Convention, which concerned the fact-finding responsibility of the Commission, now replaced by Article 38 of the Convention as regards the Court's procedures).

53. The Court notes the lack of any satisfactory or convincing explanation by the Government as to the non-attendance of an important official witness at the hearings before the Commission's delegates (see paragraph 35 above).

Consequently, it confirms the finding reached by the Commission in its report that in this case the Government fell short of their obligations under former Article 28 § 1 (a) of the Convention to furnish all necessary facilities to the Commission in its task of establishing the facts.

II. ALLEGED VIOLATIONS OF ARTICLE 2 OF THE CONVENTION

54. The applicant alleges that the State is responsible for the death of his brother Kemal Kılıç through the lack of protection and failure to provide an effective investigation into his death. He invokes Article 2 of the Convention, which provides:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;

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

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

55. The Government disputed those allegations. The Commission expressed the opinion that on the facts of the case, which disclosed a lack of effective guarantees against unlawful conduct by State agents, the State, through their failure to take investigative measures or otherwise respond to the concerns of Kemal Kılıç about the pattern of attacks on persons connected with *Özgür Gündem* and through the defects in the investigative and judicial procedures carried out after his death, did not comply with their positive obligation to protect Kemal Kılıç's right to life.

A. Submissions of those who appeared before the Court

1. The applicant

56. The applicant submitted, agreeing with the Commission's report and citing the Court's judgment in the Osman case (Osman v. the United Kingdom judgment of 28 October 1998, *Reports* 1998-VIII, p. 3124) that the authorities had failed to ensure the effective implementation and enforcement of law in the south-east region in or about 1993. He referred to the *Susurluk* report as giving strong support to the allegations that unlawful attacks were being carried out with the support and knowledge of the authorities. He relied on the defects in investigations into unlawful killings found by the Convention organs as showing that public prosecutors were unlikely to carry out effective enquiries into allegations against the security forces. He also pointed to the way in which the jurisdiction to investigate complaints against the security forces was transferred from the public prosecutors to administrative councils, which were not independent and to the use of State Security Courts, which were also lacking in independence due to the presence of a military judge, to deal with alleged terrorist crime.

57. These elements together disclosed a lack of accountability on the part of the security forces or those acting under their control or with their acquiescence which was, in the view of the applicant and the Commission, incompatible with the rule of law. In the particular circumstances of this case, where Kemal Kılıç as a journalist for *Özgür Gündem* was at risk of being targeted, the authorities in refraining from making any adequate response to his request for protection had failed to protect his life as required by law.

58. The applicant, again relying on the Commission's report, further argued that the investigation into Kemal Kılıç's death was fundamentally flawed. After the initial investigative measures at the scene, the authorities took few steps to find the perpetrators. They failed to broaden the

investigation to discover if the killing was related to Kemal Kılıç's employment as a journalist by *Özgür Gündem* even though the gendarme captain in charge of the investigation was aware of the difficulties experienced by journalists at this time, and by Kemal Kılıç in particular. Though a suspect Hüseyin Güney was accused, amongst other incidents, of killing Kemal Kılıç, the applicant pointed out that there was no evidence at his trial linking him with the murder. Nonetheless, the trial which was still pending at the date of the Commission's report in October 1998 had had the practical effect of closing the investigation into the killing, despite its lack of relevance to that event.

2. The Government

59. The Government rejected the Commission's approach as general and imprecise. They argued strongly that the so-called "*Susurluk* report" had no evidential or probative value and could not be taken into account in assessing the situation in south-east Turkey. The report was prepared for the sole purpose of providing information to the Prime Minister's Office and making certain suggestions. Its authors emphasised that the veracity and accuracy of the report were to be evaluated by that Office. Speculation and discussion about the matters raised in the report were rife and all based on the assumption that its contents were true. The State however could only be held liable on the basis of facts that have been proved beyond reasonable doubt.

60. As regards the applicant's and Commission's assertions that Kemal Kılıç was at risk of unlawful violence, the Government pointed out that the State had been dealing with a high level of terrorist violence since 1984 which reached its peak between 1993-1994, causing the death of more than 30,000 Turkish citizens. The situation in the south-east was exploited by many armed terrorist groups, including the PKK and Hizbollah who were in a struggle for power in that region in 1993-1994. While the security forces did their utmost to establish law and order, they faced immense obstacles and as in other parts of the world, terrorist attacks and killings could not be prevented. Indeed, in the climate of widespread intimidation and violence, no-one in society could feel safe at that time. All journalists could be said to be at risk, for example, not only Kemal Kılıç.

61. As regards the investigation into the death of Kemal Kılıç, the Government asserted that this was carried out with utmost precision and professionalism. All necessary steps were taken promptly and efficiently, including scene examination, autopsy, ballistics examination, taking of statements from witnesses. The investigation continued even after Hüseyin Güney was placed on trial as it was known that there were three others

involved in the murder. Further, once the Diyarbakır State Security Court found that it had not been established that Hüseyin Güney had committed the killing, an investigation was opened in the State Security Court which would continue until the end of the relevant prescription period.

B. The Court's assessment

1. The alleged failure to protect the right to life

(a) Alleged failure in protective measures

62. The Court recalls that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see L.C.B. v. the United Kingdom judgment of 9 June 1998, *Reports* 1998-III, p. 1403, § 36). This involves a primary duty on the State to secure the right to life by putting in place 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. It also extends in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual or individuals whose life is at risk from the criminal acts of another individual (see the Osman judgment, cited above, § 115).

63. Bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the scope of the positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Not every claimed risk to life therefore can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. For a positive obligation to arise, it must be 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 identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk (see the Osman judgment, cited above, § 116).

64. In the present case, it has not been established beyond reasonable doubt that any State agent or person acting on the behalf of the State authorities was involved in the killing of Kemal Kılıç (see paragraphs 48 and 50). The question to be determined is whether the authorities failed to

comply with their positive obligation to protect him from a known risk to his life.

65. The Court notes that Kemal Kılıç made a request for protection to the Şanlıurfa Governor on 23 December 1992, just under two months before he was shot dead by unknown gunmen. His petition shows that he considered himself, and others, to be at risk because he worked for *Özgür Gündem*. He claimed that distributors and sellers of the newspaper had been threatened and attacked in Şanlıurfa and in other towns in the south-east region. In his press release of 11 January 1993, he detailed specific attacks on two news stands in Şanlıurfa.

66. The Government have claimed that Kemal Kılıç was not at more risk than any other person, or journalist in the south-east region, referring to the tragic number of victims to the conflict in that region. The Court has previously found however that in early 1993 the authorities were aware that those involved in the publication and distribution of *Özgür Gündem* feared that they were falling victim to a concerted campaign tolerated, if not approved, by State officials (see Yaşa v. Turkey judgment of 2 September 1998, *Reports* 1998-VI, p. 2440, § 106). It is undisputed that a significant number of serious incidents occurred involving killings of journalists, attacks on newspaper kiosks and distributors of the newspaper (see Yaşa v. Turkey judgment, cited above, § 106 and No. 23144/93, Ersöz and others v. Turkey, Comm. Rep. 29.10.98, §§ 28-62, 141-142, pending before the Court). The Court is satisfied that Kemal Kılıç as a journalist for *Özgür Gündem* was at this time at particular risk of falling victim to an unlawful attack. Moreover, this risk could in the circumstances be regarded as real and immediate.

67. The authorities were aware of this risk. The Governor of Şanlıurfa had been petitioned by Kemal Kılıç who requested protective measures. In Diyarbakır, the police were in consultation with the *Özgür Gündem* office there about protective measures.

68. Furthermore, the authorities were aware, or ought to have been aware of the possibility that this risk derived from the activities of persons or groups acting with the knowledge or acquiescence of elements in the security forces. A 1993 report by a Parliamentary Investigation Commission (see paragraph 33) stated that it had received information that a Hizbollah training camp was receiving aid and training from the security forces and concluded that some officials might be implicated in the 908 unsolved killings in the south-east region. The *Susurluk* report, published in January 1998, informed the Prime Minister's Office that the authorities were aware of killings being carried out to eliminate alleged supporters of the PKK, including the murders of Musa Anter and other journalists during this period. The Government insisted that this report did not have any judicial or evidential value. However, even the Government described the report as providing information on the basis of which the Prime Minister was to take

further appropriate measures. It may therefore be regarded as a significant document.

The Court does not rely on the report as establishing that any State official was implicated in any particular killing. The report does however provide further strong substantiation for allegations, current at the time and since, that "contra-guerrilla" groups or terrorist groups were targeting individuals perceived to be acting against the State interests with the acquiescence, and possible assistance, of members of the security forces.

69. The Court has to consider whether the authorities did all that could be reasonably expected of them to avoid the risk to Kemal Kılıç.

70. The Court recalls that, as the Government submit, there were large numbers of security forces in the south-east region pursuing the aim of establishing public order. They faced the difficult task of countering the armed and violent attacks of the PKK and other groups. There was a framework of law in place with the aim of protecting life. The Turkish penal code prohibited murder and there were police and gendarmerie forces with the functions of preventing and investigating crime, under the supervision of the judicial branch of public prosecutors. There were also courts applying the provisions of the criminal law in trying, convicting and sentencing offenders.

71. The Court observes however that the implementation of the criminal law in respect of unlawful acts allegedly carried out with the involvement of the security forces discloses particular characteristics in the south-east region in this period.

72. Firstly, where offences were committed by State officials in certain circumstances, the public prosecutor's competence to investigate was removed to administrative councils which took the decision whether to prosecute (see paragraph 39). These councils were made up of civil servants, under the orders of the Governor, who was himself responsible for the security forces whose conduct was in issue. The investigations which they instigated were often carried out by gendarmes linked hierarchically to the units concerned in the incident. The Court accordingly found in two cases that the administrative councils did not provide an independent or effective procedure for investigating deaths involving members of the security forces (Güleç v. Turkey judgment of 27 July 1998, *Reports* 1998-IV, pp. 1731-33, §§ 77-82 and Oğur v. Turkey judgment of 20 May 1999, to be published in *Reports* 1999-, §§ 85-93)

73. Secondly, the cases examined by the Convention organs concerning the region at this time have produced a series of findings of failures by the authorities to investigate allegations of wrongdoing by the security forces, both in the context of the procedural obligations under Article 2 of the Convention and the requirement for effective remedies imposed by Article 13 of the Convention (see concerning Article 2, Kaya v. Turkey

judgment of 19 February 1998, *Reports* 1998-I, § 86-92, Ergı v. Turkey judgment of 28 July 1998, *Reports* 1998-IV, §§ 82-85, Yaşa v. Turkey judgment of 2 September 1998, *Reports* 1998-VI, §§ 98-108), Cakıcı v. Turkey judgment of 8 July 1999 § 87, and Tanrıkulu v. Turkey judgment of 8 July 1999, §§ 101-111; concerning Article 13 of the Convention, see the previously-mentioned judgments and Aksoy v. Turkey judgment of 18 December 1996, *Reports* 1996-VI, pp. 2286-7, §§ 95-100, Aydın v. Turkey judgment of 25 September 1997, *Reports* 1998-VI, pp. 1895-8, §§ 103-109, Mentes and others v. Turkey judgment of 28 November 1997, *Reports* 1997-VIII, pp. 2715-6, §§ 89-92, Selçuk and Asker v. Turkey judgment of 24 April 1998, *Reports* 1998-II, pp. 912-4, §§ 93-98, Kurt v. Turkey judgment of 25 May 1998, *Reports* 1998-III, pp. 1188-90, §§ 135-142, and Tekin v. Turkey judgment of 9 June 1998, *Reports* 1998-IV, pp. 1519-1520, §§ 62-69).

A common feature of these cases is a finding that the public prosecutor has failed to pursue complaints by individuals claiming that the security forces were involved in an unlawful act, for example not interviewing or taking statements from members of the security forces implicated, accepting at face-value the reports of incidents submitted by members of the security forces and attributing incidents to the PKK on the basis of minimal or no evidence.

74. Thirdly, the attribution of responsibility for incidents to the PKK had particular significance as regards the investigation and judicial procedures which ensue since jurisdiction for terrorist crimes has been given to the State Security Courts (see paragraph 38). In a series of cases, the Court has found that the State Security Courts do not fulfil the requirement of independence imposed by Article 6 of the Convention, due to the presence of a military judge whose participation gives rise to legitimate fears that the court may be unduly influenced by considerations which had nothing to do with the nature of the case (see Incal v. Turkey judgment of 9 June 1998, *Reports* 1998-IV, pp. 1571-3, §§ 65-73).

75. The Court finds that these defects undermined the effectiveness of criminal law protection in the south-east region during the period relevant to this case. It considers that this permitted or fostered a lack of accountability of members of the security forces for their actions which, as the Commission stated in its report, was not compatible with the rule of law in a democratic society respecting the fundamental rights and freedoms guaranteed under the Convention.

76. In addition to these defects which removed the protection which Kemal Kılıç should have received by law, there was an absence of any operational measures of protection. The Government have disputed that they could have effectively provided protection against attacks. The Court is not convinced by this argument. A wide range of preventive measures were available which would have assisted in minimising the risk to Kemal Kılıç's

life and which would not have involved an impractical diversion of resources. On the contrary however, the authorities denied that there was any risk. There is no evidence that they took any steps in response to Kemal Kılıç's request for protection either by applying reasonable measures of protection or by investigating the extent of the alleged risk to *Özgür Gündem* employees in Şanlıurfa with a view to instituting any appropriate measures of prevention.

77. The Court concludes that in the circumstances of this case the authorities failed to take reasonable measures available to them to prevent a real and immediate risk to the life of Kemal Kılıç. There has, accordingly, been a violation of Article 2 of the Convention.

(b) Alleged inadequacy of the investigation

78. The Court reiterates that the obligation to protect life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention "to secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see, *mutatis mutandis*, the McCann and Others v. the United Kingdom judgment of 27 September 1995, Series A no. 324, p. 49, § 161 and the Kaya v. Turkey judgment cited above, §105).

79. The Court recalls that in the present case an investigation was carried out at the scene of the killing by the gendarme captain Kargılı who also took steps to identify and interview potential witnesses and to obtain ballistics examination of the cartridges found at the scene.

80. However no investigative step was taken by Captain Kargılı after his letter of 15 March 1993 transmitting information and documents to the Şanlıurfa public prosecutor. Furthermore, although the indictment lodged against the suspect Hüseyin Güney arrested in Diyarbakır on 24 December 1993 listed the killing of Kemal Kılıç as one of the separatist offences committed by him as a Hizbollah member, there was no direct evidence linking him with that particular crime (see paragraphs 48 and 50 above). The Diyarbakır State Security Court did not hear any witnesses concerning the Kılıç incident nor had Güney made any admissions as to his involvement. No steps had been taken to link Güney, who previously lived in Batman, with the killing of Kemal Kılıç in Şanlıurfa. While the prosecution relied on a ballistics examination which showed that the gun allegedly used by Hüseyin Güney in an attack on a shop in Diyarbakır had also been used in fifteen other incidents, including the shooting of Kemal Kılıç, there was no evidence to show that it had been in his possession before the attack on the shop. This finding is confirmed by the decision of 29 March 1999 of the Diyarbakır State Security Court, which found that it

was not proved that Güney had used the gun in any other incident (see paragraph 26 above).

81. The Government contested the applicant and Commission's view that the misconceived inclusion of the murder of Kemal Kılıç in the prosecution of Hüseyin Güney had the practical effect of closing the investigation. However, the Court notes that on 16 February 1994 the Şanlıurfa public prosecutor issued a decision of withdrawal of jurisdiction in respect of the incident, stating that the incident fell within the jurisdiction of the State Security Court to which he therefore transferred the file. It is not apparent that any steps were taken by the Diyarbakır State Security Court prosecution with a view to continuing the investigation in any concrete form. The inactive status of the file is also supported by the Government's information that following the State Security Court decision of 29 March 1999 a new file has been opened into the matter by its public prosecutor who has sent out a general request for information to be forwarded to him concerning the incident.

82. The Court observes that the investigation by the gendarmes and the Şanlıurfa public prosecutor after the incident did not include any enquiries as to the possible targeting of Kemal Kılıç due to his job as an *Özgür Gündem* journalist. The fact that the case was transferred to the State Security Court prosecutor indicates that it was regarded as a separatist crime. There is no indication that any steps have been taken to investigate any collusion by security forces in the incident.

83. Having regard therefore to the limited scope and short duration of the investigation in this case, the Court finds that the authorities have failed to carry out an effective investigation into the circumstances surrounding Kemal Kılıç's death. It concludes that there has in this respect been a violation of Article 2 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

84. The applicant complained that the killing of his brother Kemal Kılıç also disclosed a violation of Article 10 of the Convention which provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

85. The applicant argued that his brother was killed because he was a journalist. As he was targeted on account of his journalistic activities, this was an unjustified interference with his freedom of expression. The killing was therefore an act with a dual character which should give rise to separate violations under Articles 2 and 10 of the Convention.

86. The Government rejected the applicant's submissions.

87. The Court notes that the applicant's complaints arise out of the same facts as those considered under Article 2 of the Convention. It therefore does not consider it necessary to examine this complaint separately.

IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

88. The applicant complained that he had not had an effective remedy within the meaning of Article 13 of the Convention, which provides:

> "Everyone whose rights and freedoms as set forth in this 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."

89. The Government argued that in light of the criminal investigation carried out and the penal prosecution which followed the apprehension of Hüseyin Güney, no problem arises concerning effective remedies.

90. The Commission, with whom the applicant agreed, was of the opinion that the applicant had arguable grounds for claiming that the security forces were implicated in the killing of his brother. Referring to its findings relating to the inadequacy of the investigation, it concluded that the applicant had been denied an effective remedy.

91. The Court reiterates that Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State (see the following judgments: Aksoy v. Turkey, cited above, p. 2286, § 95; Aydın v. Turkey, cited above, pp. 1895-96, § 103; and Kaya v. Turkey, cited above, pp. 329-30, § 106).

Given the fundamental importance of the right to protection of life, Article 13 requires, 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 deprivation of life and including effective access for the complainant to the investigation procedure (see the Kaya judgment cited above, pp. 330-31, § 107).

92. On the basis of the evidence adduced in the present case, the Court has not found it proved beyond reasonable doubt that agents of the State carried out, or were otherwise implicated in, the killing of the applicant's brother. As it has held in previous cases, however, that does not preclude the complaint in relation to Article 2 from being an "arguable" one for the purposes of Article 13 (see the Boyle and Rice v. the United Kingdom judgment of 27 April 1988, Series A no. 131, p. 23, § 52, and the Kaya and Yaşa judgments cited above, pp. 330-31, § 107 and p. 2442, § 113 respectively). In this connection, the Court observes that it is not in dispute that the applicant's brother was the victim of an unlawful killing and he may therefore be considered to have an "arguable claim".

93. The authorities thus had an obligation to carry out an effective investigation into the circumstances of the killing of the applicant's brother. For the reasons set out above (see paragraphs 79-82), no effective criminal investigation can be considered to have been conducted in accordance with Article 13, the requirements of which are broader than the obligation to investigate imposed by Article 2 (see the Kaya judgment cited above, pp. 330-31, § 107). The Court finds therefore that the applicant has been denied an effective remedy in respect of the death of his brother and thereby access to any other available remedies at his disposal, including a claim for compensation.

Consequently, there has been a violation of Article 13 of the Convention.

V. ALLEGED PRACTICE BY THE AUTHORITIES OF INFRINGING ARTICLES 2, 10 AND 13 OF THE CONVENTION

94. The applicant maintained that there existed in Turkey an officially tolerated practice of violating Articles 2 and 13 of the Convention, which aggravated the breach of which he had been a victim. Referring to other cases concerning events in south-east Turkey in which the Commission and the Court had also found breaches of these provisions, the applicant submitted that they revealed a pattern of denial by the authorities of allegations of serious human-rights violations as well as a denial of remedies.

95. Having regard to its findings under Articles 2 and 13 above, the Court does not find it necessary to determine whether the failings identified in this case are part of a practice adopted by the authorities.

VI. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

96. The applicant submitted that his brother was killed because he was a journalist and because of his Kurdish origin and that he was thus, contrary to the prohibition contained in Article 14 of the Convention, a victim of discrimination on grounds of presumed political or other opinion and of national origin in relation to the exercise of his right to life as protected by Article 2. Article 14 reads:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

97. The Government did not address this issue in their memorial or at the hearing.

98. The Court considers that these complaints arise out of the same facts considered under Articles 2 and 13 of the Convention and does not find it necessary to examine them separately.

VII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

99. Article 41 of the Convention provides:

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

A. Pecuniary damage

100. The applicant claimed 30,000 pounds sterling (GBP) in respect of the pecuniary damage suffered by his brother who is now dead. He submitted that his brother, aged 30 at his death and working as a journalist with a salary of the equivalent of GBP 1000 per month, can be calculated as having a capitalised loss of earnings of GBP 182,000. However, in order to avoid any unjust enrichment, the applicant claimed the lower sum of GBP 30,000.

101. The Government, pointing out that the applicant had failed to establish any direct State involvement in the death of his brother, rejected the applicant's claims as exaggerated and likely to lead to unjust enrichment. They disputed that his brother would have earned the sum claimed, which was an immense amount in Turkish terms.

102. The Court notes that the applicant's brother was unmarried and had no children. It is not claimed the applicant was in any way dependent on him. This does not exclude an award of pecuniary damages being made to an applicant who has established that a close member of the family has suffered a violation of the Convention (see Aksoy v. Turkey judgment of 18 December 1996, *Reports* 1996-VI, § 113, where the pecuniary claims made by the applicant prior to his death for loss of earnings and medical expenses arising out of detention and torture were taken into account by the Court in making an award of damages to the applicant's father who had continued the application). In the present case however, the claims for pecuniary damage relate to alleged losses accruing subsequent to the death of the applicant's brother. They do not represent losses actually incurred either by the applicant's brother before his death or by the applicant after his brother's death. The Court does not find it appropriate in the circumstances of this case to make any award to the applicant under this head.

B. Non-pecuniary damage

103. The applicant claimed, having regard to the severity and number of violations, GBP 40,000 in respect of his brother and GBP 2,500 in respect of himself.

104. The Government claimed that these amounts were excessive and unjustified.

105. As regards the claim made on behalf of non-pecuniary damage for his deceased brother, the Court notes that awards have previously been made to surviving spouses and children and where appropriate, to applicants who were surviving parents or siblings. It has previously awarded sums as regards the deceased where it was found that there had been arbitrary detention or torture before his disappearance or death, such sums to be held for the person's heirs (see Kurt v. Turkey judgment, cited above, §§ 174-175 and Cakıçı v. Turkey, cited above, § 130). The Court notes that there have been findings of violations of Article 2 and 13 in respect of failure to protect the life of Kemal Kılıç, who died instantaneously, after a brief scuffle with unknown gunmen. It finds it appropriate in the circumstances of the present case to award GBP 15,000, which amount is to be paid to the applicant and held by him for his brother's heirs.

106. The Court accepts that the applicant has himself suffered non-pecuniary damage which cannot be compensated solely by the findings of violations. Making its assessment on an equitable basis, the Court awards the sum of GBP 2,500 to the applicant to be converted into Turkish liras at the rate applicable at the date of payment.

C. Costs and expenses

107. The applicant claimed a total of GBP 32,327.36 for fees and costs incurred in bringing the application, less the amounts received by way of Council of Europe legal aid. This included fees and costs incurred in respect of attendance at the taking of evidence before the Commission's delegates at hearings in Ankara and Strasbourg and attendance at the hearing before the Court in Strasbourg. A sum of GBP 5,255 is listed as fees and administrative costs incurred in respect of the Kurdish Human Rights Project (the KHRP) in its role as liaison between the legal team in the United Kingdom and the lawyers and the applicant in Turkey, as well as a sum of GBP 3,570 in respect of work undertaken by lawyers in Turkey.

108. The Government regarded the professional fees as exaggerated and unreasonable and submitted that regard should be had to the applicable rates for the bar in Istanbul.

109. In relation to the claim for costs, the Court, deciding on an equitable basis and having regard to the details of the claims submitted by the applicant, awards him the sum of GBP 20,000 together with any value-added tax that may be chargeable, less the 4,200 French francs (FRF) received by way of legal aid from the Council of Europe.

D. Default interest

110. According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 7,5% per annum.

FOR THESE REASONS, THE COURT

1. *Holds* by six votes to one that the Government failed to protect the life of Kemal Kılıç in violation of Article 2 of the Convention;

2. *Holds* unanimously that there has been a violation of Article 2 of the Convention on account of the failure of the authorities of the respondent State to conduct an effective investigation into the circumstances of the death of the applicant's brother;

3. *Holds* unanimously that it is unnecessary to examine whether there has been a violation of Article 10 of the Convention;

4. *Holds* by six votes to one that there has been a violation of Article 13 of the Convention;

5. *Holds* unanimously that it is unnecessary to examine whether there has been a violation of Article 14 of the Convention;

6. *Holds* by six votes to one that the respondent State is to pay the applicant in respect of his brother, within three months, by way of compensation for non-pecuniary damage, GBP 15,000 (fifteen thousand pounds sterling) to be converted into Turkish liras at the exchange rate applicable at the date of settlement, which sum is to be held by the applicant for his brother's heirs;

7. *Holds* unanimously that the respondent State is to pay the applicant, within three months, in respect of compensation for non-pecuniary damage, GBP 2,500 (two thousand five hundred pounds sterling) to be converted into Turkish liras at the exchange rate applicable at the date of settlement;

8. *Holds* unanimously that the respondent State is to pay the applicant, within three months, in respect of costs and expenses, GBP 20,000 (twenty thousand pounds sterling), together with any value-added tax that may be chargeable, less FRF 4,200 (four thousand two hundred French francs) to be converted into pounds sterling at the exchange rate applicable at the date of delivery of this judgment;

9. *Holds* unanimously that simple interest at an annual rate of 7.5% shall be payable from the expiry of the above-mentioned three months until settlement of the above sums;

10. *Dismisses* unanimously the remainder of the applicant's claims for just satisfaction.

Done in English, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 28 March 2000.

Michael O'BOYLE
Registrar

Elisabeth PALM
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly dissenting opinion of Mr F. Gölcüklü is annexed to this judgment.

PARTLY DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

(provisional translation)

To my great regret, I am unable to agree with the majority on points 1, 4 and 6 of the operative provisions of the Kılıç judgment for the following reasons:

1. The Court reached the conclusion that the Government had violated Article 2 by failing to take the necessary measures to protect the life of Kemal Kılıç.

There is not a shadow of doubt in any one's mind that south-east Turkey is a high-risk area for all its inhabitants. PKK and Hizbollah terrorists and members of the far left, encouraged and supported by foreign powers, seize every opportunity to perpetrate their crimes. Moreover, gangsters and rogues take advantage of the presence of these terrorist groups in the region. The Government have taken – and continue to take – all necessary measures within their power to combat these threats to life (see paragraph 70 of the judgment). The Court itself recognises that the positive obligation imposed on the State by the Convention is not absolute but merely one to use best endeavours (see paragraphs 63 to 66 of the judgment).

Thus, surely someone like Kemal Kılıç, who was living in the region, carrying on a profession which he said put him at risk (he was a journalist) and feeling threatened – not even he could say by whom – should have exercised greater care than others and taken his own safety precautions rather than wait for the Government to protect him against those dangers?

While, according to the findings of the Commission, Kemal Kılıç was aware of the risk he was running, he nonetheless chose to take the bus home at 5.30 p.m. on 18 February 1993 although it was already dark and an allegedly suspicious car had been spotted following the bus. Without taking any precautions, he got off at a deserted stop where there was no one to come to his aid if necessary.

Unfortunately, no government is able to make security agents available to accompany persons who feel threatened or to provide them with personal protection in a high-risk area where perhaps hundreds or even thousands of people are in a like situation.

Consequently, I do not share the opinion that the Government failed, in breach of Article 2 of the Convention, in any duty it had to protect Kemal Kılıç's life.

2. As regards the finding of a violation of Article 13 of the Convention, I refer to my dissenting opinion in the case of Ergi v. Turkey (see the judgment of 28 July 1998, *Reports of Judgments and Decisions* 1998–IV).

Further, I agree with the Commission that once the conclusion has been reached that there has been a violation of Article 2 of the Convention on the grounds that there was no effective investigation into the death that has given rise to the complaint, no separate question arises under Article 13. The fact that there was no satisfactory and adequate investigation into the death which resulted in the applicant's complaints, both under Article 2 and Article 13, automatically means that there was no effective remedy before a national court. On that subject, I refer to my dissenting opinion in the case of Kaya v. Turkey (see the judgment of 19 February 1998, *Reports* 1998) and the opinion expressed by the Commission with a large majority (see Aytekin v. Turkey, application no. 22880/93, 18 September 1997; Ergi v. Turkey, application no. 23818/94, 20 May 1997; Yaşa v. Turkey, application no. 22495/93, 8 April 1997).

3. The Court awarded the applicant GBP 15,000 "in respect of his brother ... by way of compensation for non-pecuniary damage ... which sum is to be held by the applicant for his brother's heirs".

The *actio popularis* is excluded under the Convention system, with all the consequences that logically follow. It is for that reason that the Court has up till now awarded compensation for non-pecuniary damage for individual violations only to very close relatives such as the surviving spouse or children of the deceased person or, exceptionally, when it has appeared equitable, the father or mother if an express claim has been made (see paragraph 105 of the judgment in the instant case and the Tanrikulu v. Turkey judgment, § 138).

It is completely alien and contrary to the Convention system and devoid of any legal justification for an abstract, anonymous and undefined group (perhaps very distant heirs) that has suffered no non-pecuniary damage as a result of the violations found to be awarded compensation.

Kemal Kılıç was single. He had no companion or children and therefore no heirs deserving compensation for non-pecuniary damage. Yet, even more surprisingly, the Court awarded the applicant's brother the sum of GBP 2,500 for non-pecuniary damage (see paragraph 106 of the judgment in the instant case). As one of the deceased's heirs, that brother will also receive part of the award of GBP 15,000. He will thus receive two lots of compensation for the same loss, a fact that goes to highlight the inequitable nature of the Court's decision in this case.

4. Before closing, I feel bound to express my views on what I consider to be an important point. In cases where the presumed offender is a State agent, he may only be prosecuted if the administrative body ("administrative board") has given prior authorisation. However, that body is, by law, made up of public servants and is neither independent nor impartial. The Court, whose view I agree with entirely, has consistently criticised the Turkish government for that state of affairs.

However, the Court's inadmissibility decision of 5 October 1999 in the case of Grams v. Germany is instructive on the point. The case concerned the death of a presumed member of the Red Army Faction. The Court noted that the Schwerin Public Prosecutor's Office had decided to drop the prosecution on the ground that the police officers had fired in lawful self-defence and Grams had committed suicide by shooting himself in the head. In arriving at that conclusion, the public prosecutor's office had relied on a 210 page report (*Absclussvermerk*) in which the special unit responsible for the investigation of the case had set out its findings. What is interesting in this example – and it will be noted in passing that the application was not even communicated to the Government – is that the investigation was conducted not by a judicial body but by a special unit, that is to say a purely administrative body.

Appendix E

The European Court of Human Rights: System and Procedure

THE EUROPEAN COURT OF HUMAN RIGHTS:

SYSTEM AND PROCEDURE

As from 1 November 1998, Protocol 11 to the European Convention on Human Rights abolished the former two-tier system of the European Commission and Court, and created a single full-time permanent Court. This note briefly summarises the main points of the new system in Strasbourg and sets out how a case will progress through the system.

The new system under Protocol 11

- There are no changes to the substantive human rights protected by the Convention (Articles 1-18).
- The amended Convention created a new Court functioning on a permanent basis (Article 19). One judge is elected by the Parliamentary Assembly for each state party, holds office for six years and may be re-elected (Article 23).
- The Court may establish Committees of three judges which will be able unanimously to declare cases inadmissible (Article 28). Chambers of seven judges will determine the remainder of the cases (Articles 27 & 29). The national judge will be an *ex officio* member of the chamber. There is no right of appeal from an admissibility decision.
- The pre-existing admissibility criteria have been retained (Article 35). The most important of these are the requirement to exhaust all available, effective domestic remedies and the requirement to lodge a case at the European Court within six months of the final decision of the domestic courts (or within six months of the incident complained of, if there are no effective domestic remedies).
- The President of the Court may permit any Convention state or "any person concerned" (including human rights organisations) to submit written comments or take part in hearings as a 'third party' (i.e. even if the organisation is not acting for the applicant).
- New rules of the Court were adopted on 4 November 1998. The rules specify the procedure and internal workings of the Court.

How a case is handled by the European Court of Human Rights

Lodging the application with the Court

- An application can initially lodged simply by letter. There is no Court fee.

Registration and examination of the case

- The Court will open a provisional file. A Court Registry lawyer will respond with an application form and a form of authority (which should be signed by the applicant and which authorises the lawyer to act on his/her behalf).

- The application form and form of authority should be completed and returned to the Court within six weeks. Copies of all relevant documents should be lodged at the Court with the application form.

- The application is registered on receipt of the completed application form. Following registration, all documents lodged with the Court are accessible to the public (unless the Court decides otherwise).

- Once registered, an application is assigned to a Judge Rapporteur (whose identity is not disclosed to the applicant) to consider admissibility.

- The Court (in Committees of three or Chambers of seven) may declare an application inadmissible or the application may be sent to the respondent Government for a reply.

Communication of a case

- If a case is sent to the Government, the Government will be asked to reply to specific questions (copies of which are sent to the applicant) within a stipulated time.

Legal Aid

- When a case is sent to the Government, the applicant is then invited to apply for legal aid. The assessment of the applicant's financial situation is carried out by the appropriate domestic body (in Turkey, this is usually the muhtar or the local municipal authorities). The Court will send an application for legal aid to the Government to comment on.

Government's Observations

- A copy of the Government's written Observations will be sent to the applicant. The applicant may submit further written Observations in reply (within a stipulated time).

Interim Measures

- In very urgent cases, where there is an imminent threat to life or of serious injury, the Court may ask the Government to take particular action or to stop from taking certain action. For example, 'interim measures' may be applied where an applicant is threatened with expulsion to a country where there is a danger of torture or death. In that situation, the Court may ask the Government not to deport the applicant whilst the case is pending at the European Court.

Decision on admissibility

- An application may be declared inadmissible by a Committee of three judges (if unanimous). The remainder of the cases are dealt with by a Chamber of seven judges.

- The Court may hold an oral hearing to decide admissibility, although this is now rare and usually only if the case raises difficult or new issues. An application may be declared admissible/inadmissible in part.

Friendly settlement

- The friendly settlement procedure provides the Government and the applicant with an opportunity to resolve the dispute. The Court will write to the parties asking for any proposals as to settlement. The case is struck off the Court's list of cases if settlement is agreed.

Consideration of the merits

- The parties are invited to lodge final written submissions (commonly referred to as the 'Memorial'). Details of any costs or compensation which are being claimed should either be included with the Memorial or should be submitted to the Court within two months of the admissibility decision (or other stipulated time).

- The Court now decides most cases without holding a hearing. However, if there is a hearing, it takes place in public (unless there are particular reasons for the hearing to be held in private). The hearings usually take no more than two hours in total. Applicants' representatives are usually given 30 minutes to make their initial oral arguments, followed by the same period for the government's representatives. If the Court asks questions of the parties there may be a 15-20 minute adjournment, then each party may have 15-20 minutes to answer questions and reply to the other side.

Judgment

- Most judgments are issued by chambers of seven judges, but the most significant cases will be heard by a Grand Chamber of 17 judges. The Court's judgment is published several months after any hearing or after the parties' final written submissions. The Court may reach a decision unanimously or by a majority. In either case, full reasons are provided in the judgment. Individual judges may also add their dissenting judgment to the majority judgment. Within three months of a chamber judgment, any party may ask for the case to be referred to the Grand Chamber of 17 judges for a final judgment. The request is considered by a panel of five judges from the Grand Chamber. Once final, judgments are legally binding on the Government (Article 46(1)).

- The Court's primary remedy is a declaration that there has been a violation of one or more Convention rights.

- The judgment may include an award for 'just satisfaction' under Article 41 (previously Article 50). This may include compensation for both pecuniary and

non-pecuniary loss, legal costs and expenses. Awards for just satisfaction may be reserved in order for the Court to receive further submissions.

- The Court will not quash decisions of the domestic authorities or courts, strike down domestic legislation or otherwise require a Government to take particular measures.

- There is no provision in the Convention for costs to be awarded against an applicant.

Supervision of enforcement of Court judgments

- Judgments are sent to the Committee of Ministers which will review at regular intervals whether the Government has complied with it (Article 46(2)).

How long will the case take?

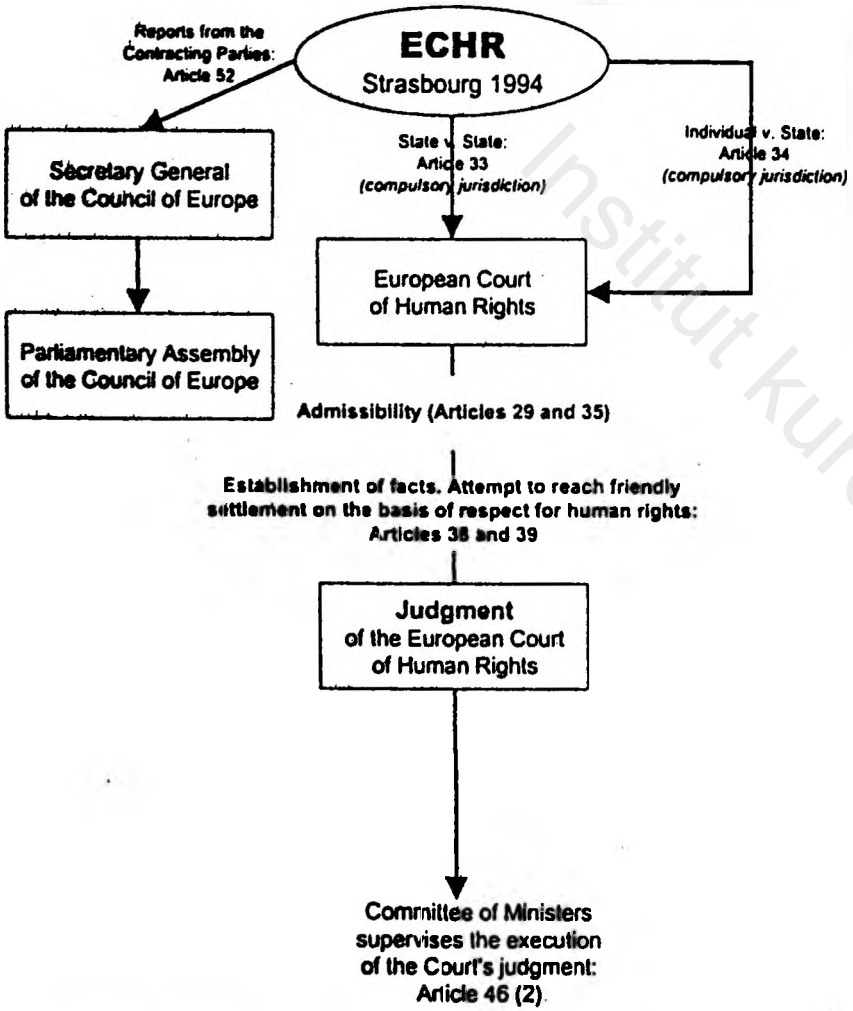
European Court cases are still taking several years to progress through the system. A case will be registered shortly after the application is lodged, but it may take more than a year for the Court even to decide whether to refer the case to the Government to reply.

Usually, it takes at least two to three years for admissibility decisions to be taken (unless there are clear reasons why the case should be declared inadmissible at the outset).

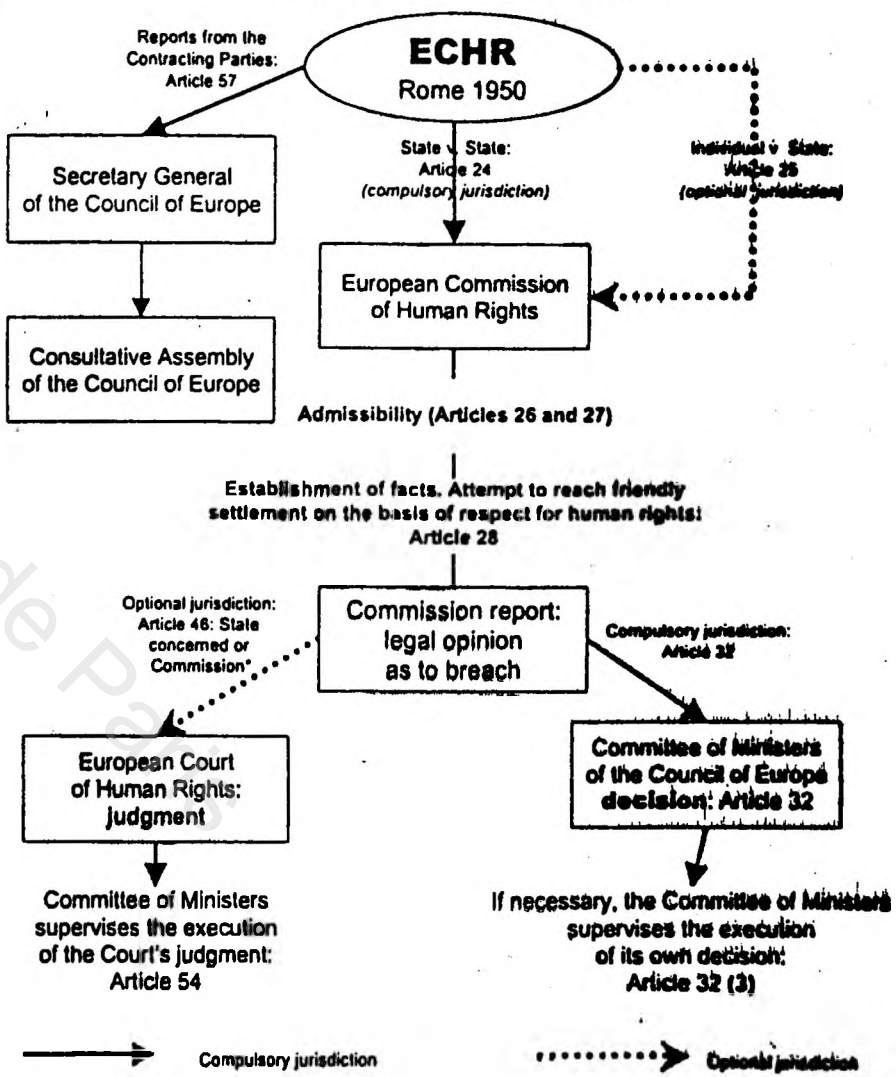
Where a case is declared admissible it is likely to take at least four to five years (from the initial introduction of the case) before the Court will produce a final judgment.

European Convention on Human Rights (ECHR)
Summary overview

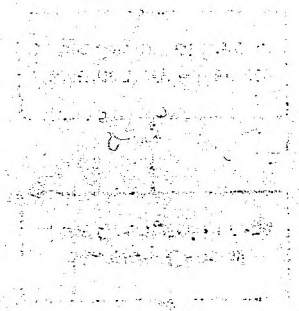
New control mechanism



Former control mechanism



Design and design: P. Graphic Publications unit, Directorate of Human Rights



Appendix F

Inadequacies of Investigations in Southeast Turkey as established in the Article 31 Reports of the European Commission of Human Rights and the Judgments of the European Court of Human Rights

INADEQUACIES OF INVESTIGATIONS IN SOUTH EAST TURKEY AS ESTABLISHED IN THE ARTICLE 31 REPORTS OF THE EUROPEAN COMMISSION ON HUMAN RIGHTS AND THE JUDGEMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS

Researched and Compiled by
Suzanne Sumner
Updated: 1 December 1999

Cases are cited by Name, Article 31 Report or Court Judgements followed by paragraph number. The full reference (case number and date of Report/Judgement) for each case is provided at the end. In each section cases are ordered alphabetically for Art. 31 reports followed by alphabetically for Court decisions.

A: Public Prosecutors

Where the Article 31 reports and Court decisions make it clear, it is indicated whether the case concerns Public Prosecutors or State Security Court Public Prosecutors.

1. Witnesses, Evidence and Investigation

1.1 Did not interview witnesses

- Public Prosecutor did not interview family members, villagers or military personnel. (ERGI, Art 31, para.136 and 151)
- The Public Prosecutor did not interview either Abdüllatif Ilhan or Abrahim Karahan himself, nor take any statement from a gendarme who witnessed the alleged injury occurring. (ILHAN, Art 31, para.223)
- Failed to interview family and other witnesses (KILIC, Art 31, para.247)
- The Public Prosecutor failed to interview the driver of the car which the victim was in (SABUKTEKIN, Art 31, para.79)
- Failed to interview ... wife of victim who was an eyewitness. Reported that she had gone into hiding, despite fact that she had visited the Public Prosecutor's office (TANRIKULU, Art. 31, para.233)
- No attempt made to establish truth through questioning villagers who may have witnessed events (ASKER and SELCUK, Court, para.97)
- No villagers in vicinity questioned about whether heard gun battle (KAYA, Mehmet, Court, para.90)
- No attempt to hear other witnesses from village (MENTES, Court, para.91)

1.2 Failed to attempt to locate witnesses

- The is no statement from a witness who was in the street at the time of the shooting or who witnessed the immediate aftermath of the shooting, despite it being 07.00 on a working day and people would have been in vicinity (AKKOC, Art 31, para.275)
- No attempts made to seek information from alleged perpetrators or other villagers who may have witnessed the events. (ASKER and SELCUK, Art 31, para.195)
- No investigation or attempts to find witnesses made. (AYDIN, Art 31, para.199)
- No documented attempt to find and take statements from witnesses at Yazikonak (KAYA, Mahmut, Art 31, para.364)
- No enquiries made to locate other witnesses (KURT, Art 31, para.227)
- Failure to seek evidence from other villagers in affected village (MENTES, Art 31, para.204)
- It does not appear that any serious attempt was made to contact two eye-witnesses or to take statements from the villagers (ÖNEN, Art 31, para.316)
- No attempt made to locate witnesses (SABUKTEKIN, Art 31, para.101)
- The Public Prosecutor did not take statements as he claimed villagers had moved and could not be found. However a letter from the Tatvan district gendarmes, indicating the villages that the people were thought to have moved to, had been sent to him. There is no evidence to indicate that further steps were taken to locate them. (SARLI, Art 31, para.207)
- He did not take steps to ascertain possible witnesses, (AYDIN, Court, para.106)

1.3 Problems in selection of witnesses

- Doubtful way in which certain witnesses chosen (MENTES, Art 31, para.204)
- Decision not to prosecute based solely on brief statements by four villagers who had been selected in a manner giving rise to certain misgivings and who lived a one hour walk away (MENTES, Court, para.91)

1.4 Did not take statements

- No statements were taken from other villager witnesses (AKDENIZ and others, Art 31, para.480)
- Did not take statements from eye-witnesses although there were at least three (AYTEKIN, Art 31, para.103)
- No statements taken from family members, villagers or military personnel by any Public Prosecutor (ERGI, Art. 31, para.136 and 151)
- No documented attempt to find and take statements from witnesses at Yazikonak. (KAYA, Mahmut, Art 31, para.364)

- State Security Court Public Prosecutor did not take further statements (ÖNEN, Art 31, para.3[illegible])
- There is no evidence that a statement was ever taken from Ahmet Sarli (SARLI, Art 31, para.206)
- Failed to ... take statement from wife of victim who was an eyewitness. (TANRIKULU, Art. 31, para.233)
- Public Prosecutor issued a decision on lack of jurisdiction without having taken statements from victim's family, villagers or military personnel present (ERGI, Court, para.83)
- No measures taken to invite applicants to give statements (MENTES, Court, para.91)

1.5 Did not take statements at appropriate time

- There were delays in obtaining statements from applicants and other witnesses (AKDENIZ and others, Art 31, para.480)
- Statements taken almost 2 years after the event. This was after the application had been made to the Commission. (AKDIVAR, Art 31, para.194)
- One year had passed before statements taken from the applicant and others. (CAKICI, Art 31, para.282)
- No proper statements taken until end 1998 (SABUKTEKIN, Art 31, para.80)

1.6 Manner in which statements taken or hearings carried out

- Only statements from those under command. (AKTEKIN, Art 31, para.103)
- The manner in which statements were taken was insufficient and they failed to investigate contradictions (SABUKTEKIN, Art 31, para.84)
- A considerable number of the statements which were obtained were of limited value due to particular questions put to the people concerned (TIMURTAS, Art 31, para.262)
- Second investigation was re-hearing of same four witnesses by another prosecutor (MENTES, Court, para.91)

1.7 Made no investigation when given evidence of an offence or allegations made

- No indication that any steps were taken after 23 January 1993 and before March 1997 in relation to the investigation, notwithstanding the applicant's statement to the police that prior to her husband's death they had received threats by telephone. (AKKOC, Art31, para.276)
- The prosecutor made no inquiry and failed to investigate the cause of the injury (AKSOY, Art.31, para.188)
- ASKER complained to district governor making a petition about destruction of his home - no steps were taken in response. (ASKER & SELCUK, Art 31, para.165)
- No investigation was lodged into allegations of wrongdoing on the part of the security forces (AYDER and others, Art 31, para.425)
- No military enquiry or investigation carried out by the State Security Court Public Prosecutor as to the conduct of the operation. (ERGI, Art 31, para.138).
- Failed to act on report by eyewitness that a person had been taken into custody (KURT, Art 31, para.225 and 227)
- The authorities failed to take steps promptly in response to complaints about the disappearance (SARLI, Art 31, para.241)
- No investigation was instigated by Public Prosecutor on receipt of report that Muhsin Tas had escaped, notwithstanding applicant's concerns, expressed in a petition and orally. (TAS, Art 31, para.205)
- Public Prosecutor failed to take any action whatsoever to investigation allegations (TEKIN, Art 31, para.192)
- Public Prosecutor ignored the visible evidence before him that the victim had been tortured and no investigation took place (AKSOY, Court, para.56 and 99)
- Public Prosecutor made no attempt to contact person accused of ill treatment. (TEKIN, Court, para.67)

1.8 Investigations brief and limited

- Investigations limited and inconclusive (ASKER & SELCUK, Art 31, para.195)
- Despite statement to the contrary, there is no evidence that investigations continued after a certain date in (KILIC, Art 31, para.196)
- Investigations made were brief (2-3 weeks duration) (MENTES, Art 31, para.204 and 205)
- Investigations based on extremely limited enquiries (MENTES, Art 31, para.204 and 205)
- Investigations that did take place were not thorough or effective (TAS, Art 31, para.207)
- No measures were taken by public prosecutors beyond enquiries as to possible entries in custody records and obtaining two brief ambiguous statements (CAKICI, Court, para.80)

1.9 Investigations deficient

- Ballistics report did not contain details of number or origin of bullets (OGUR, Art 31, para.138)
- The investigation carried out was inadequate (SARLI, Art 31, para.241)

- A number of grave deficiencies, in particular ...the taking of a statement from the applicant (TANRIKULU, Art 31, para.248)
- A number of grave deficiencies, in particular... the forensic examination of the body of Dr. Tanrikulu. (TANRIKULU, Art 31, para.248)
- There were no steps taken to verify the report that the body had been found or to seek documentary confirmation of identity (CAKICI, Court, para.80)
- No measures taken to verify whether deceased in PKK (KAYA, Mehmet, Court, para.90)

1.10 Investigations incomplete

- Only evidence apparently incriminating Seyithan Araz was his alleged statement at the Security Directorate, which he alleged to the public prosecutor and arresting magistrate had been obtained by coercion and was not true. (AKKOC, Art 31, para.277)
- Investigation incomplete and superficial. (SABUKTEKIN, Art 31, para.85)
- Public Prosecutor under clear obligations to investigate allegations of torture, rape and ill treatment. He only carried out an incomplete enquiry. (AYDIN, Court, para.106)
- Public Prosecutor did not visit the scene of the incident and check the consistency of the facts with the statements (AYDIN, Court, para.106)
- Public Prosecutor took no meaningful measures to determine if AYDIN family held at Derik gendarmerie headquarters as alleged. (AYDIN, Court, para.106)

1.11 Failed to seek evidence

- No steps taken to get information from alleged perpetrators or witnesses in the village (ASKER and SELCUK, Art 31, para.195)
- Public Prosecutor did not attempt to either contact applicants or seek substantive information from the alleged perpetrators (MENTES, Art 31, para.204 and 205)
- Hardly any attempts were made or seriously pursued to obtain evidence from Orhan Ertas (ÖNEN, Art 31, para.320)
- No attempt to examine what happened in custody (TEKIN, Art 31, para.194)
- No attempt to interview applicant (TEKIN, Art 31, para.194)
- Public Prosecutor did not investigate detention areas (TIMURTAS, Art 31, para.263)
- No steps were taken, beyond enquiring as to the entries in custody records, until after the application was communicated to the Government by the Commission (CAKICI, Court, para.106)
- Public Prosecutor should have been alert to collect evidence at the scene (KAYA, Mehmet, Court, para.89)

1.12 Did not request to see custody records

- No documented attempt to check custody records at Tunceli (KAYA, Mahmut, Art 31, para.364)
- No attempt to examine custody records (TEKIN, Art 31, para.194)
- Did not demand to see custody records. (TIMURTAS, Art 31, para.263)
- Did not seek to verify statement given by checking against custody records (KAYA, Mehmet, Court, para.90)

1.13 Investigation not independent

- The independence of the four persons conducting the investigation is open to serious doubt given that they were all members of the gendarmerie and three of them attached to the intelligence unit. (AKTAS, Art 31, para.318)
- Investigation lacks objectivity or independence (AYTEKIN, Art 31, para.103)
- Public Prosecutor took no independent investigative steps himself to verify the account of the gendarmes (ILHAN, Art 31, para.224)
- Enquiries flawed by participation of officers implicated by complaints (KURT, Art 31, para.209)

1.14 Conclusions

- Investigation was based on unfounded presumptions and steps to investigate were superficial (AKDENIZ and others, Art 31, para.481)
- The investigation was fundamentally flawed
- 'So inadequate as to amount to a failure to protect the right to life' (AYTEKIN, Art 31, para.106)
- Investigation was dilatory and superficial, accepting, without verification, the custody records and the assertion that the body had been found. (CAKICI, Art 31, para.284)
- Failure to provide adequate and effective investigation (GÜL, Art 31, para.331)
- There has been a failure to provide an adequate and effective investigation into the circumstances in which Abdüllatif Ilhan was injured. (ILHAN, Art 31, para.225)

- Effective investigation not carried out in this case (KAYA, Mehmet, Art 31, para.181)
- State Security Court Public Prosecutor carried out no detailed investigation (KAYA, Mehmet, Art 31, para.171)
- Investigation dilatory (KAYA, Mahmut, Art 31, para.368)
- Investigation perfunctory and based on preconceived assumptions. (KURT, Art 31, para.209)
- There was a denial of any effective investigation process (KURT, Art 31, para.228)
- The domestic investigation and subsequent proceedings disclose a number of grave deficiencies (ÖNEN, Art 31, para.343)
- Investigation and subsequent criminal proceedings fundamentally flawed by defects in forensic evidence and reliance on opinion of forensic authorities (SALMAN, Art 31, para.322)
- Failure to provide an adequate and effective investigation (TAS, Art 31, para.207)
- There has neither been a prompt not an independent or effective inquiry into the circumstance of the disappearance of Muhsin Tas (TAS, Art 31, para.228)
- Investigation dilatory, perfunctory and superficial and did not constitute a serious attempt to find out what, if anything, had happened to Abdulvahap Timurtas (TIMURTAS, Art 31, para.264)
- The investigation was incomplete, inaccurate and perfunctory and cannot be said to have constituted a serious attempt at a murder enquiry. (TANRIKULU, Art 31, para.248)
- Investigations flawed and perfunctory and investigations superficial and do not reflect a serious wish to establish what happened (TEKIN, Art 31, para.198)
- No adequate and effective investigation - unable to specify steps taken (YASA, Art. 31, para.105 and 119)
- No adequate and effective investigation into circumstances of death (ERGI, Court, para.155)
- Public Prosecutor did not fulfil duty under Turkish law to carry out investigation (KURT, Court, para.141)
- Commission considered that investigation... not been conducted by independent authorities, had not been thorough and had taken place without the applicant being able to take part. (OGUR, Court, para.86)
- Whole of the investigation characterised by inadequate and imprecise reporting (TANRIKULU, Court, para.105)
- Decision to refer case to State Security Court taken on insufficient evidence (TANRIKULU, Court, para.108)
- Authorities failed to carry out an effective investigation into the circumstances surrounding the death (TANRIKULU, Court, para.109)
- Five years after event, no concrete and credible progress has been made (YASA, Court, para.107)

2. Attitude of Prosecutor

2.1 General

- The responsibility for the investigation was transferred back and forth from the Public Prosecutor to State Security Court Public Prosecutor (AKDENIZ and others, Art 31, para.480)
- State Security Court Public Prosecutor reported consistently that there was no evidence that an operation had taken place or that the persons has been detained by the security forces although there were statements from eye-witnesses to that effect. (AKDENIZ and others, Art 31, para.480)
- Public Prosecutor had blinkered approach to investigation. (AKSOY, Art.31, para.188)
- State Security Court Public Prosecutor read Incident Report then took no further action. (ERGI, Art 31, para.138)
- Presumed that PKK shot victim, no investigation to see if this was case - no independent inquiry (ERGI, Art 31, para.153)
- Claimed it was 'not worth' gathering forensic evidence (GÜL, Art 31, para.314)
- While the public prosecutor claimed to be unaware that there was any delay in transferring Abdüllatif Ilhan to hospital, it would appear that the contents of the file before him should have alerted him (ILHAN, Art 31, para.224)
- Stopped as soon as met with denials (KAYA, Mahmut, Art 31, para.365)
- Did not consider widening enquiry to investigate possible involvement of persons targeting journalists on behalf of other State agents (KILIC, Art 31, para.197)
- Although a number of investigative steps were taken, they were not followed with any determination (TAS, Art 31, para.206)
- Investigations do not appear to reflect a serious wish to find out what really happened in Gendarme Station and headquarter (TEKIN, Art 31, para.198)
- Applicants allegations not taken seriously (TIMURTAS, Art 31, para.263)
- No investigation appears to have been made by the prosecutor who referred the matter to an Administrative Council (Z.D., Art 31, para.206)
- Public Prosecutor gave no serious consideration to applicants complaint and took at face value the gendarme's supposition that her son had been kidnapped by the PKK (KURT, Court, para.133)

- Public Prosecutor did not consider it necessary to carry out a full post-mortem, which could have provided .aluable information (OGUR, Court, para.89)
- Doubtful that the investigations of the scene could have amounted to more than a superficial one (TANRIKULU, Court, para.104)
- Decision of non-jurisdiction made without adequate investigation (TEKIN, Court, para.67)

2.2 Refused to or restrained in questioning security forces

- No step was taken to seek information from the relevant security force personnel (AKDENIZ and others, Art 31, para.480)
- Attitude of restraint towards pursuing enquires amongst security forces (AYDIN, Art 31, para.202)
- Did not question gendarmerie. (AYDIN, Art 31, para.199)
- Did not question gendarmerie. (AYDIN, Art 31, para.199)
- Explanations of gendarmes accepted unquestioningly (AYTEKIN, Art 31, para.104)
- No statements taken from gendarme officers involved. No enquiries made of special team department (GÜL, Art 31, para.315 and 341)
- The Public Prosecutor took no further enquiry to discover from the gendarmes details of the operation conducted in the village (SARLI, Art 31, para.239)
- The vague explanations of the Sirnak brigade special operations group command as to their inability to identify the signatories of the report were accepted without further investigation (TAS, Art 31, para.206)
- Did not take statements from the officers on duty or the three police officers who had arrived at the scene five minutes after the shooting (TANRIKULU, Art 31, para.49)
- No questioning of officers involved (TIMURTAS, Art 31, para.263),
- Officer in charge not interviewed during course of investigation (ASKER and SELCUK, Court, para.97)
- Had deferential attitude to the members of the security forces. (AYDIN, Court, para.106)
- Did not question the legitimacy of the acts of security forces (ERGI, Court, para.83)
- No statements were taken from any of the soldiers at the scene and no attempt was made to confirm whether there were spent cartridges over the area consistent with an intense gun battle having been waged by both sides as alleged. (KAYA, Mehmet, Court, para.89)
- No indications that he was prepared to scrutinise the soldiers' account of the incident (KAYA, Mehmet, Court, para.89)
- No attempt to enquire into activities of security forces at the material place and time (MENTES, Court, para.91)
- No member of the security forces was questioned, although names were known. (OGUR, Court, para.89)

2.3 Did not question other reports

- Did not question accuracy of incident report and autopsy report (KAYA, Mehmet, Art 31, para.169)
- Decision not to prosecute relied heavily on Istanbul Forensic Institute reports and not on conflicting statements taken (SALMAN, Art 31, para.320)
- The Public Prosecutor failed to take steps to question the lack of independence of the Administrative Council investigation (TAS, Art 31, para.237)
- Prepared to accept as face value the reliability of custody register and the denials of the gendarmes. Failed to look for corroborating evidence at the Headquarters (AYDIN, Court, para.106)
- Expert report prepared at prosecutor's request contains imprecise information and findings mostly unsupported by established facts. (OGUR, Court, para.89)

2.4 Did not act immediately on complaints/evidence

- Investigation did not commence by Public Prosecutor until December 1993 although complaints made first of 5 October (AKDENIZ and others, Art 31, para.480)
- There is no indication in the materials provided by the Government that any steps were taken in response to the applicant's complaints. (AKKOC, Art 31, para.257)
- Delay occurred before the investigation commenced (AKTAS, Art 31, para.317)
- Over a month had lapsed before the Prosecutor acted on the contents of the statement of the applicant and her sister (ÖNEN, Art 31, para.317)
- No steps were taken until 1995, almost two years after the disappearance (TAS, Art 31, para.205)
- Public Prosecutor began preliminary investigations 10 months after receiving complaints of maltreatment (TEKIN, Art 31, para.193)
- Allegations not acted on immediately (TEKIN, Art 31, para.198)
- Official investigation did not begin until 2 months after event despite requests (TIMURTAS, Art 31, para.253)

- Public Prosecutor failed to follow up complaint by Mr. Altun, investigation only commenced 10 months later, slow in taking statements (four months) (TEKIN, Court, para.67)
- It was a further week after the petition was made before the applicant's statement was taken. It was two years later when enquiries were made to the gendarmerie headquarters and police station in Sirnak as to whether Abdulvahap Timurtas had been detained there. (TIMURTAS, Art 31, para.260)

3. Professional Failings/Failure to Correct/Failure to follow up

3.1 Failed to keep accurate records of investigations

- The reports of the State Security Court Public Prosecutor contained inaccuracies (AKDENIZ and others, Art 31, para.480)
- No published detailed investigation or judicial finding of facts by domestic authorities (ASKER and SELCUK Art 31, para.145(i))
- Absence of input into file (KAYA, Mahmut, Art 31, para.365)

3.2 Did not include important information in incident report

- Public Prosecutor did not record information from interviews after the event in his incident report (ERGI, Art 31, para.135)
- The contents of the incident report do not coincide with the events as they occurred according to the oral testimony of any of the gendarmes. There are doubts as to where the incident report was drawn up and the report was not signed by all people together (ILHAN, Art 31, para.185)
- The Commission finds that there are serious doubts as to the reliability of both the incident report and the statements taken by the gendarmes. (ILHAN, Art 31, para.187)
- Expert report prepared at prosecutor's request contains imprecise information and findings mostly unsupported by established facts. (OGUR, Court, para.89)
- The incident report did not include the names of the local residents who had given a description of the event. (TANRIKULU, Court, para.104)

3.3 Did not follow up information

- Failed to take action when noting that a person had been taken into custody and has since been missing. Should have prompted action (CAKICI, Art 31, para.281)
- Followed own lines of inquiry and not matters raised by family (KAYA, Mahmut, Art 31, para.365)
- Information provided in petitions was not followed up (KAYA, Mahmut, Art 31, para.295)
- No follow-up on conflicting evidence or to follow up on people alleged to be involved in killing (KAYA, Mahmut, Art 31, para.364)
- No investigation into how victims transported from Elazig to Tunceli (KAYA, Mahmut, Art 31, para.364)
- Failed to pursue any enquiry into other possible causes of death (KILIC, Art 31, para.196, 197 and 247)

3.4 Failure to pursue enquiries into alleged unknown perpetrator killings

- Failure to pursue enquiries as to the involvement of alleged contra-guerrilla groups in the death of Hasan Kaya (KAYA, Mahmut, Art 31, para.388)
- No measures taken to verify whether deceased in PKK, no villagers in vicinity questioned about whether heard gun battle, did not seek to verify statement given by checking against custody records (KAYA, Mehmet, Court, para.90)
- Corpse handed over to villagers, making further analysis impossible (KAYA, Mehmet, Court, para.89)
- Public Prosecutor made decision on non-jurisdiction without awaiting findings of ballistics expert (KAYA, Mehmet, Court, para.89)

3.5 Did not request photos at scene

- Absence of photos from scene (AYTEKIN, Art 31, para.104)
- No photographs taken (GÜL, Art 31, para.313)
- Did not request photos at scene (ÖNEN, Art 31, para.313)
- Absence of reliable photographic evidence from the scene (TANRIKULU, Art 31, para.228)
- There is no evidence of further investigation at the scene of crime – the absence of photographs, for example, is noteworthy (TANRIKULU, Court, para.104)

3.6 Did not request tests at scene

- No finger printing or analysis of blood traces carried out (GÜL, Art 31, para.313)

- Did not request forensic examination on the ropes and tapes on the body (KILIC, Art 31, para.194)
- Public Prosecutor did not request tests on deceased hands or clothing for gunpowder or on weapons for fingerprints (KAYA, Mehmet, Court, para.89)
- Public Prosecutor did not consider it necessary to carry out a full post-mortem, which could have provided valuable information (OGUR, Court, para.89)
- Did not request ballistics test (OGUR, Court, para.89)

3.7 Did not use doctors with sufficient experience (see AUTOPSIES also)

- The doctor used has only just qualified as a general practitioner and did not possess extensive forensic expertise (AKTAS, Art 31, para.316)
- Public Prosecutor sent applicant to doctor with no experience of such cases (AYDIN, Art 31, para.201)

3.8 Did not request medical report

- Did not take steps to find out the extent of the injuries by requesting a medical report (ILHAN, Art 31, para.224)

3.9 Failure to confirm

- Did not directly inspect original records (CAKICI, Art 31, para.282)
- Did not request to see copies of autopsy report or burial records to confirm identity of body (CAKICI, Court, para.80)

3.10 Failure to correct

- Took no steps to remedy the shortcomings of the medical report after Abdüllatif Ilhan had been admitted to hospital (ILHAN, Art 31, para.245)

3.11 Did not advise people properly

- No State authority took up the plight of the villagers or referred them to a competent authority after they made petitions (AKDIVAR, Art 31, para.238)

3.12 Decided not to prosecute despite evidence

- The public prosecutor, although aware that Abdüllatif Ilhan had suffered injuries at the time of his apprehension by the gendarmes, issued a decision not to prosecute, finding that he had fallen and injured himself through carelessness while fleeing from the security forces and that no-one had acted deliberately or negligently. (ILHAN, Art 31, para.223)

3.13 Failed to appear at Commission hearings

- Neither of the two Public Prosecutors summoned appeared (ASKER and SELCUK, Art 31, para.145(IV)
- Government taken passive attitude to the attendance of official witnesses and three people involved in the assessment of the damage failed to attend the hearing without any reason being put forward to justify their absence (AYDER and others, Art 31, para.430)
- Important witnesses failed to attend and Government fallen short of furnishing all necessary facilities to the Commission for establishing facts of the case (CAKICI, Art 31, para.245)
- Failed to take the necessary steps to facilitate the attendance of a witness (CAKICI, Art 31, para.230)
- Public Prosecutor and State Security Court Public Prosecutor failed to appear before delegates at hearing without convincing reason (KAYA, Mehmet, Art 31 para.172 and 88)
- Public Prosecutor failed to attend hearing without convincing reasons (TANRIKULU, Art 31, para.237)
- Failed to appear at Commission hearings for reasons cannot find convincing (TEKIN, Art 31, para.199)
- Public Prosecutor declined to attend hearing as said had nothing more to add (TIMURTAS, Art 31, para.266)

3.14 Failed to provide details of investigations to Commission/Court

- Copy of correspondence not been provided in investigation file (AKDENIZ and others, Art 31, para.466)
- Failure to provide records - - investigation was limited and inconclusive (ASKER and SELCUK, Art 31, para.195)
- Investigation file not provided, despite repeated requests (ASKER and SELCUK, Art 31, para.195)
- Commission not provided with the damage assessment report relating to Lalealp's property, which the government claimed it carried out (AYDER and others, Art 31, para.466)
- Failed to produce any document to indicate the body found was that of CAKICI. (CAKICI, Art 31, para.239)
- Failed to go through standard procedures of identifying body and releasing for burial. The lack of documentation to prove the body found was the deceased is a glaring omission. (CAKICI, Art 31, para.239)
- Failed to provide Commission with custody records despite demands (ERTAK, Art 31, para.166)

- Important statements not included in documents to Commission (ERTAK, Art 31, para.167)
- Government failed to supply two public prosecutor files concerning investigations at Saggoze village. (MENTES, Art 31, para.145 iv. and 150)
- The incident report was not provided to the Commission before the hearing of witnesses (SARLI, Art 31, para.184)
- Failed to provide copies of complete investigation files (TANRIKULU, Art 31, para.236)
- Copies of two important police reports were not provided to the Commission or the Court (TANRIKULU, Court, para.71)
- Although the Government have consistently maintained that the investigation is still pending, no concrete information on it's progress has been provided to the Court or Commission (TANRIKULU, Court, para.109)

3.15 Inhuman and degrading treatment

- The ordeal experienced by the applicant following the apprehension of his son reaches the severity of inhuman and degrading treatment (TAS, Art 31, para.219)

4. Interference with right of individual petition/Problems legal proceedings

4.1 Inappropriate contact with applicants and questioning about application

- Questioning amounted to indirect and improper pressure which interfered with the free exercise of individual petition (AKDENIZ and others, Art 31, para.521 & 523)
- Approached applicants and questioned them about applications to the Commission in absence of legal representatives. (AKDIVAR, Art 31, para.253)
- Applicant questioned about her application during her detention in February 1994 and was used in seeking to obtain admissions as to her involvement with the PKK (AKKOC, Art 31, para.346)
- The questioning of an applicant by the police about any aspect of an application to the Commission is unacceptable, save in exceptional circumstances, and that in any event such questioning should only take place where the applicant is accompanied by her own lawyer (AKKOC, Art 31, para.346)
- Applicant approached regarding application to Commission, seen as attempts to discourage him from pursing his complaints and exercising his rights (BILGIN, Art 31, para.256)
- Questioning of applicants about their applications to the Commission amounts to illicit and unacceptable pressure (ERGI, Art 31, para.178)
- Applicant interviewed by police in Anti-Terror department and the Public Prosecutor concerning his declaration of means without lawyer present. (ERGI, Art 31, para.179)
- Mrs. Kurt sent to notary public. Strong implication that the state paid for the notarised statements. Lawyer not present (KURT, Art. 31, para.244-248)
- Acted inappropriately in their contacts with applicant in apparent efforts to determine whether or not she wished to pursue case through Commission. (KURT, Art 31, para.248)
- Applicant summoned by Anti-Terror department and Security Directorate and questioned about application (SALMAN, Art 31, para.351)
- Applicant ill-treated and told to give up on application to Commission (SALMAN, Art 31, para.351)
- No lawyer present during questioning of applicant (SALMAN, Art 31, para.352)
- Inappropriate questioning without a proper solicitor-client relationship having been established (SARLI, Art 31, para.241)
- Questioned about application by domestic authorities in absence of legal representatives (Z.D., Art 31, para.221)
- Deliberate attempt on the part of the authorities to cast doubt on the validity of the application and thereby on the credibility of the applicant (TANRIKULU, Court, para.131)

4.2 Interference with Lawyers

- Lawyers assisting applicants have been arrested and detained (AKDIVAR, Art 31, para.253)

4.3 Inadequate Legal Systems

- Legitimate doubts as to the independence and impartiality of the State Security Courts. Cases of unknown perpetrators have been considered as under their jurisdiction also. (KILIC, Art 31, para.226)
- Legal structures in south-east Turkey in or about 1993 caused situation incompatible with the rule of law and respect for universal rights and freedoms (KILIC, Art 31, para.226) and (KAYA, Mahmut, Art 31)
- The applicant's husband was killed by unknown perpetrator(s) in 1993 in Diyarbakir, in south-east Turkey, and considers that its (above) findings in the Kiliç and Mahmut Kaya cases are equally applicable to the present application (AKKOC, Art 31, para.270)

- The system of criminal justice in the south-east disclosed serious problems of accountability of members of the security forces (AKKOC, Art 31, para.286)
- Undoubted practical difficulties and inhibitions for persons who complain of destruction of property in south-east Turkey, where broad emergency powers and immunities have been conferred on the emergency governors. There is no example of a successful, or indeed any prosecution being brought against a member of the security forces (AYDER and others, Art 31, para.464)
- The domestic court did not judge it necessary to hear any security force personnel and the attitude towards the complaints was severely prejudiced and the complaints did not receive serious consideration (AYDER and others, Art 31, para.427)

4.4 Proceedings inaccessible

- It is not apparent that the applicant was informed of the criminal proceedings or afforded the opportunity to join the party (GÜL, Art 31, para.319)

B - GENDARMES

1. Inadequacies in manner in which took statements

- Gendarmes fed in information when taking statements (KURT, Art 31, para.205 and 226)

2. Inadequate Search at scene of crime

- Inadequate search after shooting – failure to record where empty cartridges were found or look for missing bullets. Failed to note were bullet marks were. (TANRIKULU, Art 31, para.227 and 228)
- The investigation conducted into the incident ... a number of grave deficiencies, in particular in respect of the search of the scene of the crime by Gendarme (TANRIKULU, Art 31, para.248)

3. Did not take photographs at scene

- No photographs taken (GÜL, Art 31, para.313)
- No photographs taken at scene of crime – should have been a standard procedure in the initial phase of a criminal investigation (ÖNEN, Art 31, para.315 & 340)
- No photographs taken at scene of crime "imprecise information collected by the police present at the scene the Commission fails to see how, without any kind of photographic record, are liable finding as to the exact location of the post were Dr. Tanrikulu was shot could ever be made (TANRIKULU, Art 31, para.228)

4. Failure to send firearms for forensic examination

- Sent firearms to safe-keeping, but no forensic examination performed on them and discrepancy in serial numbers in incident and autopsy reports (KAYA, Mehmet, Art 31, para.168)

5. Inadequate documentation

- No sketch map taken of where guns and cartridges were found and no record of the officers who found them (GÜL, Art 31, para.313)
- The information recorded on the sketch map is inadequate. It does not indicate blood were the body was found or the position of where the bullet cartridges were found (ÖNEN, Art 31, para.314 & 315)
- No adequate plan/map – no indication of scale or distance.(TANRIKULU, Art 31, para.228)
- Inadequate documentation provided (TANRIKULU, Art 31, para.231)
- Lack of precision and detail on sketch map (TANRIKULU, Court, para.105)

6. Did not include important information in report

- Eye witness information not put in incident report (TANRIKULU, Art 31, para.230)

7. Did not keep accurate records

- Commission doubts that gendarme custody records are accurate record of persons taken into custody in 1993 (AYDIN, Art 31, para.172)
- Diyarbakir police register does not constitute an accurate or comprehensive record of the persons who may have been detained there over that period (1993) (CAKICI, Art 31, para.221)
- Serious and substantial reasons to doubt the accuracy of the records (ERTAK, Art 31, para.166)
- No procedures to record time or length of interrogations (SALMAN, Art 31, para.272)
- Unable to identify from records who was present at interrogation (SALMAN, Art 31, para.274)

- The lack of records concerning the detention of Muhsin Tas discloses an alarming and fundamental failure to provide necessary safeguards against arbitrary detention and the risk of 'disappearance' (TAS, Art 31, para.226)
- The lack of custody records disclose a serious failing which is aggravated by the Commission's findings as to the general unreliability and inaccuracy of the records in question (CAKICI, Court, para.105)
- It is unacceptable that there is a failure to keep records which enable the location of a detainee to be established (CAKICI, Court, para.105)

8. Did not reveal identity of colleagues

- Gendarmes refused to reveal the identity of the person manning the armoured vehicle despite requests from official authorities (GULEC, Art 31, para.230)
- Gendarme drafted incident report although was not present at incident and derived information from brief coded radio transmissions (ERGI, Court, para.83)
- Lack of co-operation from gendarmerie - refused to supply the names of soldiers who had been on board the armoured vehicle. (GULEC, Court, para.79)

9. Failure to attend Commission hearings or unhelpful when in attendance

- The Government did not serve Commission's summons of gendarme commander at taking of evidence in July 1995. (MENTES, Art 31, para.145(iv))
- Lieutenant Altinok evasive witness - unhelpful in questioning - contradictory and inconsistent (CAKICI, Art 31, para.199)

10. Did not refer injured to hospital for tests

- Although Abdüllatif Ilhan had received serious and visible injury to the head on being apprehended by the gendarmes, there was a lapse of 36 hours before he was admitted to hospital (ILHAN, Art 31, para.220)

11. Attitude of Commander

- Commander informed the delegates that he in fact took no steps to investigate (AKDENIZ and others, Art 31, para.469)

12. Conclusion

- The Commission finds that there are serious doubts as to the reliability of both the incident report and the statements taken by the gendarmes. (ILHAN, Art 31, para.187)
- Serious problems of accountability of the security forces (KILIC, Art 31, para.246)

C – MEDICAL and AUTOPSIES

1. Doctors

1.1 Reports inadequate

- Reports brief, include no medical history and no opinion on allegation (AYDIN, Art 31, para.201)
- Reports failed to meet the requirements of an effective investigation into a complaint of rape (AYDIN, Court, para.107)
- The medical report issued was brief, failing to give an unequivocal account of the stated cause of the injuries or to detail the minor injuries that had been suffered. (ILHAN, Art 31, para.245)
- Defects in forensic examination and report – no steps taken to establish dating of wounds and other marks, no photographs taken (SALMAN, Art 31, para.302 and 319)

1.2 Doctors inexperienced

- Doctor not experienced with dealing with rape victim, did not volunteer information on medical or psychological opinion of whether victim of rape. (AYDIN, Court, para.107)

1.3 Doctors not independent

- Military doctor called out and despite visible head injuries decided that Abdüllatif Ilhan was faking (ILHAN, Art 31, para.220)

2. Autopsies

2.1 Reports inadequate

- Report was brief and did not number the injuries on the body, giving only general reference to grazes, cuts and erosions. The Commission finds the report to be seriously deficient (GÜL, Art 31, para.312)
- Autopsy report imprecise, i.e. number of bullets. (KAYA, Mehmet, Art 31, para.164)
- The first autopsy report brief and inadequate, second still did not make findings or give explanations as to possible causes of some of the injuries (KAYA, Mahmut, Art 31, para.364)
- Defects in forensic examination and report – no steps taken to establish dating of wounds and other marks, no photographs taken (SALMAN, Art 31, para.302 and 319)
- Autopsy report incomplete: absence of observations on the number of bullets and distance fired, the perfunctory nature of the autopsy performed or the findings recorded in the report did not lay basis for effective follow up or satisfy minimum requirements of an investigation, since left too many critical questions. (KAYA, Mehmet, Court, para.89)

2.2 Reports not independent

- Autopsy contained remarks that cause doubt to its objectivity (KAYA, Mehmet, Art 31, para.167)
- Concluded - Autopsy defective and incomplete and taken for granted that applicant a terrorist killed in armed confrontation (KAYA, Mehmet, Art 31, para.171)

2.3 Doctors inexperienced

- Doctor had only just qualified and lacked forensic expertise (AKTAS, Art 31, para.316)
- Doctor Dogru lacked sufficient expertise to conduct a forensic examination as could not determine from how far bullets had been fired (KAYA, Mehmet, Art 31, para.165)
- Doctors insufficient expertise perform forensic examination (TANRIKULU, Art 31, para.235)
- Post-mortem examination performed on the same day by two general practitioners. The absence of a forensic specialist resulted in a limited amount of information being obtained (TANRIKULU, Court, para.106)

2.4 Autopsy below standard

- Contrary to forensic practice, no examination of the internal appearance of the neck was carried out and the photographs provided by the Government could not serve as reliable verification of the external state of the body (AKTAS, Art 31, para.316)
- Autopsy did not number the injuries and only gave general references to grazes, cuts and erosions (GÜL, Art 31, para.312)
- Post mortem conducted on the spot in an area of terrorist violence -difficult to comply with standard practices (KAYA, Mehmet, Court, para.89)
- There is no record of any attempt being made to retrieve the remaining eleven bullets, which must have passed through the body (TANRIKULU, Court, para.107)

2.5 No autopsy

- No attempt made to perform classical autopsy or forensic examination (KAYA, Mehmet, Art 31, para.165)
- Body handed over for burial rather than for further examination (KAYA, Mehmet, Art 31, para.166)
- No forensic analysis as to whether bodies killed on spot or transported (KAYA, Mahmut, Art 31, para.364)
- No classical autopsy performed (OGUR, Art 31, para.138)
- No Forensic information collected - where Dr Tanrikulu was shot, how he was lying (TANRIKULU, Art 31, para.234)
- Neither doctor nor Public Prosecutor requested body be flown to safer location for more detailed analysis (KAYA, Mehmet, Court, para.89)
- Public Prosecutor did not consider it necessary to carry out a full post-mortem, which could have provided valuable information (OGUR, Court, para.89)

D - ADMINISTRATIVE COUNCIL

1. Factual

1.1 Did not take information into account

- Despite being clearly informed by the complainants, witnesses and other public authorities that Gulec actually killed by shots coming from the gendarmerie vehicle, did not take this into account (GULEC, Art 31, para.227)

1.2 Did not call on witnesses

- Deputy governor claimed that no one could go to trial as no one had witnessed event, despite the witnesses statement in the case file proving the contrary (GULEC, Art 31, para.228)
- Key witness not called upon to give evidence to the national investigation (GULEC, Art 31, para.230)

1.3 Did not investigate further or remedy deficiencies of previous investigations

- Although they first became aware of the case on 29 November 1990, on statements were taken from the gendarmes until March 1991 (AKTAS, Art 31, para.317)
- Enquiries at Administrative Council were superficial (ERTAK, Art 31, para.186)
- Did not thoroughly or effectively pursue the inquiries made regarding the security force personnel involved in the alleged escape (TAS, Art 31, para.237)
- Did not question accused (TEKIN, Art 31, para.196)
- No indication that they took any of the investigative measures listed in paragraph 194 (e.g. to find out what happened in custody, examine records) (TEKIN, Art 31, para.196)
- Court not provided with evidence that suggest Council took any action when investigation transferred to it (ASKER and SELCUK, Court, para.97)
- Did not remedy deficiencies of previous investigations: sought no forensic or ballistics examination, did not question security forces although names were known (OGUR, Court, para.90)
- No serious attempt to identify person who fired fatal shot, although witnesses indicated that it came from the security forces. (OGUR, Court, para.90)

2. Structural

2.1 Council not independent

- Not independent as council and state authorities in same chain of command (ERTAK, Art 31, para.183)
- Subjective manner in which case was dealt with and nature of Administrative Council (chaired by same person who appointed investigating officers and in charge of local gendarmerie) (GULEC, Court, para.80)
- Therefore authorities not independent (GULEC, Court, para.82)
- Serious doubts about their ability to carry out an independent examination (OGUR, Court, para.91)
- Investigating officer was a subordinate to the same chain of command as he was investigating. (OGUR, Court, para.91)
- Chaired by governor who was administratively in charge of security forces (OGUR, Court, para.91)
- One member said it was not possible to oppose the governor – either the members signed the decision prepared by him or they were replaced by other members who were willing to do so. (OGUR, Court, para.91)
- Administrative Council investigation not independent (TAS, Art 31, para.237)

2.2 Proceedings Inaccessible

- Made investigations inaccessible to complainant. (GULEC, Art 31, para.231)
- Investigations inaccessible to complainant (ERTAK, Art 31, para.188)
- Proceedings inaccessible to family of victim (OGUR, Art 31, para.141)
- During administrative investigation, the case file was inaccessible to victims family as was part of the proceedings at the Supreme Administrative Court, which deprived them of the possibility to appeal (OGUR, Court, para.92)

Guide to cases

Name	Case Number	Date of Article 31 Report	Date of Court Judgement
Akdeniz and others	23954/94	10/9/99	
Akdivar and others	23954/94	26/10/95	16/9/96
Akkoç	22947-8/93	23/4/99	
Aksoy	21987/93	23/10/95	18/12/96
Aktas	24351/94	25/10/99	
Asker and Selcuk	23184/94 and 23185/94	28/11/96	24/4/98
Ayder and others	23656/94	21/10/99	
Aydin, Sukran	23178/94	7/3/96	25/9/97
Aytekin	22880/93	18/9/97	23/9/98
Bilgin	23819/94	21/10/99	
Cakici	23657/94	12/3/98	8/7/99
Ergi	23818/94	20/5/97	28/7/98
Ersoz	23144/93	29/10/98	
Ertak	20764/92	4/12/98 *	
Gül	22676/93	27/10/99	
Gulec	21593/93	17/4/97	27/7/98
Ilhan	22277/93	23/4/99	
Kaya, Mahmut	22535/93	23/10/98	
Kaya, Mehmet	22729/93	24/10/96	19/2/98
Kilic	22492/93	23/10/98	
Kurt	24276/94	5/12/96	25/5/98
Mentes	23186/94	7/3/96	28/11/97
Ogur	21594/93	30/10/97 *	20/5/99
Önen	22876/93	10/9/99	
Sabuktekin	27243/95	21/10/99 *	
Salman	21986/93	1/3/99	
Sarli	24490/94	21/10/99	
Tas	24396/94	9/10/99	
Tanrikulu	23531/94	15/4/98	8/7/99
Tekin	22496/93	17/4/97	9/6/98
Timurtas	23531/94	29/10/98	
Yasa	22495/93	8/4/97	2/9/97
Z.D.	25801/94	6/9/99	

n.b. The Article 31 Reports indicated by * were taken from the French version. The phrasing used is therefore an unofficial translation and not necessarily the exact wording of the equivalent report in English.

Suzanne Sumner
4/11/99

Appendix G

List of judgments in KHRP assisted cases in the European Court of Human Rights

JUDGMENTS OF KHRP-ASSISTED CASES
IN THE EUROPEAN COURT OF HUMAN RIGHTS

Case name	Case number	Date of Decision	Nature
1. ***Akdivar and Others*** *(merits)*	99/1995/605/693	16 September 1996	Village Destruction
2. ***Aksoy***	100/1995/606/694	18 December 1996	Torture
3. ***Aydin***	57/1996/676/866	25 September 1997	Rape and Torture
4. ***Mentes and Others*** *(merits)*	58/1996/677/867	27 November 1997	Village Destruction
5. ***Kaya***	158/1996/777/978	19 February 1998	Killing
6. ***Selcuk and Asker***	12/1997/796/998-999	24 April 1998	Village Destruction
7. ***Gundem***	139/1996/758/957	25 May 1998	Village Destruction
8. ***Kurt***	15/1997/799/1002	25 May 1998	Disappearance
9. ***Tekin***	52/1997/836/1042	9 June 1998	Torture and ill-treatment
10. ***Ergi***	66/1997/850/1057	28 July 1998	Killing
11. ***Yasa***	63/1997/847/1054	2 September 1998	Killing
12. ***Aytekin***	102/1997/886/1098	23 September 1998	Killing

Case name	Case number	Date of Decision	Nature
13. *Tanrikulu*	23763/94	8 July 1999	Extra-judicial killing
14. *Cakici*	23657/94	8 July 1999	Disappearance
15. *Ozgur Gundem*	23144/93	16 March 2000	Freedom of Expression
16. *Kaya*	22535/93	28 March 2000	Killing
17. *Kilic*	22492/93	28 March 2000	Killing
18. *Ertak*	20764/92	9 May 2000	Disappearance
19. *Timurtas*	23531/94	13 June 2000	Disappearance
20. *Salman*	21986/93	26 June 2000	Torture; death in custody
21. *Ilhan*	22277/93	26 June 2000	Torture
22. *Aksoy**	28635/95 30171/96 34535/97	10 October 2000	Freedom of expression
23. *Akkoç*	22947/93	10 October 2000	Killing and torture
24. *Taş*	24396/94	14 November 2000	Killing and torture
25. *Bilgin*	23819/94	16 November 2000	Village destruction
26. *Gül*	22676/93	14 December 2000	Extra-judicial killing
27. *Dulas*	25801/94	30 January 2001	Village destruction

28. ***Çiçek***	25704/94	27 February 2001	Disappearance
29. ***Berktay***	22493/93	1 March 2001	Torture
30. ***Tanli***	26129/95	10 April 2001	Death in custody
31. ***Şarli***	24490/94	22 May 2001	Disappearance
32. ***Akdeniz***	23954/94	31 May 2001	Disappearance/ Torture
33. ***Akman***	37453/97	26 June 2001	Extra-judicial killing
34. ***Aydin & others***	28293/95 29494/95 30219/96	10 July 2001	Extra-judicial killing/Inhuman treatment
35. ***Avşar***	25557/94	10 July 2001	Extra-judicial killing

Relevant Articles of the European Convention on Human Rights

(Note the changes made following the coming into force of Protocol 11).

Convention

Article 2: Right to life.
Article 3: Prohibition of torture or inhuman or degrading treatment or punishment.
Article 4: Prohibition of slavery and forced labour.
Article 5: Right to liberty and security.
Article 6: Right to a fair trial.
Article 7: No punishment without law.
Article 8: Right to respect for private and family life.
Article 9: Freedom of thought, conscience and religion.
Article 10: Freedom of expression.
Article 11: Freedom of assembly and association.
Article 12: Right to marry.
Article 13: Right to an effective remedy.
Article 14: Prohibition of discrimination.
Article 15: Derogation in time of emergency.
Article 16: Restrictions on political activity of aliens.
Article 17: Prohibition of abuse of rights.
Article 18: Restrictions under Convention shall only be applied for prescribed purpose.
Article 34: Application by person, non-governmental organisations or groups of individuals. (formerly Article 25).
Article 38: Examination of the case and friendly settlement proceedings (formerly Article 28).
Article 41: Just satisfaction to injured party in event of breach of Convention. (formerly Article 50).

Protocol No. 1

Article 1: Protection of property.
Article 2: Right to education.
Article 3: Right to free elections.

Protocol No. 2

Article 1: Prohibition of imprisonment for debt.
Article 2: Freedom of movement.
Article 3: Prohibition of expulsion of nationals.
Article 4: Prohibition of collective expulsion of aliens.

Protocol No. 6

Article 1: Abolition of the death penalty.

Protocol No. 7

Article 1: Procedural safeguards relating to expulsion of aliens..
Article 2: Right to appeal in criminal matters.
Article 3: Compensation for wrongful conviction.
Article 4: Right not to be tried or punished twice.
Article 5: Equality between spouses.

To date, Turkey has only ratified the Convention and Protocol No. 1.

The Kurdish Human Rights Project

The Kurdish Human Rights Project (KHRP) is an independent, non-political, non-governmental human rights organisation founded and based in London, England. KHRP is a registered charity and is committed to the promotion and protection of the human rights of all persons living within the Kurdish regions, irrespective of race, religion, sex, political persuasion or other belief or opinion. Its supporters include both Kurdish and non-Kurdish people.

AIMS

- To promote awareness of the situation of the Kurds in Iran, Iraq, Syria, Turkey and the countries of the former Soviet Union
- To bring an end to the violation of the rights of the Kurds in these countries
- To promote the protection of human rights of Kurdish people everywhere

METHODS

- Monitoring legislation including emergency legislation and its application
- Conducting investigations and producing reports on the human rights situation of Kurds in Iran, Iraq, Syria, Turkey, and in the countries of the former Soviet Union by, amongst other methods, sending trial observers and engaging in fact-finding missions
- Using such reports to promote awareness of the plight of the Kurds on the part of committees established under human rights treaties to monitor compliance of states
- Using such reports to promote awareness of the plight of the Kurds on the part of the European Parliament, the Parliamentary Assembly of the Council of Europe, the national parliamentary bodies and inter-governmental organisations including the United Nations
- Liaison with other independent human rights organisations working in the same field and co-operating with lawyers, journalists and others concerned with human rights
- Assisting individuals with their applications before the European Court of Human Rights
- Offering assistance to indigenous human rights groups and lawyers in the form of advice and training seminars on international human rights mechanisms

KHRP
Kurdish Human Rights Project

Suite 319, Linen Hall
162-168 Regent Street
London W1B 5TG
Tel: +44 20 7287 2772
Fax: +44 20 7734 4927
E-mail: khrp@khrp.demon.co.uk
Website: www.khrp.org

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