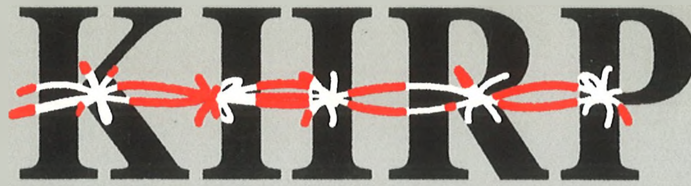

Kurdish Human Rights Project

YASA v. TURKEY AND TEKIN v. TURKEY – TORTURE, EXTRA-JUDICIAL KILLING AND FREEDOM OF EXPRESSION IN TURKEY

A CASE REPORT

APRIL 1999

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FOREWORD

In 1998 the European Court of Human Rights delivered its decisions in the cases of *Yasa v. Turkey* and *Tekin v. Turkey*. In these cases the Court explores serious and controversial issues about Turkish government persecution of individuals for the expression of their political opinions, government complicity in murder, ill-treatment of detainees, the nature of the State's duty to protect the right to life, and the content of the duty of States to investigate thoroughly complaints of human rights abuses. In each case the Court ruled that Turkey had breached its obligations under the European Convention on Human Rights to respect and uphold human rights.

Yasa and *Tekin* are two of a number of cases brought by Kurds against the State of Turkey with the assistance of the Kurdish Human Rights Project (KHRP).[1] The conduct of legal proceedings before the Convention tribunals requires the close co-operation of many individuals and organisations. In assisting individuals to bring applications, KHRP has therefore worked with human rights organisations and activists both in Turkey[2] and in Europe.[3] Furthermore, as proceedings take an average of four years from the time of registration of an application to delivery of judgment by the Court, they require long-term commitment from all concerned. These cases would not have been possible without the hard work of the Human Rights Association of Turkey. Such commitment was particularly demanded of the applicants in the *Yasa* and *Tekin* cases. Indeed, over many years - after being subjected to the worst kind of physical and verbal violence, and then official indifference - they maintained their dignity and found the fortitude to insist that their grievances be dealt with according to the law.

KHRP aims to improve and maintain the level of awareness of the nature of human rights abuses, provide education on international human rights standards, and 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 *Yasa* and *Tekin* have a part to play in advancing each of these aims. It is hoped that the international community will monitor the implementation of these judgments and that the State of Turkey will reconsider its international human rights commitments.

The introduction to this Case Report discusses the legal aspects of the cases in the

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[1] Other KHRP cases which have been decided by the Court to date are: *Akdivar v. Turkey*, (1997) 23 E.H.R.R. 143, see KHRP Case Report: *Akdivar v. Turkey: The Story of Kurdish Villagers Seeking Justice in Europe* (London 1996); *Aksoy v. Turkey* (1996) 23 E.H.R.R. 553; *Aydin v. Turkey*, Judgment of 25 September 1997, see KHRP Case Report, *Aksoy v. Turkey; Aydin v. Turkey: A Case Report on the Practise of Torture in Turkey* (London 1997); *Mentes and Ors v. Turkey*, Judgment of 28 November 1997, see KHRP Case Report: *Mentes and Ors v. Turkey: A KHRP Case Report on Village Destruction in Turkey* (London 1998); *Gundem v. Turkey*, Judgment of 25 May 1998; *Selcuk and Asker v. Turkey*, Judgment of 24 April 1998, see KHRP Case Report: *Gundem v. Turkey; Selcuk and Asker v. Turkey: A Case Report* (London 1998); *Kurt v. Turkey*, Judgment of 25 May 1998; *Kaya v. Turkey*, Judgment of 19 February 1998, see KHRP Case Report: *Kurt v. Turkey; Kaya v. Turkey: A Case Report* (London 1999); *Ergi v. Turkey*, Judgment of 28 July 1998; *Aytekin v. Turkey*, Judgment of 23 September 1998.

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

[3] For example, the Law Society of England and Wales, the Bar Human Rights Committee of England and Wales, and the Human rights Committee of the Norwegian Bar Association.

socio-political context operating in Turkey at the time of the incidents giving rise to the applications. Part I outlines the legal procedure, the legal arguments submitted, and the Commission and Court reasoning and findings in *Yasa*. Part II deals with *Tekin's* case. Appendices contain outlines of the applicants' opening speeches to the Court, the Susurluk Report, the Commission's opinions, and the Court's judgments.

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INTRODUCTION

This report deals with the first cases assisted by the Kurdish Human Rights Project in which it was argued before the European Court of Human Rights (the Court) that Turkey had violated its obligation to uphold the right to freedom of expression. In *Yasa v. Turkey* the applicant claimed that gunmen injured him in an attack on 15 November 1992 as a result of selling the newspaper *Ozgur Gundem* at his newspaper kiosk. He also claimed that his uncle was fatally shot on 14 June 1993 because he had taken over the management of the applicant's newspaper kiosk. In the second case, *Tekin v. Turkey*, the applicant claimed that he was tortured while in police custody from 15 February 1993 because the *Ozgur Gundem* newspaper employed him as a journalist.

At the centre of each application is the theory that Turkey persecuted the applicants because of their association with a newspaper that espoused a political view different from that held by State authorities. In order to understand the context of the complaints it is therefore necessary to consider *Ozgur Gundem's* background and its relationship with the State.

The first issue of *Ozgur Gundem* (meaning Free Agenda) was published on 31 May 1992. It was Kurdish owned and was written in the Turkish language; it had a predominantly left wing orientation and was pro-Kurdish in its cultural and political outlook.[1]

From the outset the authorities' stance towards *Ozgur Gundem* was hostile. Over 100 legal proceedings were brought against *Ozgur Gundem* and its staff during the newspaper's lifetime.[2] In these proceedings the authorities sought confiscation orders, prison sentences and fines, and orders for closure of the newspaper. For example, between May 1992 and April 1993, out of 228 issues of the newspaper, 39 issues were confiscated by the authorities.[3] Between April and July 1993 a further 41 issues were confiscated. In upholding the confiscation decisions, the State Security Court[4] ruled that *Ozgur Gundem*

[1] See Muller M., *Censorship and the Rule of Law in Turkey: Violations of Press Freedom and Attacks on Ozgur Gundem,* Article 19, the Kurdish Human Rights Project, the Bar Human Rights Committee (UK) and *medico international,* (London 1994), para.1.2; Poulton H., *State Before Freedom: Media Repression in Turkey,* Article 19 and the Kurdish Human Rights Project, (London 1998), para.6.1.2.

[2] Muller M., *Op cit.,* para.3.1. See also Amnesty International, *Turkey: A Policy of Denial - Update 1*, February 1995, AI Index EUR 44/24/95, pp.5-6.

[3] Under the Press Law (as amended) a public prosecutor may, without obtaining a court order, stop distribution of a newspaper or magazine. The decision may be confirmed by a State Security Court. Under article 28 of the Constitution publication of "any news or articles which threaten the internal or external security of the State with its territory and nation" is forbidden. This article permits, by Court order, the seizure and temporary suspension of publications that endanger or contravene the "indivisible integrity of the State".

[4] The State Security Courts (DGMs) are established under article 143 of the Turkish Constitution "to deal with offences against the Republic which are contrary to the democratic order enunciated in the Constitution, and offences which undermine the internal or external security of the State". In *Incal v. Turkey* (Judgment of 9 June 1998), the European Court of Human Rights held that the requirement that one of the three members

had attempted to portray Turkish citizens as Kurds, which was "an act of separatism". The Court also found that the use of the words "Kurd" and "Kurdistan" in the newspaper was a breach of the provisions of the Constitution that define Turkey as a unitary State.[5]

In addition to confiscating issues of the newspaper, the authorities detained over 50 *Ozgur Gundem* staff at least once between May 1992 and November 1993. In December 1993 over 150 staff were charged under the Anti-Terror Law with "spreading separatist propaganda" for articles published in the newspaper.[6] *Ozgur Gundem's* chief news editor, Davut Karadag, was prosecuted for "disseminating separatist propaganda" in 30 articles published by the newspaper. He was sentenced to four years imprisonment. Meanwhile, the proprietor of the newspaper, Yasar Kaya, was prosecuted on charges of delivering an illegal speech in Iraq. He was also imprisoned and fined for a number of years in relation to the publication of *Ozgur Gundem.*[7]

Allegations of torture and other forms of ill-treatment were frequently made by those detained.[8] The allegations in *Tekin's* case are an example of the types of complaints made against the police. The fact that the Court found beyond all reasonable doubt that the applicant in *Tekin* had been ill-treated during his detention demonstrates that such allegations are not mere fabrications made for political reasons.

The violence against *Ozgur Gundem* staff and distributors ended only when the newspaper ceased to exist. On 11 November 1993, *Ozgur Gundem* was closed by government order and banned on 14 April 1994. Its successor, *Ozgur Ulke*, was banned and closed in February 1995, by order of the Review Peace Court No.1 of Istanbul on the ground of being *Ozgur Gundem's* successor. Its issues were confiscated after distribution. *Ozgur Ulke's* successor, *Yeni Politika,* was banned from the emergency region[9] and its issues became the subject of legal action by the public prosecutor of the Istanbul State Security Court.[10]

At the core of legal proceedings against *Ozgur Gundem* was the belief that the expression

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sitting on a State Security Court be a military judge, was a violation of article 6(1) of the European Convention on Human Rights dealing with the right to a fair trial.

[5] Articles 2 and 3 of the Constitution state that Turkey is a "secular State" and that its "territory and nation, is an indivisible entity. Its language is Turkish". Article 13 provides that law to "safeguard the indivisible integrity of the State with its territory and nation" may restrict fundamental rights and freedoms. Article 14 states that the constitutional rights and freedoms cannot be "exercised with the aim of violating the indivisible integrity of the State with its territory and nation". Article 28 forbids publication of "any news or articles which threaten the internal or external security of the State with its territory and nation".

[6] Muller M., *Op cit.*, para. 2.6.

[7] *Ibid.*, para. 3.1.

[8] See generally: Muller M., *Op cit.*, para.2.6; Poulton H., *Op cit.*, para.10.1; Helsinki Watch, *Free Expression in Turkey, 1993, Killings, Convictions, Confiscations,* (Helsinki 1993).

[9] The emergency region is currently comprised of six provinces in south east Turkey, namely Diyarbakir, Hakkari, Siirt, Tunceli, Sirnak and Van.

[10] Poulton H., *Op cit.*, para.7.4.2.

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of pro-Kurdish opinions or Kurdish ethnic consciousness through the written media was part of a campaign by that ethnic minority[11] to secure independence from Turkey and thus to destroy the unity of the Turkish State.[12] It finds its roots in the belief - which has permeated the political system in Turkey since the creation of the State in 1923[13] - that the existence of a non-Turkish ethnic identity is a threat to the Republic. Such a view demands the denial of the existence of minorities within Turkey's national borders and the rejection of the concept of multiculturalism. This belief is disclosed in the nature of the charges laid against the newspaper and its staff, and the reasoning of the State Security Court.

While it can be argued that legal restrictions on the right to freedom of expression in the interests of national security and the preservation of territorial integrity are permitted by international human rights law,[14] it is to be remembered that such qualifications upon the operation of the right must conform to strict rules in order to be lawful. Apart from being prescribed by law, the restrictions must be necessary and proportionate to a legitimate aim as well as being justified. Moreover, non-violent dissent on matters affecting national security and territorial integrity cannot be restricted by the law even where there is domestic concern about violent separatism.[15] In many respects, the legal restrictions Turkey has placed on the exercise of freedom of expression fall short of these standards.[16]

However, the experiences of staff and persons associated with *Ozgur Gundem* were not confined to being defendants in legal proceedings - they also encountered many acts of violence, including murders, assaults and arson attacks. It is reported that 16 journalists employed by *Ozgur Gundem*[17] and 14 people associated with the newspaper, including distributors, news vendors and delivery workers, have been murdered.[18] On 5 August 1992 a correspondent for *Ozgur Gundem*, Burhan Karadeniz, was fatally shot, as was the owner of *Ozgur Gundem*, Behcet Canturk. On 7 August 1993, Aysel Malkac, a reporter for *Ozgur Gundem*, was taken away by plainclothes police and has not been seen since.[19] On

[11] Out of a total population of approximately 60 million, there are an estimated 15 million Kurds in Turkey. The majority of Turkish Kurds live in one geographical area, the eastern Anatolian region.
[12] In a press briefing in July 1993, the Turkish Prime Minister and the Chief of Staff called on members of the press to support them in the "total war" against separatism: see Connors J., *The Current Situation of the Kurds of Turkey*, Kurdish Human Rights Project, (London 1994), p.10.
[13] On the implications of the unitary nation-state model for minorities see generally: Poulton, H., *Op cit.*, para.3.1.
[14] See article 10(2) of the European Convention of Human Rights and page 23 of this Report; article 19(3) of the International Covenant on Civil and Political Rights (Turkey is not a signatory of the ICCPR); and article 13(2) of the Inter-American Convention on Human Rights.
[15] In *Incal v. Turkey*, Judgment of 9 June 1998, the European Court of Human Rights held that the conviction of a lawyer for preparing materials protesting against the treatment of the Kurds had violated his right to freedom of expression under article 10. See also the Court's decision in *Castells v. Spain*, (1992) 14 E.H.H.R. 445.
[16] See generally: Muller M., *Op cit.*,para. 4.2; Poulton H., *Op cit.*,para.4.5.1.
[17] Muller M., *Op cit.*, para.2.1; see also: Article 19, *Censorship News: Censorship by the Bullet*, Issue 16, 9 September 1992.
[18] Muller, M., *Op cit.*, para.2.1.
[19] Amnesty International, *Op cit.*, p.13.

25 September 1993 and 30 September 1993, Mehmet Balamir and Abdulkadir Altan respectively received injuries in attacks against them as they sold *Ozgur Gundem* on the streets.[20]

Meanwhile, between November 1992 and December 1993, 11 people associated with *Ozgur Gundem* including distributors, news vendors, and delivery workers were wounded in attacks upon them.[21] In Diyarbakir in November 1992, six newspaper sellers reported being the subject of arson attacks and/or threats over the sale of *Ozgur Gundem*. Main distributors and vendors of the newspaper in Bismil, Batman, Silvan, Ergani, Adiyaman, Mardin, Elazig, Bingol and Yuksekova reported similar threats.[22] In 1994, the offices of *Ozgur Gundem* in Istanbul and Ankara were the target of bomb attacks while under military surveillance.[23]

Responsibility for some of the attacks has been attributed[24] to radical Islamic groups such as Hizbullah, extreme right wing groups, and the Kurdistan Workers Party (PKK).[25] However, human rights organisations[26] and at least one Turkish government inquiry, namely the Susurluk inquiry, have identified State complicity in the violence. The Susurluk Report[27] sets out the findings of the investigation initiated by the Turkish Prime Minister into a car accident that occurred on 3 November 1996 at Susurluk in western Turkey. The accident attracted attention because of the identity of the passengers in the car: a high level government official who was active in combating the PKK; a former police chief; and a person wanted internationally for political murder and narcotics smuggling carrying identity papers including a Turkish passport, for use by State officials only, made out in his name, and a large amount of cash. Thus, the accident raised the issue of collaboration between State security forces and organised crime. The 1998 Article 19/KHRP report on media repression in Turkey, states:

> "The [Susurluk] report confirmed what many had previously expected, namely that an execution squad had been set up 'within the State', and that members of MIT, the police and JITEM - the military's intelligence unit operating under the control of the military police in rural areas (the *Jandarma*) - were all involved."[28]

In particular, the Susurluk Report confirmed the involvement of the authorities in the

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[20] Muller M., *Op cit.*, para.2.1.
[21] *Ibid.*, para.2.2.
[22] *Ibid.*, para.2.3.
[23] Poulton H., *Op cit.*, para.8.1.
[24] Poulton H., *Op cit.*, para.8.2.
[25] The PKK is a Kurdish insurgent organisation involved in an armed struggle against the Turkish State. It also uses violence against Kurdish individuals and organisations - including the media - with whose political views it disagrees: see generally, Poulton H., *Op cit.*, para.8.2.2.
[26] Poulton H., *Op cit.*, para.8.2.
[27] A translation of the Susurluk Report is contained in Appendix A of this Report.
[28] *Ibid.*, para.8.2.1.

bombing of *Ozgur Gundem* offices and the murder of the newspaper's proprietor, Behcet Canturk. It also disclosed that when the State was not satisfied that legal action was silencing *Ozgur Gundem*, it resorted to extra-judicial measures. The Report states:

> "Although his identity and deals were very clear, the State was unable to deal with Canturk. Legal avenues were insufficient and as a result: '*Ozgur Gundem* was blown up with plastic explosives, and whilst Canturk was expected to obey the State, upon the newspaper being bombed he attempted to start a new installation, then a decision was made by the Turkish Security Organisation to murder him and the decision was carried out'." (translation)

The Report also indicates State security force involvement in the murder of journalists generally. It states that the following was reported to it in the course of its investigations by security force personnel:

> "... an illegal formation was carried out under the umbrella of JITEM.[29] We had the authority to execute almost anybody whom we suspected of having a relationship with the PKK. We assumed the method of apprehending these individuals, establishing their offences, and instead of handing them over to the justice murdered them in a way which ensured the perpetrator would remain unknown. This was required from us and we received instructions in that fashion." (translation)

The arguments regarding the facts in *Yasa's* case drew on the findings of the Susurluk Report. In that case, the applicant and his uncle had been shot - so much had been agreed by the State - but there was no one who had seen the attackers clearly enough to be able to provide a description. The authorities' failure to conduct an investigation into the shootings also meant that any evidence as to the identity of the assailants was lost. Thus, the applicant was faced with the difficulty of establishing beyond reasonable doubt the identity of those responsible. In the absence of other evidence to support the argument that the gunmen were agents of the State, he therefore relied upon the Susurluk Report and data on the treatment of *Ozgur Gundem* staff and associated persons.

The Court was prepared to acknowledge that the Susurluk Report provided some support for State involvement in attacks by unknown assailants.[30] However, the Court was not satisfied that the Susurluk Report established beyond reasonable doubt that State agents were responsible for the shootings in *Yasa*. It so held because the Report's findings were not sufficiently precise to implicate the State in the shootings in that incident.[31] Having

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[29] JITEM is a unit established within the Gendarme with the task of co-ordinating the appointments and administration of the Special Teams in southern and south-east Antolia. The existence of the JITEM unit has been denied by the Government of Turkey.

[30] The Court stated that the Susurluk Report gave rise to "serious concerns": *Op cit.*, para.96.

[31] *Ibid.*

failed to identify the assailants, the applicant was unable to prove that the State had violated his right to life under article 2 of the Convention in relation to the attacks themselves.[32] Furthermore, that failure meant the Court was unable to find that the applicant's right to freedom of expression had been violated by the State.[33]

With regard to the right to freedom of expression in *Tekin's* case, the evidential issues were quite different from those raised in *Yasa.* In *Yasa* it was agreed that the attacks took place, the issue being the identity of the attackers. In *Tekin,* the issue was whether or not the alleged acts against the applicant had occurred (if so, the identity of the attackers was clear since the applicant was in police custody at the time). While the Court found that the attacks had occurred (constituting inhuman and degrading treatment) it was also necessary for the Court to be satisfied beyond reasonable doubt that the attacks were connected with the applicant's employment as a journalist with *Ozgur Gundem.* The applicant gave evidence that the focus of the police interrogation and threats was upon his work for the newspaper. However, there was also evidence (in the nature of the charge against him and in the police threats) that he was threatening village guards.[34] Consequently, the Court was unable to find to the required degree of certainty that the ill-treatment occurred because of the applicant's political views expressed in *Ozgur Gundem.*

The failure of the applicants in *Yasa* and *Tekin* to overcome the evidential burdens involved in proving that their right to freedom of expression had been violated by Turkey did not, however, prevent the Court finding against the State in respect of its obligation to conduct thorough investigations. Indeed the Court expressed concern about State complicity in the violence against *Ozgur Gundem,* and those associated with it, sufficient for it to rule that the fear of State sponsored persecution should have been taken into account when investigating the *Yasa* incidents. The Court stated that "in the light in particular of the findings of the Susurluk Report" it approved the Commission's observation that the State could not have been unaware that those involved in *Ozgur Gundem* "feared they were falling victim to a concerted campaign tolerated, if not approved, by State officials". Accordingly, the Court found it incumbent on the authorities to have regard in their investigations to the fact that State agents may have been implicated in the attacks.[35] This failure to take State involvement seriously was taken into account in concluding that Turkey had violated the applicant's right to life under article 2 of the

[32] The applicant did, however, prove beyond reasonable doubt, that Turkey had violated article 2 on the ground that it had not conducted adequate investigations into the incidents: see Judgment of 2 September 1998, paras.98-108.
[33] The Court found it unnecessary to consider the complaint regarding the right to freedom of expression because the facts underlying the complaint had been considered under articles 2 and 13 of the Convention.
[34] Village guards are an armed force of Kurdish villagers who are recruited and paid by the Turkish government. Officially, recruitment to the village guards is voluntary; in practice, refusal is reportedly followed by government reprisals against villagers: see Committee on Migration, Refugees and Demography of the Council of Europe, *Report on the Humanitarian Situation of the Kurdish Refugees and Displaced Persons in South-East Turkey and North Iraq,* Doc.8131, June 1998, paras. 9-11.
[35] See Judgment of 2 September 1998, at para.106.

Convention.[36]

Although the numbers of violent incidents against those associated with *Ozgur Gundem* (such as that experienced by the applicants in the *Yasa* and *Tekin* cases) has been significant, it is noteworthy that the Turkish authorities have not brought a single prosecution. This inaction on the part of the Turkish authorities led the **Bar Human Rights Committee** (England and Wales), ***medico international*** (Germany), the **Kurdish Human Rights Project**, and **Article 19** (The International Centre Against Censorship) to recommend in 1994 that the Turkish government launch independent investigations into all recent murders of journalists and other attacks, including beatings and allegations of torture by the police and security forces, and to ensure that anyone responsible regardless of rank or position be charged and brought to trial.[37] The validity of these recommendations was confirmed in 1998 by the Court's decisions in *Yasa* and *Tekin.* In each case the Court found that the authorities had failed to carry out thorough and effective investigations into the attacks upon the applicants in breach of Turkey's obligation to do so under article 13 of the Convention.

The decisions in *Yasa* and *Tekin* send a clear message to all States bound by the Convention that allegations of State involvement in human rights abuses are best taken seriously and dealt with according to the law for, in the event that proper action is not taken, the State may well be called to account before international authorities.

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[36] *Ibid.*, paras. 98-108.
[37] *Ibid.*, p.41.

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PART I: YASA v. TURKEY

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SUMMARY OF YASA v. TURKEY

The case of *Yasa v. Turkey* concerned armed attacks on the applicant and his uncle. In the first attack the applicant was seriously injured, and in the second his uncle was killed.

The applicant complained that the armed attacks gave rise to violations of articles 2, 10, 13 and 18, and article 14 in conjunction with articles 2, 10 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention). Complaints under articles 3 and 6 of the Convention, argued before the European Commission of Human Rights (the Commission), were not proceeded with before the European Court of Human Rights (the Court). On 2 September 1998 the Court delivered its decision. It held that Turkey had violated articles 2 and 13 of the Convention.

THE FACTS

The facts as presented by the applicant

The applicant stated that at the relevant time he leased a newspaper kiosk named Bulvar Buffet in Diyarbakir, Turkey. One of the publications sold at the kiosk was a pro-Kurdish newspaper, *Ozgur Gundem*.

In October 1992, he started to receive death threats. He submitted that the police made these threats because he sold certain newspapers, in particular *Ozgur Gundem*.

In early November 1992, Commissioner Kemal Fidan of the Diyarbakir Security Branch and another police officer allegedly visited the applicant and threatened to burn down his kiosk because of the newspapers he sold. Approximately one week later, on the morning of 15 November 1992, the applicant's kiosk was set on fire. It was completely destroyed.

On 15 January 1993, at about 7.15 am, the applicant was fired upon while he was riding to his rebuilt kiosk on his bicycle with his son on the back. Eight bullets fired by his assailants hit him. Three grazed his back, one entered his right leg, one entered his right arm, one his left wrist, one between his middle finger and the forefinger of his left hand and one through his right buttock into his abdomen. The applicant shot back in an attempt to defend himself.

The applicant was taken by taxi to Diyarbakir Hospital. However, medical treatment was delayed for two hours due to police intervention. The applicant spent 11 days in the hospital, during which he made a statement to the police that his assailants were police officers. On discharge from hospital the applicant was charged with and convicted of carrying an unlicensed firearm. The public prosecutor's office did not ask the applicant to provide a statement about the attack.

On 14 June 1993, at about 7.30 am, the applicant's uncle, Hasim Yasa, who had been

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running the applicant's kiosk since March 1993, was fatally shot while walking in the street in Diyarbakir. Hasim's seven-year-old son was the only witness. The same day the applicant was arrested, assaulted and threatened with death by the police. The applicant alleged that the police also told him that they had shot his uncle and that he had been the intended target.

On 10 October 1993, the applicant's 13 year-old brother, Yalcin Yasa, was also killed near his home. He had been looking after the applicant's kiosk following the attacks on the applicant and his uncle. During the attack on Yalcin, a second brother, 16 year-old Yahya Yasa, was seriously injured.

This sequence of attacks left no one in the family to manage the kiosk. Consequently, the applicant submitted, he had no option but to sell his business.

In support of his argument that he and his uncle were shot as part of a campaign of official persecution against the newspaper and persons involved in the production and distribution of *Ozgur Gundem*, the applicant adduced evidence on the legal proceedings taken against the newspaper and the acts of violence to which those persons involved with the newspaper were subjected during the period of its publication.

The facts as presented by the Government of Turkey

The Government agreed that the applicant had been shot on 15 January 1993 and his uncle killed on 14 June 1993. However, it argued that there was no evidence to support the contention that members of the security forces were responsible for the attacks. Further, the Government stated that the applicant had never officially complained to the authorities that his attackers were agents of the State. Nor was there any evidence that a police officer had told him that it was in fact he who had been the target of his uncle's killers.

The Government also denied there had been official intimidation of persons in any way connected with the sale of pro-Kurdish newspapers. It acknowledged that particular editions of newspapers had been confiscated but it said that these were always taken on the basis of judicial decisions, and were thus neither arbitrary nor repressive.

The findings of fact of the European Commission of Human Rights

The Commission proceeded, after consultation with the parties, on the basis of documentary evidence and argument submitted by the parties. It took the view that oral testimony would not clarify the matter given the nature of the allegations.

The Commission found that the evidence did not establish beyond reasonable doubt that agents of the security forces or police were involved in the shooting of either the applicant or his uncle. In addition, it held that the applicant's complaints concerning police obstruction at the hospital and ill-treatment in custody following his uncle's funeral had

not been substantiated. The Commission did, however, find that the Government had or ought to have been aware that those involved in the publication and distribution of *Ozgur Gundem* feared that they were falling victim to a concerted campaign tolerated, if not approved, by State agents.

Regarding domestic proceedings, the Commission found that police had attended the scene where the applicant had been shot. The police recovered the applicant's pistol and arrested and took statements from the two taxi drivers who had handled the pistol after it was fired. The police also took a statement from the applicant regarding the incident. A summary incident report was drawn up in which the applicant was described as an injured suspect. A forensic examination of the cartridges found by the police was undertaken. The expert's ballistic report stated that the cartridges showed marks identical to those found in the shootings of two other people in Diyarbakir. On 20 January and 14 April 1993 the Diyarbakir public prosecutor asked the relevant security branch to investigate the attack and to keep the office of the Attorney-General informed.

As to the killing of Hasim Yasa, the police had opened a preliminary investigation file. An expert ballistics report stated that the bullet shells found at the scene were not fit for examination. The police also interviewed two witnesses. However, neither was able to identify the gunman. The police record of the interview of Hasim Yasa's son indicated that he could not recognise the attacker although he was able to give a general description.

The Government took no further steps to investigate the two incidents.

The findings of fact of the European Court of Human Rights

The Court noted that the establishment of the facts is a matter for the Commission but that the Court is not bound by those findings. In this case the applicant submitted to the Court fresh evidence in the form of the Susurluk Report,[38] which he argued supported his version of events by way of leading to the inference that the perpetrators of the attacks on the applicant and his uncle were State agents. In this respect, the Court observed that although it must refer primarily to the circumstances existing at the time of the incidents complained of, it is not precluded from having regard to information subsequently coming to light.

In assessing the evidential weight of the Susurluk Report, the Court stated that the circumstances of the individual case together with the seriousness and nature of the charge against the respondent State must be considered. It concluded that despite the serious concerns it raises, the Susurluk Report does not contain material enabling the perpetrators of the attacks to be identified with "sufficient precision". Accordingly, the Court considered that it should not depart from the Commission's findings on the facts.

[38] See pp.4-5 above and Appendix A.

MAP OF THE AREA WHERE THE ALLEGED INCIDENT OCCURRED

THE LEGAL PROCEEDINGS

Chronology of events, including legal proceedings

October 1992	Applicant receives death threats from police because he sold certain newspapers, particularly Ozgur Gundem, at his kiosk in Diyarbakir.
Early November 1992	Applicant visited by police officers threatening to burn down his kiosk because of the newspapers he sold.
15 November 1992	Applicant's newspaper kiosk set on fire and destroyed.
15 January 1993	Applicant injured by shots fired at him in the street.
17 January 1993	Applicant makes statement to the police claiming his attackers were police officers.
20 January 1993	Diyarbakir public prosecutor requests the relevant security branch to investigate the attack on the applicant.
March 1993	Hasim Yasa, the applicant's uncle, starts managing the applicant's kiosk.
14 April 1993	Public prosecutor asks investigators to keep the Office of the Attorney General informed as to the progress of the enquiries.
24 May 1993	Applicant is convicted and sentenced for carrying an unlicensed firearm.
14 June 1993	Applicant's uncle, Hasim Yasa, fatally shot in the street in Diyarbakir. Police take statements from two witnesses. Applicant is arrested, assaulted and threatened by police, who told him he was the target of the shooting that day.
12 July 1993	Applicant, assisted by the Kurdish Human Rights Project and the Human Rights Association of Turkey, applies to the European Commission of Human Rights alleging violations of articles 2, 3, 6, 10, 13, 14 and 18 of the Convention.
10 October 1993	Applicant's younger brother, Yalcin Yasa, who had been looking after the applicant's newspaper kiosk is attacked and killed near his home. Another brother is injured during the attack.
3 April 1995	Commission declares application partly admissible.
8 April 1997	Commission adopts Article 31 Report.
9 July 1997	Commission refers case to the European Court of Human Rights.
21 April 1998	Hearing before the Court in Strasbourg.
2 September 1998	Court delivers judgment and holds Turkey to have breached articles 2 and 13 of the Convention.

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

On 1 November 1998, Protocol 11 of the Convention came into force. The Protocol establishes a full-time, single court to replace the European Commission of Human Rights and the European Court of Human Rights. Under the new procedure all applications are to be registered by a Chamber of the Court and assigned to a judge-rapporteur. In the event that the judge-rapporteur refers the application to a three-judge committee, the committee may, by unanimous decision, declare the application inadmissible. Otherwise, a Chamber of seven judges will examine the application in order to determine the merits of the case and any issue as to the Chamber's competence to adjudicate in the case. As *Yasa* was decided prior to the Protocol 11 procedure coming into effect, an outline of the earlier procedure is addressed below.

The procedure involved in lodging a complaint with the former Commission has already been explained in our previous publication *Aksoy v. Turkey; Aydin v. Turkey - A Case Report on the Practice of Torture in Turkey* (London 1997). Further information about the procedure in the Commission and the Court 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) and *A Practitioner's Guide to the European Convention on Human Rights* by K. Reid (Sweet & Maxwell, London 1998).

Investigation hearings

(1) Under the new procedure

Under the new procedure, the assigned judge-rapporteur prepares the case file and establishes contact with the parties. The parties then submit their observations in writing. Any hearing of the matter will take place before the Chamber and it will make itself available to the parties with a view to a friendly settlement of the dispute. In the event of a friendly settlement not being reached, the Chamber will deliver its judgment in the case. Where the Chamber decides not to follow its own case-law or where an issue of principle is involved, the Chamber is empowered under the new article 30 of the Convention, to refer the case to the Grand Chamber of its own motion provided neither party objects. The parties have three months after delivery of the judgment to lodge a request to refer the case to the Grand Chamber. The right to appeal to the Grand Chamber is not automatic and the request will be granted only in exceptional cases, such as where a case raises a serious question concerning the application and interpretation of the Convention. As under the pre-Protocol 11 system, the Committee of Ministers will supervise the execution of the judgment.

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(2) Under the old procedure

Under the pre-Protocol 11 procedure, if the Commission considered it necessary, it was able pursuant to the former article 28 (1)(a) of the Convention to "undertake ... an investigation for the effective conduct of which the state concerned shall furnish all necessary facilities". 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) of the Convention 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.

In *Yasa* the Commission decided, after consultation with the parties and given the nature of the allegations, not to conduct an investigation hearing. Thus, it proceeded by examining the allegations on the basis of the written materials submitted by the parties.

Preliminary objections to the Court's jurisdiction

(1) Was the applicant a victim?

The Government raised by way of preliminary objection the argument that the applicant had no standing to submit an application on behalf of his uncle. It argued that it had not been proved that Hasim Yasa was the applicant's uncle and, even if it were proven, that did not make them direct relatives. It submitted that a direct relationship between the applicant and the deceased person was required before a person could claim to be a victim for the purpose of exercising the right of individual petition under article 25 of the Convention.[39]

The applicant submitted that the Government had been content to acknowledge that the applicant was Hasim Yasa's nephew throughout the proceedings before the Commission.

The Commission's Delegate stated before the Court that if the person wished to complain about a matter as serious as the murder of a close relative then that was sufficient to establish that person's standing before the Court.

The Court dismissed the Government's preliminary objection as to standing. In doing so it had regard to the object and purpose of the Convention. It also observed that the Government first objected that the applicant was not a victim in its written observations on the Commission's admissibility decision and that it did not dispute in those observations the applicant's statement that he was Hasim Yasa's nephew. The Court therefore held that the Government was estopped from denying before it that the applicant had such a

[39] Article 25 was amended by Protocol 11 so that as from November 1998 the right of individual petition is mandatory: see the new article 34 of the Convention.

relationship with the deceased. Further, the Court considered that the Government's other argument, that the deceased had many close relatives and that he had business interests in common with the applicant, was irrelevant. In conclusion, the Court agreed with the Commission's finding that the applicant, as the deceased's nephew, could legitimately claim to be a victim of an act comprising the murder of his uncle.

(2) The proceedings before domestic authorities

The Government raised by way of further preliminary objection to the Court's jurisdiction over the complaints, the argument that the applicant had failed to exhaust domestic remedies. It contended that the applicant had not brought proceedings that were available to him under Turkish law. The Government pointed out that allegations of assault by security forces give rise to an administrative action against the authorities to which those responsible were accountable and civil proceedings for damages for the unlawful acts. Furthermore, it said the applicant could have brought criminal proceedings.

The Commission's Delegate pointed out that while the applicant was in hospital he had made a statement to the police in which he had stated that his assailants were police officers. Two separate criminal investigations were commenced by the public prosecutor's office as a result. Regarding the complaint about the fatal shooting of the applicant's uncle, the Delegate pointed out that the applicant's arrest and ill-treatment to which he said he had been subjected on the same day may be the reason why the applicant had not lodged a complaint with the public prosecutor. Consequently, the applicant was not required to bring further court proceedings or wait until the end of those inquiries, which were continuing.

The Court recalled that while the applicant is obliged by article 26 to seek a remedy from the domestic legal system before bringing proceedings under the Convention, this obligation is qualified. It stated that article 26 requires that complaints should be "made to the appropriate domestic body ... but not that recourse should be had to remedies which are inadequate or ineffective".[40] The Court observed that the test to be applied in assessing whether or not domestic remedies have been exhausted is whether, in all the circumstances of the case, the applicant did everything that could reasonably be expected of him to exhaust domestic remedies.[41]

With regards to a civil action for damages sustained through illegal acts or patently unlawful conduct on the part of State agents, the Court considered that such action would be ineffective as it would be necessary to identify the person believed to have committed the tort, which was not possible.

Regarding administrative law proceedings under article 125 of the Turkish Constitution

[40] See Judgment of 2 September 1998, para.71.
[41] *Ibid.*, para.77.

based on the authorities' strict liability, the Court was not satisfied that this remedy was certain in practice as there was no example placed before the Court of any person having brought such an action in a situation comparable to that of the applicant. In addition, the Court considered that an administrative law action could not be an action that had to be exhausted in respect of complaints under articles 2 or 13, as in this case, because States are obliged by those articles to conduct investigations in cases of fatal attacks, capable of leading to the identification and punishment of those responsible. Such investigations are not, however, required in an administrative law action, which is concerned with the strict liability of the State, not the identification of the perpetrator. The Court dismissed the Government's preliminary objection in so far as it related to civil and administrative remedies.

With regard to criminal law remedies, the Court considered that it gave rise to issues closely linked to those raised by the applicant's complaints under articles 2 and 13 of the Convention. Accordingly, it left this aspect of the preliminary objection for consideration with the merits of the case. It observed that the applicant had lodged a complaint on 17 January 1993 while in Diyarbakir Social-Security Hospital and that separate criminal investigations were begun by the judicial authorities in relation to the assault on the applicant and the murder of his uncle.

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

Before the Court, the applicant in *Yasa's* case complained of violations of articles 2, 13, 10, 14 and 18 of the Convention. The Court held that Turkey had breached articles 2 and 13 of the Convention, as set out in the table below.

Articles allegedly violated	Commission's Opinion	Court's Decision
Article 2 (right to life)	Violation	Violation
Article 13 (right to an effective remedy)	No separate issue arises	Violation
Practice of infringing arts. 2 and 13	Not considered	Evidence insufficient
Article 10 (freedom of expression)	No violation	No violation
Article 14 (prohibition of discrimination)	No violation	Not considered
Article 18 (limitation on use of restrictions on rights)	No violation	Not considered

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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 contended that there was a violation of article 2 on three grounds. First, he argued that members of the security forces attempted to kill him on 15 January 1993. Secondly, he argued that members of the security forces had murdered his uncle. Thirdly, he contended that no adequate and effective judicial investigation had been conducted into the circumstances of either his assault or his uncle's murder. The applicant produced the Susurluk Report in support of his allegations.

The Commission concluded that the applicant had not established beyond reasonable doubt that agents from the security forces or police officers had been implicated in the two shootings. It did, however, also hold that article 2 had been infringed in that the authorities had failed to carry out adequate investigations into the facts of the incidents, in breach of its obligation to protect the right to life.

Before the Court the Commission's Delegate submitted that the Susurluk Report tended to support the idea that the State was implicated in a number of human rights violations in south-east Turkey which were similar to the alleged attacks in this case. However, the Commission's considered view was that the Susurluk Report did not provide a sufficient basis for excluding all reasonable doubt as to the liability of the State for the attacks. Accordingly, it asked the Court to accept the facts as found by the Commission.

The Government argued that the alleged facts were not attributable to State agents. It argued that the only evidence adduced by the applicant were lists of alleged acts of repression against journalists drawn up on the basis of press releases emanating from sympathetic organisations.

The Government also argued that the Commission erred in holding that the Government had breached its obligation to carry out an effective investigation. The Government said that the investigations were still pending and that the relevant authorities had to date conducted those investigations into the contentious events properly and appropriately despite the fact that the applicant had not lodged a complaint setting out his allegations. It criticised the Commission for not seeking to find out what measures had been taken by the national authorities to prevent deterioration in security or what judicial and administrative investigations had been carried out to identify the offenders. It submitted that the Commission had not had proper regard to the fact that the judicial authorities had, of their own motion, initiated judicial proceedings with a view to identifying the assailants. The fact that the investigations were unsuccessful, it said, was irrelevant.

The Government further submitted that regard should be had in the present case to the principle contained in the Commission's case-law that article 2 could not imply a positive obligation to prevent any possibility of violence occurring.

In the alternative, the Government submitted that the authorities could do no more since the events had taken place in "the context of the fight against terrorists". Accordingly, the authorities were "constrained to proceed with precaution and to wait until the results of various investigations had been cross-checked".

Regarding the Susurluk Report, the Government challenged its evidential value on several grounds. It stated *inter alia* that the Report had no direct link with the present case, had no official status and, in particular, was not the result of a judicial inquiry as such.

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The Court observed that it was not bound by the Commission's findings of fact[42] and noted that it was not precluded from having regard to information coming to light subsequently. Accordingly, it proceeded to consider the applicant's complaint that the attacks on himself and his uncle were a violation of article 2 of the Convention in the light of the fresh evidence in the form of the Susurluk Report, which was adduced before it. However, the Court found that the Susurluk Report did not enable the perpetrators of the attacks on the applicant and his uncle to be identified. Consequently, the Court adhered to the Commission's conclusions that there was no violation of article 2 on this ground as the applicant had failed to establish beyond reasonable doubt that the security forces had attacked the applicant and his uncle.

Regarding the adequacy of the investigations, the Court held that because the investigations carried out by the authorities excluded the possibility that the security forces might have been implicated in the attacks, and due to the expiration of five years with no concrete and credible progress having been made in those investigations, the investigations could not be considered effective as required by article 2. The Court applied its previous case-law establishing that the obligation to protect the right to life under article 2 of 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: *McCann v. United Kingdom* (Judgment of 27 September 1995); *Kaya v. Turkey* (Judgment of 19 February 1998). The Court held that the obligation is not confined to cases where it has been established that an agent of the State was responsible for the killing. Nor is the issue of whether members of the deceased's family or others have lodged a formal complaint about the killing with the competent investigatory authorities decisive. Thus, the very fact that the authorities in the present case were informed of the murder of the applicant's uncle gave rise to an obligation under article 2 to carry out an effective investigation. Similarly, the shooting of the applicant gave rise to an obligation to carry out an investigation.

In the present case, there was no dispute as to what steps the authorities took to investigate the incidents. The Court noted that more than five years after the events the investigations undertaken by the authorities had not produced a tangible result and that the Government had not provided any evidence to demonstrate that the investigations had progressed since 21 June 1993. Further, the Court declined to release the authorities from their obligation under article 2 to carry out an investigation into the attacks on the ground that there were clashes between the PKK and the authorities in the relevant region of Turkey, which could hinder the collection of evidence.

In making its assessment, the Court also noted the approach of the investigatory authorities in excluding from the outset the possibility that State agents might have been implicated in the attacks. The Court viewed this approach in the context of the Commission's findings that there were a number of serious attacks in south-east Turkey on

[42] *Ibid.*, para.93.

journalists, newspaper kiosks and distributors of the newspaper *Ozgur Gundem* and that some of those incidents had even formed the subject-matter of applications under the Convention.

In particular, the Court held that, given the findings of the Susurluk Report, the Commission's finding that it did not consider that "the authorities [were] or [could] have been unaware that those involved in the publication and distribution of the *Ozgur Gundem* feared that they were falling victim to a concerted campaign tolerated, if not approved, by State officials"[43] was well-founded. It concluded that in their investigations the authorities should have had regard to the fact that State agents may have been implicated in the attacks and that the applicant's failure formally to identify the security forces as being the assailants was essentially irrelevant.

Accordingly, the Court held that the applicant had satisfied the obligation to exhaust domestic remedies and dismissed the Government's preliminary objection. In addition, it held that article 2 of the Convention had been breached by the State when it failed to conduct effective investigations into the attacks.

Article 13: Right to an effective remedy

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.

The applicant argued that the state of emergency in south-east Turkey had been imposed in order to insulate the security forces from scrutiny and to prevent effective access to domestic remedies.

The Commission considered it unnecessary to examine the applicant's argument separately as no separate issue arose under article 13.

The Government argued that the applicant had not brought any of the ordinary civil, administrative or criminal proceedings that were available under Turkish law, despite the fact that they were effective.

The Court reasoned that article 13 required the provision of a domestic remedy allowing the relevant national authority both to deal with the substance of an arguable complaint under the Convention and to grant appropriate relief. It considered that this remedy must be effective in a practical sense, in particular the exercise of the remedy "must not be

[43] *Ibid.*, para.106.

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unjustifiably hindered by the acts or omissions" of State authorities.[44]

The Court observed that its conclusion that the applicant had not proved beyond reasonable doubt that the attacks on the applicant and his uncle were carried out by State agents does not relieve the State of the obligation to carry out an effective investigation into the substance of a complaint that was arguable.[45] Further, it reiterated that the nature of the right allegedly infringed - the right to life in the present case - has implications for the extent of the obligations under article 13. In this case, the right in issue imposed an obligation to carry out a thorough and effective investigation apt to lead to those responsible being identified and punished and giving the complainant effective access to the investigation proceedings.[46]

Given the attacks had taken place five years ago with no results produced by the investigations, the Court accordingly held that Turkey had not conducted an effective criminal investigation as required by article 13.

A practice of infringing articles 2 and 13 of the Convention

The applicant contended that there had been an aggravated breach of articles 2 and 13 of the Convention on the basis that there was an officially tolerated practice of violation of the rights to life and to an effective remedy. This practice was manifest in the inevitability of criminal proceedings failing and their ineffectiveness in preventing unlawful acts and abuse of power by the authorities.

The Court held that the complaint was not established on the evidence before it.

Article 10: Freedom of expression

Article 10 of the Convention provides as follows:

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

[44] *Ibid.*, para.112.
[45] *Ibid.*, para.113.
[46] *Ibid.*, para.114.

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preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The applicant argued that the attacks on himself and his uncle constituted an aggravated violation of the right to freedom of expression protected by article 10 on the grounds that the attacks were carried out against them because they sold the *Ozgur Gundem* newspaper and were part of a State tolerated campaign of violence against persons engaged in the distribution of the newspaper.

The Commission concluded that there had been no violation of article 10.

The Court did not consider it necessary to examine those complaints separately as they arose out of the same facts considered under articles 2 and 13 of the Convention.

Freedom of expression in society is necessary to draw attention to any abuse of other human rights. The right to freedom of expression includes the right to form and hold beliefs and opinions and to communicate them in any form. According to Emerson,[47] freedom of expression in a democratic society is based on four premises:

(i) freedom of expression as a means of assuring individual self-fulfilment;
(ii) freedom of expression as an essential process for advancing knowledge and discovering truth;
(iii) freedom of expression as an indispensable means for obtaining participation in decision-making by all members of society; and
(iv) freedom of expression as a method of achieving a more adaptable and thus a more stable society, and of maintaining a balance between disagreement and necessary consensus.

The right to freedom of expression is, however, qualified under international human rights law. Article 10 of the Convention acknowledges that other basic principles – national security, territorial integrity, public safety and order, human dignity, protection of confidential information and the integrity of the judiciary – may limit the right. However, the Court held in *The Observer and Guardian v. The United Kingdom (The Spycatcher case),* 14 E.H.R.R. 153, para.59 (a), that any restriction must:

(i) be "prescribed by law"
(ii) have a legitimate aim (being those set out in paragraph 2 of article 10)
(iii) be "necessary in a democratic society" to promote that aim.

In assessing whether or not the restriction on the freedom of expression is permissible, the Court stated in *The Spycatcher case* that it is "not faced with a choice between conflicting

[47] *The System of Freedom of Expression,* (New York, Vintage Books, 1970), p.3.

principles but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted".

In *Open Door Counselling and Dublin Well Woman v. Ireland,* 15 E.H.R.R. 244, paras.59-60, the Court held that "prescribed by law" meant that the restriction must be formulated with sufficient precision to enable a citizen to regulate his conduct. It does not, however, need to be codified, a restriction reasonably foreseeable from the case-law being sufficient.

Regarding the aims prescribed in paragraph 2, these represent an exhaustive list of permissible grounds for qualifying the right, but any restriction must be genuinely focused upon protecting one of those aims. Finally, the phrase "necessary in a democratic society" does not mean necessary in the sense of indispensable, but any restriction must be more than "reasonable" or "desirable." A "pressing social need" must be demonstrated, the restriction must be proportionate to the legitimate aim pursued, and the reasons given to justify the restriction must be relevant and sufficient: *Handyside v. UK,* 1 E.H.R.R. 737, paras. 48-50.

In assessing whether any particular interference is justified the Court will have regard to any public aspect of the case, the breadth of the particular restriction (an absolute restriction is unacceptable), and the appropriate margin which Contracting States may legitimately have in determining the necessity of the restriction: *Marckx v. Belgium,* 2 E.H.R.R. 330 and *Dudgeon v. UK,* 4 E.H.R.R. 149. In making its assessment, the Court will have regard to the practice of other Contracting States.

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Article 14: Prohibition on discrimination

Article 14 of the Convention provides as follows:

The enjoyment of the rights and freedoms as 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 social status.

The applicant submitted that there had been a violation of article 14 in conjunction with articles 2, 10 and 13 of the Convention on the grounds of ethnic origin and political opinion. The applicant pointed out that he and his uncle were Turkish nationals of Kurdish ethnic origin and *Ozgur Gundem* was a pro-Kurdish newspaper.

The Commission concluded that there had been no violation of article 14 of the

The Court did not consider it necessary to examine those complaints separately as they arose out of the same facts considered under articles 2 and 13 of the Convention.

Article 18: Limitation on use of restrictions on rights

Article 18 of the Convention provides as follows:

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

The applicant alleged a violation of article 18 on account of the facts revealing clear abuses of power by the State.

The Commission concluded that there had been no violation of article 18 of the Convention.

The Court did not consider it necessary to examine this complaint separately as it arose out of the same facts considered by it under articles 2 and 13 of the Convention.

Article 50: Just compensation

Article 50 of the Convention[48] provides as follows:

If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.

The applicant sought a total award of 54,000 Deutschmarks (DEM) as compensation for pecuniary damage - being DEM 4,000 in respect of hospital expenses and DEM 50,000 for loss of earnings. In addition, he claimed DEM 50,000 on behalf of Hasim Yasa's family on account of loss of earnings and costs incurred due to his death.

By way of non-pecuniary damage, the applicant sought a total sum of 150,000 pounds sterling (GBP) - being GBP 70,000 on account of: damages for the attack upon the applicant (GBP 50,000), the failure to protect his right to life (GBP 10,000), and the failure to provide him with an effective remedy (GBP 10,000); and GBP 70,000 for the family of the deceased: in respect of Hasim Yasa's murder (GBP 50,000), the failure to protect his uncle's right to life (GBP 10,000), and the failure to provide his uncle with an effective remedy (GBP 10,000); and GBP 10,000 for the applicant and his deceased uncle

[48] See now article 41 of the Convention.

as victims of a practice of violation of article 13 of the Convention.

The Government argued that no redress was necessary in the present case. In the alternative, the Government opposed the applicant's claims for compensation on a number of grounds. It argued that the compensation claimed was exorbitant - not being relative to the social conditions in the region or the wage levels in Turkey - and unjustified; that the non-pecuniary damages could not properly be separately claimed; that there was no causal connection between the complaints and the alleged damage; and that the deceased's family could not be awarded compensation on the ground that it had not taken part in the proceedings before the Commission or the Court.

The Court did not allow the applicant's claims for pecuniary and non-pecuniary damage resulting from the applicant's injuries and Hasim Yasa'a death as it was not established that the security forces were responsible for the attacks. Further, as a practice of violations was not found then no compensation was payable under this head. The Court also agreed with the Government's submission that as Hasim Yasa's family had not taken part in the proceedings then no award could be ordered in its favour.

The Court, however, held that the applicant himself was entitled to just satisfaction for non-pecuniary damage in respect of the attack upon him. Accordingly, it ordered that the Government pay the applicant the sum of GBP 6,000 on account of the State's violations of articles 2 and 13 of the Convention in respect of the attack upon him. In addition, it ordered the Government to pay the applicant's legal costs to the value of GBP 12,000 together with Value Added Tax, less an amount paid by way of legal aid, plus interest at the United Kingdom's statutory rate of 7.5% per annum.

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PART II: TEKIN v. TURKEY

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SUMMARY OF TEKIN v. TURKEY

The case of *Tekin v. Turkey* concerned the ill-treatment of the applicant while detained in police custody. The applicant complained that the conduct of the State's agents constituted violations of articles 2, 3, 10, 13, 14 and 18 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention).

On 9 June 1998, the European Court of Human Rights (the Court) delivered its judgment in the case. It held that Turkey had violated article 3 through ill-treatment of the applicant whilst detained in police custody. Further, the Court held that Turkey had breached article 13 of the Convention by reason of the Government's failure to conduct a thorough and effective investigation into the applicant's complaints of ill-treatment.

THE FACTS

The facts as presented by the applicant

The applicant, Salih Tekin, was employed as a journalist for the newspaper *Ozgur Gundem* at the relevant time. He is a Turkish citizen of Kurdish origin living in Diyarbakir, Turkey.

On 15 February 1993, under the command of officer Harun Altin the gendarmes arrested Mr Tekin on suspicion of threatening village guards while he was visiting his family in the hamlet of Yassitepe. He was taken to Derinsu Gendarme Station and held until 19 February 1993 at which time he was transferred to Derik District Gendarmerie Headquarters.

Mr Tekin alleged that while at Derinsu he was detained in a cell with no lighting, bedding or blankets in sub-zero temperatures. He said that he believed he would have died of the cold had his three brothers not been permitted to enter his cell on 18 February and wrapped him in extra clothing. The applicant also complained that he was fed with only bread and water and beaten by the gendarmes, including officer Altin.

Before being released, Mr Tekin was brought before public prosecutor Hasan Altun. He complained to Mr Altun of being tortured and ill-treated while in detention. In particular, he handed Mr Altun a wet piece of cloth with which he said he had been blindfolded while being hosed with water. Mr Altun recorded the allegations, but took no further action. Subsequently, the Supreme Council of Judges and Prosecutors decided to commence an investigation into the reasons for Mr Altun's inaction, which led to disciplinary proceedings being launched against him and which were pending at the time of the hearing before the Court.

Mr Tekin further alleged that while in detention at Derik he was blindfolded, hosed with cold water and subjected to electric shocks, and beaten by gendarmes. Mr Tekin alleged

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that the purpose of this ill-treatment was to force him to sign a statement of confession.

On 20 February 1993, Mr Tekin returned to Diyarbakir. The case was referred to the Diyarbakir State Security Court, the Derik public prosecutor having issued a decision of non-jurisdiction. A hearing was held on 13 May 1993. On 2 August 1993, Mr Tekin was acquitted of all charges of threatening village guards.

The facts as presented by the Government

The Government denied that Mr Tekin had been ill-treated. It pointed out that if Mr Tekin's allegations of severe ill-treatment had been true he would have required hospitalisation upon release from custody, yet he was unable to produce any medical reports. Further, it argued that it was not possible for the temperature in the security room to have dropped below freezing point since the room was situated in the centre of the building and surrounded by other units, which were heated by coal-burning stoves. It also submitted that cloth of the type that the applicant had handed to the public prosecutor could not have been used as a blindfold because of its loose style of weaving. The Government also denied that Mr Tekin's brothers had been allowed to join him in the detention room.

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

On 8 November 1995 and 7 March 1996, the Commission conducted investigations into the facts in Diyarbakir and Strasbourg respectively. Three Commission Delegates heard the oral testimony of several witnesses including the applicant, the applicant's father (Haci Mehmet Tekin), officers Harun Altin and Musa Citil, and three neighbours of the applicant's father (Sinan Dinc, Mehmet Dinc and Halit Tutmaz). Despite being served with requests from the Commission to attend the hearing to give evidence, public prosecutors Hasan Altun, Bekir Ozenir and Osman Yetkin from the Diyarbakir State Security Court failed to appear.

The Commission was unable to determine the nature of the treatment to which the applicant was subjected while in detention nor the date on which it occurred. Nevertheless, the Commission was satisfied that the applicant had been detained in a cold, dark cell, and blindfolded and interrogated in a way that left wounds and bruises on his body.

The findings of fact of the European Court of Human Rights

The Court accepted the facts as found by the Commission. In particular, it stated that it gave weight to the Commission's findings because its Delegates had had the opportunity to observe the witnesses' demeanor in giving their version of events and under questioning from the other party. It observed that the Commission found the applicant's testimony to be consistent and persuasive but found the evidence given by the Government to be flawed

and unreliable.

As to the Government's submissions that the applicant had not adduced before the Court any independent medical evidence to support his claims of ill-treatment, the Court noted that the State authorities took no steps to ensure that Mr Tekin was seen by a medical practitioner during his detention or upon his release although he had complained of ill-treatment to the public prosecutor who, by Turkish law, had a duty to investigate his complaint. In addition, the Court noted that the public prosecutor, Mr Altun, who was most able to shed light on the applicant's condition after his release from custody, failed without good cause to comply with the Commission's requests to attend its hearings. In this regard the Court expressed its view that the Government was unreasonable in complaining of the evidence upon which the Commission had based its findings since by failing to secure the attendance before the Commission of key Government witnesses as required by the former article 28(1) of the Convention it had failed to "furnish all necessary facilities" to the Commission for its investigation.

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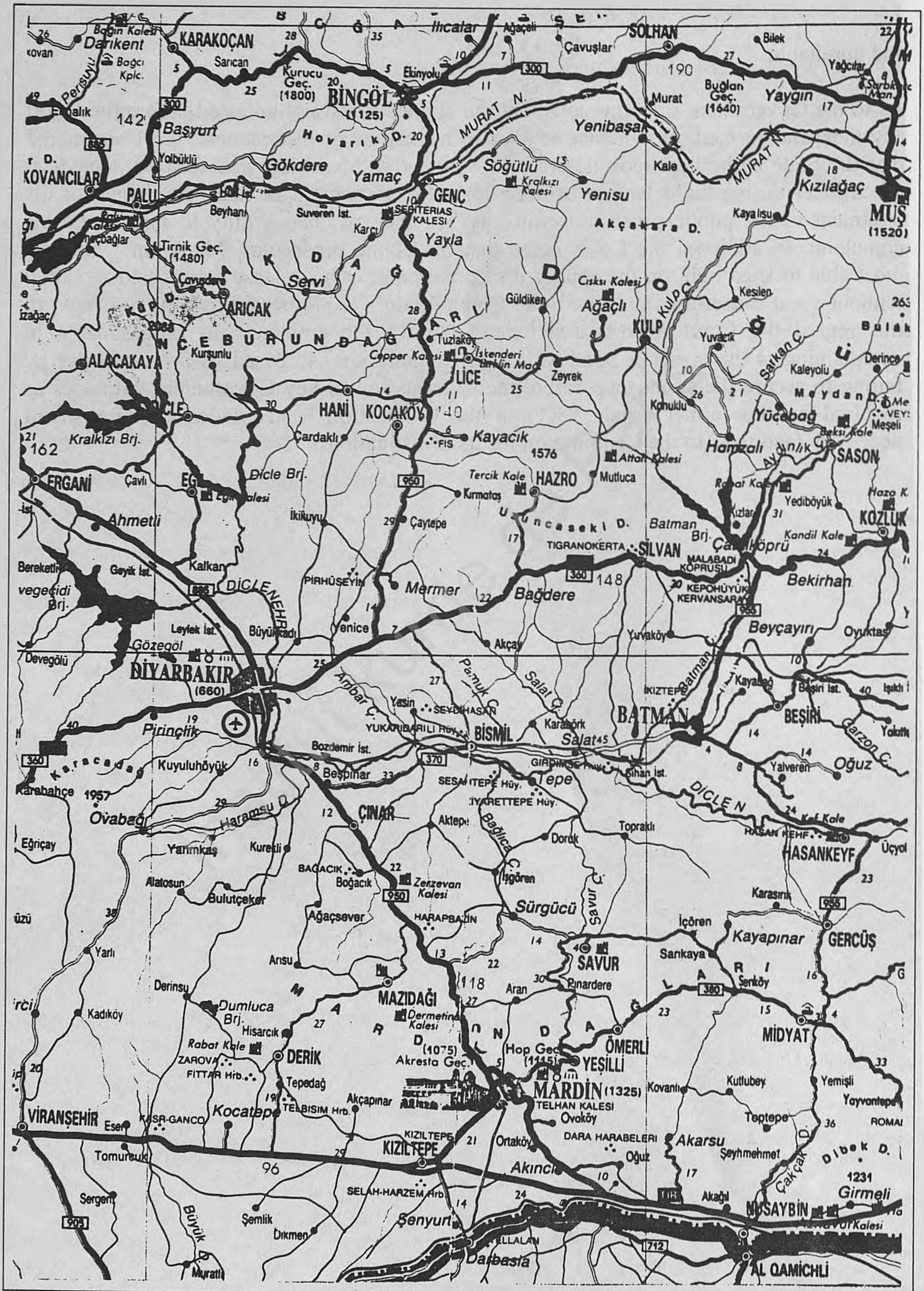
MAP OF THE AREA WHERE THE ALLEGED INCIDENT OCCURRED



THE LEGAL PROCEEDINGS

Chronology of events, including legal proceedings

15 February 1993	Applicant arrested by gendarmes under the command of Officer Harun Altin and taken to Derinsu Gendarme Station.
18 February 1993	Applicant's brothers allegedly take clothing to applicant in his cell.
19 February 1993	Applicant taken to Derik District Gendarmerie Headquarters, brought before public prosecutor Hasan Altun and later released.
13 May 1993	Hearing of applicant's case before Diyarbakir State Security Court regarding charge of threatening village guards.
14 July 1993	Applicant, assisted by Kurdish Human Rights Project and the Human Rights Association of Turkey, lodges complaints with Commission.
11 October 1993	Commission communicates applicant's application to the Government.
18 December 1993	Turkish Ministry of Justice informs Derik public prosecutor's office of applicant's application under the Convention and opens an investigation.
20 April 1994	Daday district public prosecutor questions officer Altin.
4 May 1994	Derik public prosecutor issues a decision of non-prosecution regarding officer Altin and Commander Citil.
4 May 1995	Derik public prosecutor issues decision of non-jurisdiction and case is referred to Derik District Administrative Council.
5 September 1995	Derik District Administrative Council submits its investigation report to the Office of the Mardin Provincial Governor.
13 September 1995	Decision of non-prosecution by the Mardin Provincial Administrative Board and later confirmed by the Council of State.
8 November 1995	Commission Delegates conduct investigation hearing at Diyarbakir.
7 March 1996	Commission Delegates hear further oral testimony at Strasbourg.
20 February 1995	Commission declares application admissible.
17 April 1997	Commission finds Turkey in breach of articles 3 and 13.
27 May 1997	Commission refers the case to the Court.
25 March 1998	Hearing before Court at Strasbourg.
9 June 1998	Court delivers judgment and finds Turkey to have violated arts.3 and 13.

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The proceedings before domestic authorities

On 18 December 1993, the Ministry of Justice contacted the public prosecutor's office in Derik informing them of the applicant's complaints to the Commission. A preliminary investigation was commenced.

On 20 April 1994 the Derik public prosecutor ordered a public prosecutor in Daday district to question officer Altin in connection with Mr Tekin's complaints. On 4 May 1994, Mr Ozen issued a decision of non-prosecution in relation to officers Altin and Citil on the ground that there was no independent evidence that they had ill-treated Mr Tekin. The Ministry of Justice considered that the alleged offences might fall within the scope of the Law on the Prosecution of Civil Servants, over which the public prosecutor had no jurisdiction.

On 4 May 1995, a decision of non-jurisdiction was issued by the Derik public prosecutor and the case referred to the Derik District Administrative Council. On 14 July 1995 a Gendarme Lieutenant Colonel took a statement from Commander Citil. On 5 September 1995 the Derik District Administrative Council submitted its summary investigation report to the Mardin Provincial Administrative Council, which decided on 13 September 1995 that officers Altin and Citil were immune from public prosecution due to lack of evidence. The Council of State confirmed this decision of non-prosecution on appeal.

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

On 1 November 1998, Protocol 11 of the Convention entered into force. The effect of the Protocol is to establish a full-time, single court to replace the European Commission of Human Rights and the European Court of Human Rights. Under the new procedure all applications are registered by a Chamber of the Court and assigned to a judge-rapporteur. If the judge-rapporteur refers the application to a three-judge committee, the committee may by unanimous decision declare the application inadmissible. Otherwise a Chamber of seven judges will examine the application in order to determine the merits of the case and any issue of the Chamber's competence to adjudicate.

Tekin's case was decided prior to the Protocol 11 procedure coming into effect. The procedure involved in lodging a complaint with the former Commission has already been explained in our previous publication *Aksoy v. Turkey; Aydin v Turkey - A Case Report on the Practice of Torture in Turkey* (London 1997). Further information about the procedure in the Commission and the Court, 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) and *A Practitioner's Guide to the European Convention of Human Rights*, K. Reid (Sweet &

Maxwell, London 1998).

Investigation hearings

(1) Under the new procedure

Under the new procedure, the assigned judge-rapporteur prepares the case file and establishes contact with the parties. The parties then submit their observations in writing. Any hearing of the matter will take place before the Chamber, which will make itself available to the parties with a view to a friendly settlement of the dispute. In the event of a friendly settlement not being reached, the Chamber will deliver its judgment in the case. Where the Chamber decides not to follow its own case-law or where an issue of principle is involved, the Chamber may, under the new article 30 of the Convention, refer the case to the Grand Chamber of its own motion provided neither party objects. The parties have three months after delivery of the judgment to lodge a request to refer the case to the Grand Chamber. The right to appeal to the Grand Chamber is not automatic and the request will be granted only in exceptional cases, such as when a case raises a serious question concerning the application and interpretation of the Convention. As under the pre-Protocol 11 system, the Committee of Ministers will supervise the execution of the judgment.

(2) Under the old procedure

Under the pre-Protocol 11 procedure, if the Commission considered it necessary, it was able, under former article 28 (1)(a) of the Convention to "undertake ... an investigation for the effective conduct of which the state concerned shall furnish all necessary facilities". 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) of the Convention 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.

In *Tekin,* in addition to accepting documentary material, three Commission Delegates heard the oral evidence of seven witnesses in Diyarbakir on 7 November 1995 and on 7 March 1996. The witnesses included the applicant and his father, officers Harun Altin and Musa Citil and three neighbours of the applicant's father (who allegedly spoke to the applicant shortly after his release). The Commission had also requested the attendance of public prosecutors Hasan Altun, Bekir Ozenir and Osman Yetkin to give evidence, but they failed to appear.

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

Before the Court, the applicant in *Tekin* complained of violations of articles 2, 3, 10, 13, 14 and 18 of the Convention. The applicant did not pursue his claims of breaches of articles 5(1) and 6(1), which he had argued before the Commission. The Court held that Turkey had breached articles 3 and 13 of the Convention as set out in the table below.

Articles allegedly violated	Commission's Opinion	Court's Judgment
Article 2 (right to life)	No violation	No violation
Article 3 (prohibition of torture)	Violation	Violation
Article 10 (freedom of expression)	No violation	No violation
Article 13 (right to an effective remedy)	Violation	Violation
Article 14 (prohibition of discrimination)	No violation	No violation
Article 18 (limitation on use of restrictions on rights)	No violation	No violation

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 that his treatment in police custody amounted to a violation of article 2 of the Convention. The acts which Mr Tekin complained had violated his right to life included verbal death threats by officer Altin and other gendarmes on the way to Derinsu Gendarme Station; being held in detention in sub-zero conditions with the intention of causing his death; and the threats of Commander Citil of Derik Gendarmerie Headquarters to "open up two holes in his head" if he returned to the area. In particular,

the applicant submitted that he would not have survived in his cell if his brothers had not brought him extra clothing for warmth when they visited.

The Commission found no indication that the law as required by article 2 of the Convention had protected the applicant's right to life.

The Government denied the applicant was ill-treated while in police custody. It pointed out that he had not received any medical treatment upon his release from custody, which would have been necessary had he been ill-treated as alleged. Further, it claimed that the assertion that his brothers had been permitted by the police to visit him in detention was unbelievable. Also the claim that he had been tortured for the purpose of obtaining a confession lacked credibility in view of the fact that he had denied all the charges against him. Similarly, the applicant's failure to repeat the allegation regarding electric shocks made in his original application to the Commission and the absence of evidence as to electric shock marks on his body cast doubt on the truth of his testimony. Finally, the Government submitted that a cloth of the type allegedly handed to the public prosecutor by the applicant could not have been used as a blindfold because of its loose weave.

The Court found that the facts did not amount to an interference with his right to life within the meaning of article 2. Accordingly, there was no violation of article 2 of the Convention.

Article 3: Prohibition of torture and other ill-treatment

Article 3 of the Convention provides as follows:

No one shall be subject to torture or to cruel or to inhuman or degrading treatment or punishment.

The applicant argued that his treatment while in detention amounted to torture. He stated that, despite the fact that the gendarmes were aware that he had only one kidney, he was blindfolded whilst interrogated, assaulted and threatened with death, kept in total darkness and sub-zero temperatures with no bed or blankets for four days, and given only bread and water while being held in Derinsu Gendarme Station. At Derik Gendarmerie Headquarters he had again been blindfolded, stripped naked, hosed with cold water, beaten with a truncheon to the body and the soles of his feet, and electric shocksadministered to his fingers and toes.

The Commission considered the treatment to which the applicant was subjected as a whole. It found that the conditions of detention and the treatment constituted at least inhuman and degrading treatment within the meaning of article 3.

The Government maintained its denials that the applicant had been ill-treated.

The Court recalled the relative nature of the standard set by article 3 and the requirement that, in respect of a person deprived of his liberty, recourse to unnecessary physical force diminishes human dignity and is in principle a violation of article 3. The Court then took into account the facts established before the Commission, in particular that the applicant was held in a cold and dark cell, blindfolded, and interrogated in a manner that left wounds and bruises on his body. It considered that the way in which the applicant was held and the manner in which he must have been treated in order to leave wounds and bruises on his body constituted inhuman and degrading treatment within the meaning of article 3 of the Convention.

Article 10: Freedom of expression

Article 10 of the Convention[49] provides as follows:

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 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.

The applicant alleged that his arrest and ill-treatment in detention were motivated by his employment as a journalist for the newspaper *Ozgur Gundem*. The applicant submitted that the newspaper has a Kurdish separatist stance and those ill-treating him were hostile to its point of view. He stated that officer Altin questioned him about his work as a journalist and consequently he received death threats. Commander Citil at Derik Gendarmerie Headquarters made similar threats.

The Commission held that there was insufficient evidence to corroborate the applicant's complaint under article 10.

The Government made no submission directly on this complaint.

The Court held that the applicant had not established that his detention and ill-treatment in custody constituted an interference with his right to freedom of expression. Accordingly, it found no violation of article 10.

[49] See pp. 23-24 above.

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Article 13: Right to an effective remedy

Article 13 of the Convention provides as follows:

Everyone whose rights 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 submitted that he had been denied an effective remedy for his complaints of ill-treatment and argued that the modifications to the law introduced by the State of Emergency legislation offering officials in the region *de jure* or *de facto* immunity operated to deny any effective remedy to victims of abuse of power. Thus, he argued, the State of Emergency legislation effectively rendered it impossible for the State to satisfy its obligations under articles 1 and 13 of the Convention.

The Commission found that the investigation into the applicant's allegations of torture was so inadequate as to constitute a denial of an effective remedy. In particular, it noted the applicant had made a complaint to Mr Altun, the Derik public prosecutor, of having been tortured while in detention and that Mr Altun took no action. It also considered the investigation commenced after the applicant had lodged complaints with the Commission to be inadequate and, in any event, did not make up for the initial inaction.

The Government argued that the domestic remedies were effective as was evidenced by the fact that the public prosecutor's inactivity had led to an investigation into his conduct of Mr Tekin's case.

The Court observed that where an individual has an arguable claim that he or she has been tortured or subjected to ill-treatment by agents of the State then the notion of an effective remedy involves "a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure". The Court noted that when he was released the applicant complained to the public prosecutor of ill-treatment while in detention and that no action was taken in respect of his complaints. Further, it observed that a Government investigation was only commenced following the Commission's communication of the applicant's complaints to the Government. Even then four months elapsed before a statement was taken from officer Altin and no attempt was made to question Commander Citil until 12 months after the non-prosecution decision was taken.

The Court held that the investigation was not thorough and effective and therefore found a breach of article 13. However, it was unable to find on the evidence that the modifications to the law introduced by the State of Emergency legislation operated to deny an effective remedy to victims of abuses of power.

Article 14: Prohibition on discrimination

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.

The applicant submitted that he was discriminated against because he was ill-treated on the ground of his Kurdish ethnic origin.

The Commission considered this claim to be unsubstantiated.

The Government denied the factual basis as alleged by the applicant.

The Court also found that there was insufficient evidence before it to substantiate this complaint.

Article 18: Limitation on use of restrictions on rights

Article 18 of the Convention provides as follows:

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

The applicant claimed that his ill-treatment represented an unauthorised practice by the State in breach of article 18 of the Convention.

The Commission held that the applicant's complaints under article 14 were unsubstantiated.

The Government denied the factual basis as alleged by the applicant.

The Court found that there was insufficient evidence to substantiate the applicant's claim under this head.

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Article 50: Just satisfaction

Article 50 of the Convention[50] provided as follows:

If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.

The applicant claimed a total sum of 25,000 pounds sterling (GBP) and aggravated damages of GBP 25,000 as well as GBP 19,770.11 on account of legal costs and expenses.

The Government argued that a finding in favour of the applicant would be sufficient just satisfaction.

The Court ordered the Government to pay to the applicant the sum of GBP 10,000 by way of compensation for the violation of articles 3 and 13 of the Convention. In addition, the Court ordered the Government to pay GBP 15,000 in respect of the applicant's legal costs and expenses.

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[50] See now article 41 of the Convention.

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APPENDIX A

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EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 22495/93

Esref Yasa

against

Turkey

REPORT OF THE COMMISSION

(adopted on 8 April 1997)

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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 born in 1962, who lives in Diyarbakir. He complains on his own behalf and on behalf of his uncle, Hasim Yasa, who was a Turkish citizen born in 1956 and resident in Diyarbakir until he was shot dead on 14 June 1993. The applicant is represented before the Commission by Professor K. Boyle and Ms. F. Hampson, both teachers at the University of Essex, England.

3. The application is directed against Turkey. The respondent Government were represented by their Agent, Mr. B. Çaglar.

4. The applicant alleges that he was seriously injured and his uncle killed in attacks by agents of the State as part of a campaign against persons involved in the distribution of certain newspapers, that he was ill-treated by the police while in detention and that he has no access to court or effective remedy in respect of these matters. He invokes Articles 2, 3, 10, 6, 13, 14 and 18 of the Convention.

B. The proceedings

5. The application was introduced on 12 July 1993 and registered on 20 August 1993.

6. On 11 October 1993, the Commission decided, pursuant to Rule 48 para. 2 (b) of its Rules of Procedure, to give notice of the application to the respondent Government and to invite the parties to submit written observations on its admissibility and merits.

7. The Government's observations were submitted on 22 April 1994, after two extensions in the time-limit fixed for this purpose. The applicant replied on 15 June 1994.

8. On 30 August 1994, the Commission requested the Government to submit further information.

9. On 24 October 1994, the Government provided further information after an extension in the time-limit. The applicant submitted comments on this information on 20 December 1994.

10. On 3 April 1995, the Commission declared the application partly admissible, partly inadmissible.

11. The text of the Commission's decision on admissibility was sent to the parties on 10 April 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 they might wish to put before delegates.

12. On 18 April 1995, the Government submitted supplementary comments on the application. On 24 April 1995, the applicant submitted supplementary information.

13. Following an extension in the time-limit for the submission of observations on the merits, the Government provided observations on 17 July 1995. The applicant submitted comments on these observations on 7 September 1995.

14. On 9 September 1995, the Commission examined the state of proceedings and decided to request further written observations on the merits in relation to specified questions, fixing a time-limit of 1 November 1995. The applicant's response was submitted on 3 November 1995. The Government were reminded by letter of 25 January 1996 that they had not replied to the Commission's request and informed that the Commission would shortly examine the application. A new time-limit of 22 February 1996 was fixed for the Government's response. The Government's observations were received on 10 April 1996.

15. On 18 May 1996, the Commission considered the state of proceedings. On its instructions, the Secretariat consulted the parties to verify that neither party considered that there was essential evidence that should be taken orally before the Commission's delegates. The parties were requested to respond by 17 June 1996. An extension was granted at the request of the Government until 5 July 1996.

16. By letter dated 14 June, the applicant replied that there was no essential evidence which he wished heard by Commission delegates.

17. By letter dated 2 July 1996, the Government informed the Secretariat that they had no objection to the hearing of witnesses. By letter dated 5 July 1996, the Secretariat replied that the Commission had not proposed taking evidence but that the Government should inform the Commission by 2 August 1996 if there were any witnesses which the Government considered should be heard. No further response has been received from the Government.

18. On 19 October 1996, the Commission examined the state of

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proceedings in the application.

19. On 8 April 1997, the Commission decided that there was no basis on which to apply Article 29 of the Convention.

20. 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

21. 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:

Mr. S. TRECHSEL, President
Mrs. G.H. THUNE
Mrs. J. LIDDY
MM. E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H. DANELIUS
F. MARTINEZ
C.L. ROZAKIS
L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
I. BÉKÉS
J. MUCHA
D. SVÁBY
G. RESS
A. PERENIC
C. BÎRSAN
P. LORENZEN
K. HERNDL
E. BIELIUNAS
E.A. ALKEMA
M. VILA AMIGÓ
Mrs. M. HION
MM. R. NICOLINI
A. ARABADJIEV

22. The text of this Report was adopted on 8 April 1997 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.

23. 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.

24. The Commission's decision on the admissibility of the application is attached hereto as an Appendix.

II. ESTABLISHMENT OF THE FACTS

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A. The particular circumstances of the case

1. Concerning the incidents involving the applicant and his uncle

a. Facts as presented by the applicant

25. Until recently the applicant carried out the business of a newsagent or newspaper vendor from a shop or a kiosk in the town of Diyarbakir. From October 1992 his life has been threatened by the police because he sold certain newspapers, especially Özgür Gündem and Özgür Halk.

26. In November 1992 about a week before his shop was set on fire and burned down, he was visited by two police officers from the Diyarbakir Security Headquarters. One of them was Commissioner Kemal Fidan. The applicant did not know the other officer's name. These policemen told him that they would burn down his shop.

27. In the early hours of 15 November 1992 his shop was set on fire and destroyed. He calculates the damages as being 70 000 000 Turkish Liras.

28. After this incident, the other newsagents decided to make a protest strike and on a date unspecified in November 1992 refused to sell anything including all newspapers. The police forced the sellers to accept newspapers and sell them but the applicant refused. As a result he was taken to the police station where he was ill-treated.

29. On 15 January 1993 at 07.00 hours the applicant was shot at in the Mardin Kapi area in Turistik Street. He provides the following account: when he was going by bicycle from home to his workplace with his son, he noticed two people about 20-25 years old, one of them tall and the other of average height. As a passenger minibus came past him from behind very quickly he was driven towards the pavement where these men were and he stopped. At that moment he saw one of the two men firing a gun. Immediately he pulled out his unlicensed 7.65 mm pistol from his waist, and fired six shots. None of them hit the mark. But eight bullets from the gun fired at him hit his body, three of these grazing his back and one his right leg. One entered his right arm, one his left wrist, one between his left fore and middle fingers and one through his right buttock into his belly.

30. The applicant got in a car and went to Diyarbakir hospital. He gave the driver his unlicensed gun and asked him to take it and leave it with one of his relatives.

31. According to the applicant his operation to remove bullets in the Diyarbakir hospital intensive care unit was delayed for two hours by the actions of the police. His relatives were later subjected to insults and death threats at the hospital.

32. The applicant spent 11 days in the hospital. His left arm and several fingers of his left arm are still unusable.

33. The applicant made a statement to the police at the hospital in which he claimed that his assailants were police. He has not been asked to make a statement about this crime by any prosecutor.

34. On 14 June 1993 at 07.30 hours, the applicant's uncle, Hasim Yasa, was shot and killed. He had been managing the applicant's newspaper business since March 1993, while the applicant kept away due to fear. He died as a result of bullets fired in the head by unknown assailants. His seven year old son was the only witness. On the same day, the applicant was arrested, assaulted and threatened with death by the police. He was told by the police that they had carried out the shooting and that he was the intended target.

35. Investigations by the public prosecutor at Diyarbakir into the

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shooting of the applicant and the killing of his uncle, which were commenced at a date unspecified in 1993, are still pending.

b. Facts as presented by the Government

36. The Government refer to the investigations of the public prosecutors into these events. They deny any allegations of wrongdoing, ill-treatment of the applicant or his uncle for which State authorities might be responsible. They state that the applicant has not complained to the public prosecutor that the shooting of himself and his uncle was the responsibility of the authorities.

2. Proceedings before the domestic authorities

Concerning the shooting of the applicant

37. A police report dated 15 January 1993 records the shooting to have taken place at about 07.15 hours in Turistik Street. Fifteen empty cartridges and two bullet shells were taken for forensic examination. A plan of the scene was drawn up.

38. A police incident report dated 16 January 1993, countersigned by the applicant's brother Nazif Yasa and a nurse, records that the applicant was taken to hospital for treatment. The applicant was reminded of his right to a lawyer. The applicant stated that he was not fully conscious and that since he wanted a lawyer, he would not give a statement.

39. A statement was taken by the police from the applicant in hospital on 17 January 1993 in the presence of his lawyer. This statement indicated as follows. On 15 January 1993, while riding on his bicycle to his newspaper kiosk with his son Diren on the back, he noticed two persons (description detailed) waiting, one about 10 metres away, and became alarmed that they intended some harm. He tried to turn his bicycle but it was struck by a taxi and he and his son fell to the ground. He was aware of one of the two men shooting at him and he drew his own Ceska pistol and fired back. He did not know if the second man fired since he was injured and fainting. The applicant stated that he was the intended murder victim because he ran a newsagent's business and sold specifically left wing newspapers. There had been previous attacks on newsagents which was why he had bought the Ceska pistol and had been carrying it with him for the previous three-four days.

40. A police custodial and seizure record dated 15 January 1993 indicates that the applicant had given his pistol to the taxi driver who had taken him to hospital and that it had then been taken to the applicant's kiosk. The police questioned the person at the kiosk, Sahabettin Altunhan, about the gun and it was produced from a scrap tin box under the counter. The taxi driver and Sahabettin Altunhan were taken into custody and their statements concerning the gun were taken (dated 15 January 1993) from which it appears that the applicant gave the gun to the taxi driver who took him to hospital, that he had given it to another taxi driver (also taken into custody and a statement taken on 15 January 1993) who knew the applicant's kiosk and that that second taxi driver had placed the gun under the counter. The three persons concerned were released from custody the same day.

41. In response to an enquiry of 15 January 1993 from the Security Directorate police, the hospital doctor recorded the following injuries to the applicant: one bullet entry to the left gluteal region, one bullet entry and exit to the middle left fore arm, one bullet scratch to the left index finger, one bullet entry and exit on the middle front upper right arm between the elbow and axillary region and a bullet track slightly below the skin tissue, surfacing under the arm.

42. A summary incident report dated 17 January 1993 concerning the shooting incident and titled as crime record no 1993/C-14 referred to the applicant as an injured suspect and stated that the other unidentified suspects were at large.

43. A note dated from 20 January 1993 from the public prosecutor requested the public security branch to pursue the grievous bodily harm case involving the applicant and to investigate and apprehend the suspects.

44. An expert ballistics report from the Diyarbakir regional criminal police laboratory dated 11 February 1993 indicated that the cartridges found at the scene of the shooting on 15 January 1993 showed identical traces and marks to those in the shooting of Mehmet Tekdag in Diyarbakir on 11 February 1993 and in the killing of Mehmet Sait Erten in Diyarbakir on 3 November 1992.

45. A hospital report to the public prosecutor dated 2 March 1993 indicated that the applicant's general medical state was good and that he was to be seen in a month's time. A further report dated 8 April 1993 indicated that the applicant would be unable to work for one month and that recovery would take two months.

46. A note dated 14 April 1993 from the public prosecutor requested the public security branch to pursue the grievous bodily harm case involving the applicant and to investigate and apprehend the suspects, prepare the case-file and otherwise for the search to continue and the public prosecutor's office (office of the Attorney General) to be kept informed every three months until the end of the deadline (indicated as 15 January 1998).

Concerning the shooting of Hasim Yasa

47. A preliminary investigation file no. 1993/2248 was opened into the killing of Hasim Yasa and is, according to a letter dated 2 November 1995 from the prosecutor at the Diyarbakir State Security Court, still pending. The file as provided by the Government contains an autopsy report dated 14 June 1993, recording four bullet entry wounds, two of which were fatal. The police prepared a scene of the incident sketch and took statements on 14 June 1993 from two witnesses at the scene of the shooting, which occurred about 07.50 hours. According to these statements, Vedat Simsek heard the shots, saw a person running behind the people who were gathering but would be unable to identify him. Ramazan Orhan, who ran a stall in the street, heard but did not see the shooting. When he reached the scene, Hasim Yasa was lying on the ground and he helped him into a taxi to take him to the hospital. Minutes noted by the police on questioning Hasim Yasa's son Aziz (7-8 years) recorded that the boy was with his father during the incident, that he saw but did not recognise the attacker. The boy stated that after the first shot Hasim Yasa fell to the ground, that the attacker repeatedly fired his gun at him and then made his escape. An expert ballistics report dated 21 June 1993 indicated that the bullet shells retrieved from the scene were too deformed for useful examination.

48. No other information has been received concerning any steps of investigation taken in relation to these incidents.

B. The evidence before the Commission

49. In addition to the statements and investigation file materials referred to above, submissions and materials have been submitted relating to background events.

Facts as presented by the applicant

50. The applicant alleges that there has been a campaign of persecution and attacks directed towards those involved in the distribution of certain newspapers, in particular, the Özgür Gündem. Reference is made to the following incidents:

Closure of the Özgür Gündem

51. The Özgür Gündem ceased publication in April 1994 as the result of a culmination of prosecutions brought against it by the State. From its inception in May 1992, it had been subject to prosecutions and confiscations. It had temporarily ceased production from 15 January 1993 to 26 April 1993 due to the number of closure orders and fines. While it was never officially banned from sale, there were periods when confiscation and closure orders prevented or rendered difficult publication or distribution. The Özgür Ülke, the successor to the Özgür Gündem, was forced to close in February 1995 and the Yeni Politika which replaced it ceased publication in August 1995.

Attacks on Özgür Gündem staff

52. The applicant has provided lists of attacks, ill-treatment, detentions and threats made against staff and distributors of the Özgür Gündem and similar newspapers in 1992, 1993 and early 1994. He alleges that these show a pattern of targeting persons working for Özgür Gündem.

53. The applicant states that at least seven journalists working for the Özgür Gündem have been killed (Yahya Orhan, Hüseyin Deniz, Musa Anter, Hafiz Akdemir, Cengiz Altun, Ferhat Tepe and Kemal Kiliç) while others have been subject to attack and injury (Burhan Karadeniz, Mehmet Senol, Aysel Malkaç and Nazim Babaoglu). Numerous other journalists have been detained in custody and, in some instances, been subject to ill-treatment (Salih Tekin).

54. The applicant states that news stands have been attacked for selling the Özgür Gündem:

- On 16 November 1992, the news stand of Kadir Saka was subject to an arson attack in Diyarbakir. He claimed that he had been threatened by the security forces prior to the burning.
- On 19 November 1992, in the Sehitlik district of Diyarbakir, a stationers owned by Süleyman Sunal was burned down.
- In Mazidagi, the main newsagent was threatened and subject to an arson attack.
- On 24 November 1992 in Bingöl a teashop belonging to Zeki Bulut, which sold the newspaper, was burned.
- In early October 1993, in the Yüksekova district of Hakkari, the newsagents belonging to Ferhat Altun was attacked by special teams.
- On 21 October ?1993, the Kültür bookshop in Van was burned down after a molotov cocktail was thrown into it by unidentified persons. The shop had been previously threatened by the security forces.
- On 3 December 1994, Özgür Ülke's headquarters in Istanbul and the office in Ankara were bombed, killing one person and injuring 18.

55. There have also been numerous incidents in which persons and vehicles involved in distributing the Özgür Gündem have been attacked. The applicant states that eleven vendors or distributors have been killed: Kemal Ekinci, Halil Adanir, Orhan Karaagar, Lokman Gündüz, Hasim Yasa, Zülküf Akkaya, Adil Baskan, Yalçin Yasa, Kadir ipeksümer, Mehmet Sencer and Adnan Isik. In addition, on 29 November 1992 newsagent Coskun Baloglu, who had been previously threatened, was attacked by two unknown persons with clubs and severely beaten; in September 1993, Abdülkadir Altan was seriously injured when he was attacked with meat axes by two persons within 150 metres of the Mardinkapi police station in Diyarbakir; on 2 January 1993, six persons selling the newspaper in Batman were stopped, beaten up and had their papers confiscated in full sight of the police who did not act; on 8 August 1993 Senol Öztürk who was distributing newspapers in Mersin was beaten up by the police and taken to the police station; the vehicle belonging to the main newsagent in Bingöl was destroyed by fire on 17 November 1992.

56. The applicant also states that persons involved in distributing

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the newspaper have been frequently subjected to threats. In Bismil, the main newsagent ibrahim Savas was threatened that he would be killed if he sold the Özgür Gündem. On 18 November 1993, the main newsagent in Silvan, Gani Amac, was threatened and stopped selling the paper. In Batman, the chief newsagent Muharrem idman received death threats and stopped selling the newspaper. The applicant states that on 20 November 1992 20 newsagents in Diyarbakir decided not to sell the Özgür Gündem because of the risks involved. He refers also to 32 statements from streetsellers who in 1992-1993 decided not to sell the newspapers because of the risks involved. On 12 October 1993 Volkan distribution in Antalya received death threats for distributing the paper. They had already been subject to an arson attack and four vehicles doing freight work had been destroyed. They decided that they could no longer distribute the paper. A similar threat was made to Erdem Marketing in Antalya on 12 October 1993 and they also stopped distribution.

57. A statement from the Secretary of the Human Rights branch at Diyarbakir made in or about June 1994 refers to an eight and a half months closure of the Özgür Gündem and it is alleged that the new newspaper, Özgür Ülke, intended to replace it, has been effectively prevented from being delivered to Diyarbakir, those copies which arrive being subject to seizure.

58. Reference is also made to the numerous prosecutions instituted against the Özgür Gündem and its owners, editors and journalists, which have involved closure orders, confiscations and heavy fines. These are the subject of Application No. 23144/93 Ersöz and others v. Turkey, declared admissible on 20 October 1995. For example, from 31 May 1992 to April 1993, 39 out of 228 issues of the newspaper had been subject to confiscation orders and between April and July 1993 a further 41 issues were confiscated. The prosecutions against the editors, owners and journalists were based, inter alia, on the provision under the Anti-Terrorism Act prohibiting propaganda against the indivisible unity of the State.

59. The applicant refers to publications detailing information and concerns about infringements on freedom of expression in Turkey through legal and extralegal pressures on certain newspapers and those persons involved with them eg. "A desolation called peace" report by the Parliamentary Human Rights Group, "Censorship and the rule of law in Turkey: violations of press freedom and attacks on Özgur Gündem" by Article 19, "What happened to the press in 1993" by Özgür Gündem and extracts from 1993 Info-Türk (E.208-7, E.209-6, E.212-8/9) and "Free Expression in Turkey 1993: Killings, convictions, confiscations" Helsinki Watch Vol. 5 Issue 17 and "L'intimidation - rapport sur les meurtres de journalistes et les pressions à l'encontre de la presse turque" by Reporters Sans Frontières (January 1993).

Facts as presented by the Government

60. The Government refute any allegation that there has been official intimidation of persons connected with the sale of newspapers, such newspapers being freely available throughout Turkey. Only when the courts in Istanbul, where the headquarters of the Özgür Gündem was located, issued the requisite order for seizure were any steps taken to confiscate copies of the paper. Seizure of copies would not be possible without such order.

61. In a letter dated 2 November 1995, appended to the Government observations, from the public prosecutor's office at the Diyarbakir State Security Court to the Ministry of Justice (General Directorate of International Law and Foreign Relations), it is stated that there were no assassins acting on the State's behalf in South-Eastern Anatolia. There were armed conflicts, taking place between armed organisations or internal conflicts within organisations but attributing such incidents to the State and labelling such individuals as state assassins were ugly claims.

C. Relevant domestic law and practice

62. The Government submit that the following provisions are relevant.

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."

63. 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.

64. 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."

65. The Turkish Criminal Code makes it a criminal offence

- to oblige someone through force or threats to commit or not to commit an act (Article 188),
- to issue threats (Article 191),
- to commit arson (Articles 369, 370, 371, 372), or aggravated arson if human life is endangered (Article 382),
- to commit arson unintentionally by carelessness, negligence or inexperience (Article 383), or
- to damage another's property intentionally (Article 526 et seq.).

The Turkish Criminal Code makes it a criminal offence to subject someone 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).

66. 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.

67. If the suspected authors of the contested acts are military personnel, they may also be prosecuted for causing extensive damage, endangering human lives or damaging property, if they have not followed orders in conformity with Articles 86 and 87 of the Military Code.

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Proceedings in these circumstances may be initiated by the persons concerned (non-military) before the competent authority under the Code of Criminal Procedure, or before the suspected persons' hierarchical superior (Articles 93 and 95 of Law 353 on the Constitution and the Procedure of Military Courts).

68. 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 Executive Committee of the Provincial Assembly). The local council decisions may be appealed to the Council of State; a refusal to prosecute is subject to an automatic appeal of this kind.

69. 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.

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

71. Damage caused by terrorist violence may be compensated out of the Social Help and Solidarity Fund.

72. The applicant points to certain legal provisions which in themselves weaken the protection of the individual which might otherwise have been afforded by the above general scheme :

73. Articles 13 to 15 of the Constitution provide for fundamental limitations on constitutional safeguards.

74. 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.

75. 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.

76. Decree 285 modifies the application of Law 3713, the Anti-Terror Law (1981), in those areas which are 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.

77. 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 individuals to claim indemnity from the State for damage suffered by them without justification."

78. According to the applicant, this Article grants impunity to the Governors. Damage caused in the context of the fight against terrorism would be "with justification" and therefore immune from suit. The law, on the face of it, grants extraordinarily wide powers to the Regional Governor under the state of emergency and is subject to neither parliamentary nor judicial control.

III. OPINION OF THE COMMISSION

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A. Complaints declared admissible

79. The Commission has declared admissible the applicant's complaints that he was seriously injured and his uncle killed, that he was ill-treated by the police in detention and his treatment in hospital was interfered with, that he has no access to court and no effective remedy in respect of his complaints, that he has been subject to discrimination and that his experiences disclosed restrictions on Convention rights for ulterior purposes.

B. Points at issue

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

- whether there has been a violation of Article 2 (Art. 2) of the Convention in respect of the applicant and/or his uncle;

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

- whether there has been a violation of Article 10 (Art. 10) of the Convention in respect of the applicant;

- whether there has been a violation of Article 6 para. 1 (Art. 6-1) of the Convention in respect of the applicant;

- whether there has been a violation of Article 13 (Art. 13) of the Convention in respect of the applicant;

- whether there has been a violation of Article 14 (Art. 14) of the Convention in respect of the applicant;

- whether there has been a violation of Article 18 (Art. 18) of the Convention in respect of the applicant.

C. Approach to the evidence

81. The Commission notes that there are important disputes of fact between the parties. In particular, it is alleged by the applicant that he and his uncle were shot due to their involvement in the distribution of the newspaper Özgür Gündem as part of a campaign of attacks against that and other newspapers and that this campaign was with the connivance or acquiescence, if not involving the direct participation, of agents of the State. The Government deny that there has been any such campaign. There are also disputes of fact as concerns alleged ill-treatment of the applicant by police officers and threats made by them. The Commission recalls that there is a pending application No. 23144/93 Ersöz and others v. Turkey in which owners, editors and journalists of the Özgür Gündem invoke, inter alia, Article 10 (Art. 10) in relation to the measures taken against, and attacks made on, the newspaper and the persons concerned in its publication and distribution.

82. The Commission, after consultation of the parties, did not hear oral evidence from witnesses in this case. It is of the opinion that the allegations are of a width and character that would not be easily amenable to clarification from oral testimony from the persons who could be identified as connected with the facts of this case. It observes that the events at the heart of the application are not disputed. The applicant was shot at and seriously injured in an attack by two men on 15 January 1993. His uncle Hasim Yasa was shot and killed by a gunman on 14 June 1993.

83. The Commission has consequently decided to examine the applicant's allegations as to the violations disclosed by these events on the basis of the written materials in the file, including the contents of the investigation files provided at its request by the Government and the submissions of the parties made in answer to the

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questions posed by the Commission.

D. As regards the complaints relating to Hasim Yasa

84. The applicant has introduced a complaint in respect of the killing of his uncle Hasim Yasa, invoking Article 2 (Art. 2) of the Convention in respect of his death. He states that he brings this complaint on behalf of his uncle.

85. The Government submit that the applicant has no standing to introduce a complaint on behalf of Hasim Yasa, his uncle, since no authority for the application has been presented by the legal heirs and the applicant cannot claim to be a victim in respect of the killing of his uncle.

86. While the Government did not challenge the status of the complaints on behalf of Hasim Yasa before the application was declared admissible, the Commission has considered it appropriate to state its position on this aspect as a preliminary to its examination on the merits

87. The Commission recalls that in previous cases concerning deaths it has generally been the spouse or heirs to the estate who have introduced applications before the Convention organs (eg. Eur. Court HR, McCann and others v. the United Kingdom judgment of 27 September 1995, Series A no. 324). It is not however the position under the Convention system of protection that only those persons enjoying legal rights of representation or succession under domestic law may make complaints on behalf of alleged victims of violations of the provisions of the Convention, though the lack of standing in domestic law may be of relevance to the consideration of whether an applicant has legitimate interest in making the complaints. The Commission recalls that in the case of S.P., D.P. and A.T. v. the United Kingdom (No. 23715/94, dec. 20.5.96) an issue arose as to whether the solicitor who had represented children in child care proceedings was able validly to introduce a complaint before the Commission on their behalf. It had regard to the constant case-law underlining that the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions, both procedural and substantive, be interpreted and applied so as to make its safeguards practical and effective (eg. Eur. Court HR, Loizidou judgment of 23 March 1995, Series A no. 310, p. 26-27, paras. 70-72). It concluded that, notwithstanding the lack of standing in domestic law for the solicitor to represent the children, it would examine whether other or more appropriate representation existed or was available, the nature of the links between the solicitor and the children, the object and scope of the application introduced on their behalf and whether there existed any conflicts of interest.

88. While in the present case the Government appear to allege that other persons have standing in domestic law to bring a case, it is not in fact apparent whether Hasim Yasa has a surviving spouse or parent or any child of adult age, who could or would more appropriately introduce a case. Since however the applicant is a close relative of the deceased Hasim Yasa, and he was, on facts uncontested in the application, in a business relationship with his uncle to the extent that the uncle assisted in his newspaper business, the Commission sees no ground for applying rigid formalism. It finds no indication that any conflict of interest arises in the applicant complaining of the killing of his uncle and notes that the applicant's complaints about the action against himself and about that directed against his uncle are alleged to be factually linked. In these circumstances, the Commission considers that the complaints introduced by the applicant in respect of his uncle Hasim Yasa constitute a valid exercise of the right of individual petition guaranteed under Article 25 (Art. 25) of the Convention. However, when complaining of the killing of his uncle, the applicant acts as a person who is himself directly affected by this act and not as his uncle's representative, since a deceased person is

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unable, even through a representative, to lodge an application with the Commission.

E. As regards Article 2 (Art. 2) of the Convention

89. Article 2 (Art. 2) of the Convention reads 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."

90. The applicant submits that the attacks carried out on himself and his uncle were carried out by or with connivance of the police. He points to the fact that he was threatened by a senior police officer that his kiosk would be burned, which threat was later carried out. He refers to two occasions on which he was taken into custody by the police and subjected to ill-treatment: in November 1992 and on 14 June 1993, after his uncle's death, when the police officers told him that it should have been him that was killed and not his uncle and that he would be killed next time.

91. Alternatively, the applicant complains that the State is responsible for a violation of Article 2 (Art. 2) by reason of their failure to protect the right to life, through preventive steps taken in response to attacks being carried out on persons involved in the distribution of newspapers and through effective investigation and prosecution of those who are engaged in a campaign of violence and killing.

92. The Government maintain that there is no evidence to substantiate the applicant's allegations that the security forces were responsible for the attacks on him or his uncle. There is no evidence to support the applicant's claim that a police officer told him that he was the real target for the killers of his uncle. All his claims rest on mere assertions, based on unreal and illusory grounds and he seeks to bolster them with lists and press releases of events and incidents which have nothing to do with the present case. By these subterfuges, the applicant seeks to divert attention from his lack of proof in his case and build up a general presumption of the culpability of the Turkish State. The Government strenuously resist the validity of the Commission admitting complaints by an applicant which have not been directly proved.

93. The Government submit that investigations were instituted promptly into the attacks on the applicant and his uncle and are being pursued in conformity with the normal procedures and the applicable laws. They point out the impossibility of finding proof for the applicant's unreal allegations and emphasise the difficulties of concluding investigations where serious terrorist activity is involved.

94. The Commission finds that there is no evidence before it which would permit a finding that agents of the security forces or police were involved in the shooting either of the applicant or his uncle. Notwithstanding the serious concern which must arise from the details of killings and injuries of persons involved in the distribution of certain newspapers, which occurrences have not been denied by the

Government, this cannot of itself justify any presumption as to involvement of State agents or of any direct responsibility of the State for the attacks which are the subject of this application.

95. The Commission has had regard to the applicant's arguments that the State has failed nonetheless to protect them, either substantively or procedurally.

96. As regards any duty of protection in respect of violence or threats of violence, the Commission recalls that it has held, in a case concerning the killing of the applicant's husband by the Provisional IRA, that Article 2 (Art. 2) may give rise to positive obligations on the part of the State. It excluded that a positive obligation to protect from any possible violence could be deduced from Article 2 (Art. 2) and in a case where a person, subject to the threat of terrorist violation, complained of the withdrawal of a police bodyguard, the Commission held that Article 2 (Art. 2) could not be interpreted as imposing a duty on a State to give protection of this nature, at least not for an indefinite period (Nos. 9438/81 dec. 28.2.83, D.R. 32 p. 190, and 6040/73 Coll. 44 p. 121).

97. In the present case, it is not alleged by the applicant that any specific threat of killing was directed against him or his uncle before the events concerned. He refers to a threat that his kiosk would be burned and that he was ill-treated in police custody. While it appears that he anticipated a potential threat, since he took the step of obtaining and carrying a gun, it would appear that this was in response to attacks on other newsagents which were occurring around that time.

98. It is not apparent that the applicant made any request to the authorities for protection or brought to their attention his fear of attack. The Commission does note that on 23 December 1992 the journalist Kemal Kiliç petitioned the Sanliurfa Governor on behalf of the persons working in the Özgür Gündem office in Sanliurfa concerning the death threats made to persons distributing the newspaper, the reply of the Governor of 30 December 1993 being that no protection would be offered to distributors and stating that no attacks had been made in the area. It has not been brought to the attention of the Commission that any similar appeal for help on behalf of the distributors in Diyarbakir was made. However, the applicant has referred to petitions dated 12 November 1992 made by Yasar Kaya, journalist and owner of the Özgür Gündem, to the Prime Minister Süleyman Demirel, the deputy Prime Minister Erdal inönü and to the Minister responsible for the press Gökberk Ergenekon alleging persecution against the Özgür Gündem, including the killing of various journalists and referring to threats against the lives of distributors and sellers, particularly in the emergency region.

99. The Commission cannot ignore however that these events took place in an area of Turkey subject to serious disturbances of public order. The Court's judgment in the Aksoy case (Eur. Court HR, judgment of 18 December 1996 to be cited in Reports 1996, para. 8) refers to the conflict in the South-East as having claimed the lives of 4,036 civilians and 3,884 members of the security forces. The area has, because of the grave difficulties, been subjected to emergency rule (ten of the eleven provinces in the south-east).

100. The Commission observes that the Turkish criminal law prohibits the acts complained of. It notes that there are large numbers of security forces in the area pursuing the aim of establishing public order. It does not find it established that the Turkish Government have failed in their obligation to protect the lives of the applicant and his uncle through preventive or protective measures.

101. As regards the existence of effective investigatory machinery to enforce the prohibitions in criminal law, the Commission notes that the attacks on the applicant and his uncle were subject to investigation by the public prosecutor in conformity with applicable provisions of the Turkish Code of Criminal Procedure. While it cannot be a

requirement of Article 2 (Art. 2) that a State must necessarily succeed in locating and prosecuting perpetrators of mortal or life-threatening attacks, the case-law of the Convention organs imposes 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 (Art. 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 v. the United Kingdom judgment of 27 September 1995, Series A no. 324 para. 161.

102. In the case of Kaya v. Turkey (Application No. 22729/93 Comm. Rep. 24.10.96 pending before the Court) the Commission found a violation of Article 2 (Art. 2) in light of the major deficiencies in the investigation undertaken into the death of the applicant's brother who, according to official reports, had been shot during a clash involving the security forces. The inadequate and ineffective investigation concerning, inter alia, the defective autopsy procedures and lack of detailed enquiry into the circumstances of the death, was such as to amount in that case to a failure to protect the right to life.

103. In the present case, it appears that the circumstances of the shooting of the applicant and his uncle were investigated by the police. The time and location of the events were examined, statements were taken from some witnesses at the scene, and ballistics examinations of bullet fragments were carried out. As regards the shooting of the applicant, there was also a request from the public prosecutor to the public security branch that they should pursue the case and investigate and apprehend the suspects.

104. The applicant alleges however that no effective efforts have been made to to identify and locate the perpetrators whom he considers to have been agents of the State or persons operating on their behalf. The Government have submitted that the applicant never made formal complaint to this effect to the public prosecutor. The Commission notes that, while the applicant alleges that in his statement to the police at the hospital he claimed that his assailants were police, the recorded statement makes no express reference to his suspicions of State involvement in the attack on himself. Nor does it appear that any complaint of State involvement was made by the applicant to the public prosecutor as regards the killing of his uncle. Nonetheless, the applicant in his statement dated 17 January 1993 to the police stated that he was the intended murder victim because he ran a newsagent's business selling left wing newspapers and that there had been attacks previously on newspaper sellers. Having regard to appeals made for protection and protests made by Yasar Kaya, journalist and owner of the Özgür Gündem, at ministerial level and to the considerable number of attacks on persons connected with that newspaper, the Commission does not consider that the authorities were or should have been unaware that those involved in the publication and distribution of the Özgür Gündem feared that they were falling victim to a concerted campaign tolerated, if not approved, by State officials.

105. In questions put to the parties, the Commission requested the Government to specify what steps had been taken to investigate the incidents and attacks on those involved in certain newspapers and to identify the persons or groups involved. The Government have not responded with any information beyond attacking the illusory nature of the allegations and the general lack of substantiation. The Government were also requested to clarify what steps were taken to verify the applicant's allegations, expressly drawn to their attention on communication of the application by the Commission, that the gunmen who attacked him and his uncle were acting on behalf of the State. The

Government have not drawn any new matters to the attention of the Commission beyond the documents provided in the investigation file (see paras. 37-47 above). It would therefore appear that no steps were taken to verify the applicant's allegation that he was threatened by policemen, naming one as Commissioner Kemal Fidan, before his kiosk was burned down or that policemen took him into custody following his uncle's death, ill-treated him and told him that he had been the intended victim. The authorities do not seem to have investigated seriously whether the attacks on the applicant and his uncle were part of a concerted action directed against the Özgür Gündem and those involved in the production and distribution of that newspaper, this being an avenue which it would have been natural to explore in view of the numerous attacks on persons having links with that newspaper. On the contrary, the Government appear to take the view, as adopted by the public prosecution authorities in Diyarbakir, that the attacks were carried out by the PKK or similar terrorist groups and that no further step is necessary beyond requiring the police to maintain their enquiries and report about any progress to the prosecution (see para. 46). The Commission notes that the file which has been provided contains no reports from the police, despite the prosecutor's request for updates on progress.

106. The Commission recognises the seriousness of the allegations being made against the authorities in the South-East with respect to acquiescence or connivance in a campaign of targeted attacks and can understand a certain reluctance or disbelief in the Government to accept that these might be well-founded. It nonetheless behoves a Contracting State, respecting the rule of law and having regard to its obligation under Article 1 (Art. 1) of the Convention to secure to everyone within its jurisdiction the enjoyment of the rights and freedoms guaranteed therein, to verify whether allegations, based on actual facts and events, of serious wrongdoing, whether committed by State officials or other persons, are in any respect well-founded. It notes that the Government have not denied that any of the incidents referred to by the applicant, as regards killings, injuries, disappearances of persons and damage to property connected to the Özgür Gündem, have in fact occurred.

107. The Commission is of the opinion that the failure to make any further or more detailed investigation into the attacks on the applicant and his uncle amounts to a failure to protect the right to life.

CONCLUSION

The Commission concludes, by 30 votes to 2, that there has been a violation of Article 2 (Art. 2) of the Convention in respect of the applicant and his uncle Hasim Yasa.

F. As regards Article 3 (Art. 3) of the Convention

109. The Commission will now examine whether the applicant's complaints also disclose a violation of Article 3 (Art. 3) of the Convention, which provides as follows:

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

110. The applicant refers to the life-threatening attack which he suffered, the ill-treatment which he received in police custody on 14 June 1993 and the interference in his treatment at hospital by the police following the shooting on 15 January 1993.

111. The Government deny that there is any substantiation to the applicant's allegations.

112. The Commission recalls its findings above (para. 94). It notes that it has not been established that the authorities were implicated, directly or indirectly in the attacks made on the applicant and his

uncle. It also finds on the basis of the materials contained in the file and of the submissions made by the applicant that the applicant's complaints concerning police obstruction at the hospital and ill-treatment in custody following his uncle's funeral have not been substantiated.

CONCLUSION

113. The Commission concludes, unanimously, that there has been no violation of Article 3 (Art. 3) of the Convention.

G. As regards Article 10 (Art. 10) of the Convention

114. Article 10 (Art. 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."

115. The applicant alleges that the attacks on himself and his uncle formed part of a campaign aimed at suppressing the publication and distribution of certain newspapers. The attacks themselves and the failure to protect or properly investigate disclose violations of the right to freedom of expression guaranteed under Article 10 (Art. 10).

116. The Government deny that there is any proof to support allegations of State persecution of certain newspapers and those involved in their publication and distribution or any failure to provide adequate protection or investigations pursuant to Turkish law.

117. The Commission has not found it established that the attacks against the applicant and his uncle resulted from deliberate actions by members of the security forces. 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 (Art. 10). In these circumstances, the Commission cannot find it established that there has been an interference with the right protected by Article 10 (Art. 10) of the Convention in respect of the applicant as a distributor of the newspaper.

CONCLUSION

118. The Commission concludes, by 31 votes to 1, that there has been no violation of Article 10 (Art. 10) of the Convention.

H. As regards Articles 6 para. 1 and 13 (Art. 6-1, 13) of the Convention

119. Articles 6 para. 1 and 13 (Art. 6-1, 13) of the Convention provide as follows:

Article 6 para. 1 (Art. 6-1)

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"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 ... ".

Article 13 (Art. 13)

"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."

120. The applicant complains under Article 6 (Art. 6) of a failure to initiate proceedings before an independent and impartial tribunal against those responsible for the life-threatening attack, as a result of which he cannot bring civil proceedings arising out of the attack against him. Under Article 13 (Art. 13) he complains of the lack of any authority before which his complaints can be brought with any prospect of success. The applicant refers to the static nature of the criminal investigations still pending into the attacks on himself and his uncle and the assumption, without examination of other possibilities, that the attacks were the responsibility of terrorist elements.

121. The Government contend that there are several effective domestic remedies at the applicant's disposal. They refute the suggestion that the criminal prosecution is ineffective, stating that it is unrealistic to give exclusive weight to the fact that the criminal investigation is still pending. These proceedings face difficulties in locating unknown perpetrators and are being conducted in the usual manner. In any event, they point out that the applicant has not in fact complained to the authorities that the security forces or their agents are responsible for the shootings. Secondly, the applicant has not utilised the other effective remedies available to him in respect of his complaints which exist independently from the criminal proceedings, eg. civil and administrative proceedings. They provide copies of judgments indicating that damages have been paid in respect of deaths and injuries in custody caused by the police.

122. The Commission recalls its finding above that the absence of sufficient investigations constituted a breach of Article 2 (Art. 2) of the Convention (para. 104). Since the absence of any adequate and effective investigation into the attacks on the applicant and his uncle also underlies the applicant's complaints under Article 6 and 13 (Art. 6, 13) of the Convention, it finds it unnecessary to examine them separately.

CONCLUSIONS

123. The Commission concludes, by 31 votes to 1, that no separate issue arises under Article 6 para. 1 (Art. 6-1) of the Convention.

124. The Commission concludes, by 30 votes to 2, that no separate issue arises under Article 13 (Art. 13) of the Convention.

I. As regards Articles 14 and 18 (Art. 14, 18) of the Convention

125. Articles 14 and 18 (Art. 14, 18) of the Convention provide as follows:

Article 14 (Art. 14)

"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."

Article 18 (Art. 18)

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"The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

126. The applicant maintains that because of the Kurdish origin of himself and his uncle the various alleged violations of their Convention rights were discriminatory, in breach of Article 14 (Art. 14) of the Convention. He also claims that their experiences represented an authorised practice by the State in breach of Article 18 (Art. 18) of the Convention.

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

128. The Commission has examined the applicant's allegations in the light of the evidence submitted to it, but considers them unsubstantiated.

CONCLUSIONS

129. The Commission concludes, unanimously, that there has been no violation of Article 14 (Art. 14) of the Convention.

130. The Commission concludes, unanimously, that there has been no violation of Article 18 (Art. 18) of the Convention.

J. Recapitulation

131. The Commission concludes, by 30 votes to 2, that there has been a violation of Article 2 (Art. 2) of the Convention in respect of the applicant and his uncle Hasim Yasa (para. 108 above).

132. The Commission concludes, unanimously, that there has been no violation of Article 3 (Art. 3) of the Convention (para. 113 above).

133. The Commission concludes, by 31 votes to 1, that there has been no violation of Article 10 (Art. 10) of the Convention (para. 115 above).

134. The Commission concludes, by 31 votes to 1, that no separate issue arises under Article 6 para. 1 (Art. 6-1) of the Convention (para. 123 above).

135. The Commission concludes, by 30 votes to 2, that no separate issue arises under Article 13 (Art. 13) of the Convention (para. 124 above).

136. The Commission concludes, unanimously, that there has been no violation of Article 14 (Art. 14) of the Convention (para. 129 above).

137. The Commission concludes, unanimously, that there has been no violation of Article 18 (Art. 18) of the Convention (para. 130 above).

H.C. KRÜGER Secretary to the Commission	S. TRECHSEL President of the Commission

(Or. French)

OPINION PARTIELLEMENT DISSIDENTE DE M. A.S. GÖZÜBÜYÜK
À LAQUELLE SE RALLIE M. F. MARTINEZ

A mon très grand regret, je ne peux partager l'avis de la majorité de la Commission concernant l'article 2 de la Convention qui ne s'impose pas dans la présente requête.

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- La majorité de la Commission a elle-même accepté au paragraphe 94 du rapport qu'il n'y avait pas de preuves permettant de conclure que des membres des forces de sécurité avaient été impliqués dans le meurtre de l'oncle du requérant, et dans l'attaque dirigée contre lui-même.

- La Commission a de surcroît admis, en se référant à sa jurisprudence antérieure, que l'Etat ne pourrait pas être tenu de fournir à chaque individu une protection pour une période indéterminée.

- Les conditions particulières de la criminalité liée au terrorisme du PKK rendent très difficile sinon parfois impossible l'identification des auteurs de différents actes de terrorisme. Dans la présente requête, les deux affaires n'ont pas été classées et la Commission relève que l'instruction a été menée conformément aux règles de procédure du Code de procédure pénale.

Au vu de cet état de choses, il me semble, qu'il est impossible, du simple fait de la non-identification des auteurs d'un crime dans une affaire de criminalité terroriste complexe, de conclure à la violation de l'article 2 de la Convention.

(Or. English)

PARTLY DISSENTING OPINION OF MR. L. LOUCAIDES

I find myself unable to agree with the decision of the majority that there has been no violation of Article 10 of the Convention in this case.

At all material times the applicant carried out the business of a newsagent or newspaper vendor. From the evidence before the Commission it appears that the applicant has been a victim of violence and threats. The applicant's uncle Hasim Yasa had been running the applicant's newspaper business since March 1993. On 14 June 1993 he was shot and killed. The Commission found that the respondent Government was responsible for a violation of Article 2 of the Convention in respect of the applicant and his uncle Hasim Yasa inasmuch as the Government failed to make proper investigations into the attacks on the applicant and his uncle. Furthermore as noted by the Commission in paragraph 103 of the Report the Government have not denied that any of the incidents referred to by the applicant, as regards killings, injuries, disappearances of persons and damage to property connected to the newspaper Ozgur Gundem, have in fact occurred. This newspaper was one of those distributed by the applicant.

In my opinion the facts and circumstances of the case lead to the clear inference that the capacity of the applicant and his uncle, as distributors of the newspaper in question must have been the real cause of the tragic situation in which they found themselves and of the consequent failure of the Government to investigate properly that situation.

The Commission and the Court have always emphasised that freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance (eg. Eur. Court HR Goodwin v. the United Kingdom judgment of 27 March 1996, Reports 1996 para. 39).
A distributor of a newspaper whether by profession or otherwise, is acting as a vehicle for the imparting of information and as a necessary instrument for the free flow of information and freedom of expression. In effect he is himself part and parcel of the apparatus for the effective exercise of the freedoms enshrined in Article 10 of the Convention and for that matter he is a person who in his own right can claim protection of these freedoms, especially that of imparting of information to the public at large through the distribution of newspapers.

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Therefore, once it has been established that the applicant and his uncle became the target and the victims of incidents of violence because of their capacity as distributors of newspapers and that the state failed to investigate sufficiently these incidents, it is my conclusion that this amounts to an unjustified interference with their freedom to impart information guaranteed under Article 10 of the Convention.

In these circumstances I find that there has been a violation of Article 10 of the Convention in this case.

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

CASE OF YAŞA v. TURKEY

(63/1997/847/1054)

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JUDGMENT

STRASBOURG

2 September 1998

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SUMMARY[1]

Judgment delivered by a Chamber

Turkey – alleged murder and attempted murder by security forces – lack of adequate and effective investigation into incidents

I. SUBJECT MATTER OF DISPUTE

Complaints under Articles 3 and 6 not pursued before Court – no reason for Court to consider them of its own motion.

II. GOVERNMENT'S PRELIMINARY OBJECTIONS

A. Whether applicant was a victim?

Government estopped from denying that applicant was related to person killed in one of alleged attacks – in light of principles established in its case-law and particular facts of case, applicant could legitimately claim to be a victim of his uncle's murder.

Conclusion: objection dismissed (eight votes to one).

B. Failure to exhaust domestic remedies

First limb (civil action for damages): those responsible for attacks unidentified – not valid.

Second limb (action in administrative law on basis of State's strict liability): identification of State agents responsible was not a prerequisite to bringing an action of that nature – not valid.

Third limb (criminal proceedings): closely linked to complaints on merits.

Conclusion: first two limbs of objection dismissed, third limb joined to merits (eight votes to one).

III. ARTICLE 2 OF THE CONVENTION

A. Attacks on applicant and his uncle

Case file, including new evidence furnished by applicant, did not enable Court to depart from Commission's conclusions – impossible to conclude beyond all reasonable doubt that applicant had been attacked and his uncle killed by security forces.

Conclusion: no violation (unanimously).

1. This summary by the registry does not bind the Court.

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B. Inadequacy of investigations

Obligation under Article 2 to carry out an adequate and effective investigation into circumstances of alleged incidents – not confined to cases where implication of State agents had been established – nor was issue of whether a formal complaint about killing had been lodged with competent investigatory authorities decisive: mere fact that authorities had been informed of murder had given rise *ipso facto* to obligation to carry out effective investigation – same applied to attack on applicant which, because eight shots had been fired at him, had amounted to attempted murder.

Two criminal investigations were pending – no tangible result or real progress more than five years after events – difficulty in conducting investigations in area marked by terrorism could not relieve authorities of their obligations under Article 2 – failure, in spite of circumstances, to have regard to fact that State agents might have been responsible.

Conclusion: violation (eight votes to one).

IV. ARTICLE 13 OF THE CONVENTION

Recapitulation of Court's case-law on "effective remedies" – circumstances enabled complaint under Article 2 to be considered arguable – fact that responsibility of State agents had not been established beyond all reasonable doubt made no difference in that regard – as there had been no adequate and effective investigation for purposes of Article 2, respondent State could not be considered to have complied with Article 13, whose requirements in that respect were stricter still.

Conclusion: violation (eight votes to one).

V. ADMINISTRATIVE PRACTICE

Material on file was not sufficient to enable Court to determine whether authorities had adopted a practice of violating Article 2 or Article 13.

VI. ARTICLES 10, 14 AND 18 OF THE CONVENTION

Complaints arose out of same facts as those considered under Articles 2 and 13.

Conclusion: not necessary to decide that issue (unanimously).

VII. ARTICLE 50 OF THE CONVENTION

A. Pecuniary damage

Pecuniary damage: claim dismissed.
Non-pecuniary damage: sum awarded.

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B. Costs and expenses

Claim granted in part.

***Conclusion*: respondent State to pay applicant specified sums (eight votes to one).**

COURT'S CASE-LAW REFERRED TO

18.1.1978, Ireland v. the United Kingdom; 27.4.1988, Boyle and Rice v. the United Kingdom; 20.3.1991, Cruz Varas and Others v. Sweden; 23.3.1995, Loizidou v. Turkey (preliminary objections); 8.6.1995, Yağcı and Sargın v. Turkey; 27.9.1995, McCann and Others v. the United Kingdom; 16.9.1996, Akdivar and Others v. Turkey; 18.12.1996, Aksoy v. Turkey; 25.9.1997, Aydın v. Turkey; 26.11.1997, Sakık and Others v. Turkey; 30.1.1998, United Communist Party of Turkey and Others v. Turkey; 19.2.1998, Kaya v. Turkey; 25.5.1998, Kurt v. Turkey; 28.7.1998, Ergi v. Turkey

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In the case of Yaşa v. Turkey[1],

The European Court of Human Rights, sitting, in accordance with Article 43 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A[2], as a Chamber composed of the following judges:

Mr R. BERNHARDT, *President*,
Mr THÓR VILHJÁLMSSON,
Mr F. GÖLCÜKLÜ,
Mr R. PEKKANEN,
Mr L. WILDHABER,
Mr D. GOTCHEV,
Mr J. CASADEVALL,
Mr M. VOICU,
Mr V. BUTKEVYCH,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 28 April and 28 July 1998,

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

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PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 9 July 1997 within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in an application (no. 22495/93) against Turkey lodged with the Commission under Article 25 of the Convention on 12 July 1993 by Mr Eşref Yaşa, a Turkish national.

The Commission's request referred to Articles 44 and 48 of the Convention and to the declaration whereby Turkey recognised the compulsory jurisdiction of the Court (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, 3, 6, 10, 13, 14 and 18 of the Convention.

Notes by the Registrar

1. The case is numbered 63/1997/847/1054. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. Rules of Court A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol. They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings and designated the lawyers who would represent him (Rule 30).

3. The Chamber to be constituted included *ex officio* Mr F. Gölcüklü, the elected judge of Turkish nationality (Article 43 of the Convention), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 § 4 (b)). On 27 August 1997, in the presence of the Registrar, Mr R. Ryssdal, the President of the Court, drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr R. Pekkanen, Mr L. Wildhaber, Mr D. Gotchev, Mr J. Casadevall, Mr M. Voicu and Mr V. Butkevych (Article 43 *in fine* of the Convention and Rule 21 § 5).

4. As President of the Chamber (Rule 21 § 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the Turkish Government ("the Government"), the applicant's lawyers and the Delegate of the Commission on the organisation of the proceedings (Rules 37 § 1 and 38). Pursuant to the orders made in consequence, the Registrar received the Government's and the applicant's memorials on 2 and 3 March 1998 respectively. A schedule to the applicant's memorial setting out details of his claims under Article 50 of the Convention was received by the Registrar on 20 March 1998. The Government lodged its observations on that schedule on 20 April and the applicant replied on 23 April.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 21 April 1998. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*
Mrs D. AKÇAY, *Co-Agent,*
Mr A. KAYA,
Miss A. EMÜLER,
Miss M. GÜLŞEN,
Mrs Ş. ÖZKAN,
Miss A. GÜNYAKTI, *Advisers;*

(b) *for the Commission*
Mr H. DANELIUS, *Delegate;*

(c) *for the applicant*
Mr K. BOYLE, Barrister-at-law,
Mrs F. HAMPSON, Barrister-at-law, *Counsel,*
Mrs A. REIDY, Barrister-at-law, *Adviser.*

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The Court heard addresses by Mr Danelius, Mr Boyle and Mrs Akçay.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. Mr. Eşref Yaşa, a Turkish citizen, was born in 1962 and currently lives in Diyarbakır. His uncle, Mr. Haşim Yaşa, was born in 1956 and also lived in Diyarbakır. He was killed on 14 June 1993.

7. The applicant lodged an application with the Commission "on his own behalf and on behalf of his deceased uncle" (see paragraph 56 below), in which he complained that they had been victims of armed attacks because they sold the newspaper, the *Özgür Gündem*. The attacks were part of a campaign orchestrated against that and other pro-Kurdish newspapers with the connivance or even the direct participation of State agents.

Some of the events that led to the application being made are disputed.

A. The applicant's and the Government's versions of the facts

1. *The applicant's version*

(a) The incidents involving the applicant and his uncle

8. At the material time the applicant rented a newspaper kiosk, known as the Bulvar Buffet, in the town of Diyarbakır. In October 1992 he began to receive death threats from the police because he sold certain newspapers, in particular the pro-Kurdish paper, the *Özgür Gündem*.

9. In the early hours of 15 November 1992 the applicant's kiosk was set on fire and destroyed. The applicant estimated the damage at 70,000,000 Turkish liras.

10. About a week before that incident, the applicant had been visited by two police officers, one of whom was Commissioner Kemal Fidan of the Diyarbakır Security Branch. The applicant did not know the other officer's name. They had threatened to burn down his kiosk because of the newspapers he sold.

11. After the applicant's kiosk had been burnt down, other newsagents had decided to stage a one-day protest strike and refused to sell anything.

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12. At 7.15 a.m. on 15 January 1993 shots had been fired at the applicant while he was in Turistik Street in the Mardinkapı district of Diyarbakır. He had been riding his bicycle from home to the kiosk with his son Diren on the back, when he noticed two suspicious-looking men, one tall and the other of average height, aged about 20-25. Fearing their intentions were hostile, the applicant had attempted to steer his bicycle away but had been struck by a taxi. He and his son had fallen to the ground. At that moment one of the two men had started to shoot at him. In self-defence, the applicant had drawn a pistol from his waist and fired six shots back, none of which had hit the two men. The applicant, however, had been hit by eight bullets fired by the assailant. Three had grazed his back and one his right leg. One had entered his right arm and one his left wrist. One bullet had lodged between the forefinger and middle finger of his left hand and one had gone through his right buttock into his abdomen.

13. The applicant was taken by taxi to Diyarbakır hospital. He had asked the driver to deliver his pistol to one of his relatives. The driver had given it instead to another taxi driver who knew the applicant's kiosk. He had put the pistol in a scrap-box tin under the counter of the kiosk.

14. The operation to remove the bullets from the applicant's body, which was performed in the intensive care unit of Diyarbakır hospital, was held up for two hours by the police. His relatives were later subjected to insults and received death threats at the hospital.

15. The applicant spent eleven days in hospital. He still had health problems as a result of the attack. He suffered pain in his left arm and several fingers of his left hand and there was continuing discomfort from the scars. In addition, he had stomach pains caused by an infection contracted following the operation.

16. While in hospital the applicant had made a statement to the police in which he claimed that his assailants were police officers. At no stage had the public prosecutor's office asked him to make a statement about the attack.

17. After coming out of hospital he was prosecuted for carrying an unlicensed firearm. On 24 May 1993 he was convicted and sentenced to one year's imprisonment, later converted by the court to a fine of 1,633,333 Turkish liras, to be paid in instalments over four months. His appeal against the conviction and sentence was dismissed.

18. At about 7.30 a.m. on 14 June 1993 the applicant's uncle, Haşim Yaşa, who had been running the applicant's kiosk since March 1993, was shot in the head and killed by an unknown assailant while walking along Sunay Avenue in Diyarbakır. Haşim Yaşa's seven-year old son, Aziz, was the only witness to the shooting. On the same day, the applicant was arrested, assaulted and threatened with death by the police, who told him that they had carried out the shooting and that he had been the intended target.

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19. On 10 October 1993 the applicant's younger brother, Yalçın Yaşa, aged thirteen, who had been looking after the kiosk following the attacks on the applicant and his uncle, was killed by an unknown assailant near his home. Another of the applicant's brothers, Yahya Yaşa, aged 16, was seriously injured during the attack.

20. Following that attack the applicant was forced to sell his business because there was no one left in his family to manage the kiosk.

(b) The campaign of attacks against people distributing pro-Kurdish newspapers

21. The applicant alleged that he and his uncle had been shot because of their involvement in the distribution of the newspaper, the *Özgür Gündem*. The incidents had been part of a campaign of persecution and attacks against people engaged in the publication and distribution of that and other pro-Kurdish newspapers. To support that claim, the applicant referred to the following incidents:

(i) Closure of the Özgür Gündem

22. Publication of the *Özgür Gündem* had ceased in April 1994 as a result of a wave of prosecutions brought against it by the State. Since first appearing in May 1992, the newspaper had been the subject of several prosecutions, confiscation orders and temporary closure orders. While the newspaper had never been officially banned from sale, there had been periods when confiscation and closure orders had affected its publication and distribution. The *Özgür Ülke*, the successor to the *Özgür Gündem*, was forced to close in February 1995 and the *Yeni Politika*, which replaced it, ceased publication in August 1995.

(ii) Attacks on the Özgür Gündem *staff*

23. The applicant has supplied lists detailing cases of attacks on, ill treatment or detention of and threats against staff and distributors of the *Özgür Gündem* and similar newspapers in 1992, 1993 and early 1994. He maintained that those incidents clearly established that there was a pattern of targeting persons working for the *Özgür Gündem*.

24. The applicant stated that at least seven journalists, including Musa Anter, working for the *Özgür Gündem* had been killed, while others had been injured in attacks. Numerous other journalists had been detained and, in some instances, subjected to ill treatment.

25. There had been numerous prosecutions of the owners, editors and journalists of the *Özgür Gündem* on the basis, *inter alia*, of the provision under the Prevention of Terrorism Act prohibiting propaganda against the indivisible unity of the State. In addition, Behçet Cantürk, one of the principal financiers of the *Özgür Gündem*, was murdered (see paragraph 46 below).

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26. The applicant stated that several newspaper kiosks were attacked for selling the *Özgür Gündem*. In addition, on 3 December 1994 the headquarters of the *Özgür Gündem* in Istanbul and its office in Ankara were bombed. One person was killed and eighteen injured.

27. There had also been numerous incidents in which persons and vehicles involved in the distribution of the *Özgür Gündem* had been attacked. The applicant stated that at least eleven vendors or distributors have been killed, including Yalçın Yaşa (see paragraph 19 above) and Haşim Yaşa (see paragraph 18 above). Several others had been beaten or severely injured, while many more had been threatened with violence if they did not stop selling or distributing the newspaper.

28. To support his assertions the applicant referred to various publications containing information and expressing concerns about infringements of freedom of expression in Turkey, including, "What happened to the press in 1993", published by the *Özgür Gündem*, and extracts from 1993 *Info-Türk* (E.208-7, E.209-6, E.212-8/9), the United States State Department Report for Turkey 1994 and "*L'intimidation – rapport sur les meurtres de journalistes et les pressions à l'encontre de la presse turque*" by *Reporters Sans Frontières* (January 1993).

2. *The Government's version*

(a) The incidents involving the applicant and his uncle

29. The Government confirmed that the applicant had been shot and his uncle killed on 15 January 1993 and 14 June 1993 respectively. In their memorial they referred to the investigations of the public prosecutors, which commenced on the same day as the attacks (see paragraphs 35 and 41 below). Those investigations, which were being conducted in accordance with the applicable provisions of the Turkish Code of Criminal Procedure (see paragraph 48 below), were still pending.

30. The Government maintained that there was no evidence to support the applicant's contention that members of the security forces were responsible for the attacks on the applicant and his uncle. In addition, they denied all allegations of ill treatment by the State authorities. They said that the applicant had never officially complained to the relevant authorities that his attackers were agents of the State. Moreover, there was no evidence to support the applicant's allegation that a police officer had told him that it was in fact he who had been the target of his uncle's killers.

(b) The campaign of attacks against people distributing pro-Kurdish newspapers

31. The Government refuted any allegation that there had been official intimidation of persons in any way connected with the sale of newspapers.

They said that such newspapers were sold in hundreds of kiosks and were freely available throughout Turkey. The Government acknowledged that on certain occasions particular editions of those newspapers had been confiscated (see paragraph 22 above). However, the measures, which were neither arbitrary nor repressive, were always made on the basis of judicial decisions.

B. The Commission's findings of fact

32. Noting that the allegations were of a width and character that would not be easily amenable to clarification from oral testimony, the Commission decided, after consulting the parties, to examine the allegations on the basis of the written materials submitted by the parties. The findings of the Commission can be summarised as follows.

1. The findings concerning the shooting of the applicant and the killing of his uncle

33. The Commission observed that the facts at the heart of the application were not disputed. The applicant was shot at and seriously injured in an attack by two men on 15 January 1993. His uncle, Haşim Yaşa, was shot and killed by a gunman on 14 June 1993.

34. The Commission found that there was no evidence before it that proved beyond reasonable doubt that agents of the security forces or police were involved in the shooting of either the applicant or his uncle. It also found that the applicant's complaints concerning police obstruction at the hospital and ill treatment in custody following his uncle's funeral had not been substantiated. However, having regard to "appeals made for protection and protests made by Mr Yaşar Kaya, [a] journalist and [the] owner of the *Özgür Gündem*, at ministerial level and to the considerable number of attacks on persons connected with that newspaper", the Commission found that the Government had or ought to have been aware that those involved in its publication and distribution feared that they were falling victim to a concerted campaign tolerated, if not approved, by State agents (see paragraph 104 of the Commission's report) .

2. Proceedings before the domestic authorities

(a) Proceedings concerning the shooting of the applicant

35. According to a police report dated 15 January 1993 the shooting took place at about 7.15 a.m. in Turistik Street. Fifteen empty cartridges and

two bullet shells were taken for forensic examination, and a plan of the scene was drawn up. On the day of the shooting the police recovered the applicant's pistol from his kiosk. They arrested Ş. Altunhan at the kiosk and two taxi drivers, one being the driver to whom the applicant had entrusted the pistol and the other being the driver who had taken it to the kiosk (see paragraph 13 above). The police had then taken detailed statements from them.

36. In response to an enquiry of 15 January 1993 from the Security Directorate police, the hospital doctor recorded the following injuries to the applicant: one bullet entry to the left gluteal region, one bullet entry and exit to the middle left fore arm, one bullet scratch to the left index finger, one bullet entry and exit on the middle front upper right arm between the elbow and axillary region and a bullet track slightly below the skin tissue, surfacing under the arm.

37. On 17 January 1993, in the presence of his lawyer, the applicant had given a statement to the police in which he had described the attack. He stated that the assailants had intended to murder him because he ran a newspaper kiosk that mainly sold left-wing newspapers. He explained that, as there had been previous attacks on newsagents selling such papers, he had bought the pistol and had been carrying it with him for three or four days before the attack (see paragraph 16 above).

38. A summary incident report dated 17 January 1993 on the shooting, entitled "crime record no 1993/C-14", referred to the applicant as an injured suspect and stated that the other (unidentified) suspects were at large.

39. On 20 January and 14 April 1993 the Diyarbakır Public Prosecutor had requested the relevant security branch to investigate the attack on the applicant and to apprehend the suspects. On the latter date the public prosecutor had also requested that the Office of the Attorney General be kept informed of the progress of the enquiries every three months until the end of the statutory prescription period, namely 15 January 1998.

40. An expert ballistics report from the Diyarbakır regional criminal police laboratory dated 11 February 1993 indicated that the cartridges found by the police at the scene of the shooting showed traces and marks identical to those in the shooting of two other people in Diyarbakır on 3 November 1992 and 11 February 1993 respectively.

(b) The killing of Haşim Yaşa

41. A preliminary investigation file no. 1993/2248 had been opened into the killing of Haşim Yaşa. According to an autopsy report dated 14 June 1993, four bullet entry wounds had been found on Haşim Yaşa's body, two of which were fatal.

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42. Following the shooting, the police had prepared a sketch of the scene of the incident and had taken statements on 14 June 1993 from two witnesses. According to V. Şimşek, after hearing the shots, he had seen someone, whom he was unable to identify, running behind the people gathering in the street. R. Orhan, who ran a stall in the street, had heard but not seen the shooting. On reaching the scene, he had helped Haşim Yaşa, who was lying on the ground, get into a taxi so that he could be taken to hospital.

43. The record made by the police on questioning Haşim Yaşa's son had indicated that although the boy had seen the assailant he had not recognised him. He said that the assailant – aged 20 to 25 and approximately 1.70m tall – had continued to fire at his father even though the latter had fallen to the ground after the first shot. The attacker had then made his escape.

44. An expert ballistics report dated 21 June 1993 indicated that the bullet shells retrieved from the scene were too deformed for useful examination.

(c) Subsequent progress in the investigations

45. No other information concerning any investigative measures taken in relation to those incidents was included with the documents from the investigation file provided to the Commission. However, appended to the Government's written observations before the Commission was a letter which the Public Prosecutor attached to the Security Court of the State of Diyarbakır had sent on 2 November 1995 to the Minister of Justice in which he said:

> "[The] allegation ... is wholly untrue. There are no gunmen working for the State in south-east Anatolia. In [that] region there are armed conflicts between armed organisations and conflicts arising out of the settling of scores within such organisations. The allegation that these incidents are attributable to the State and gunmen acting on its behalf is outrageous..."

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C. New evidence produced to the Court

46. Before the Court, the applicant has produced a copy of a recent report by the Board of Inspectors within the Prime Minister's office. That confidential report ("the Susurluk Report[1]") was initially intended to be only for the Prime Minister, who had commissioned it on 13 August 1997.

1. "Susurluk" was the scene of a road accident in November1986 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 all 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.

After receiving the report in January 1998, it would appear that the Prime Minister then made it available to the public, although eleven pages from the body of the report and its appendices were withheld. The report continued to be the centre of attention in Turkey while the Court was considering the case.

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 that had occurred mainly in south-east Turkey which tended to confirm the existence of a tripartite relation involving unlawful dealings between political figures, government institutions and clandestine groups.

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 had been 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. Demır (*page 37*).
>
> ...
>
> Summary information on the antecedents of Behçet Cantürk, who was of Armenian origin, are set out below.
>
> ...

1. One of the pseudonyms of a former member of the PKK turned informant who was known by the name "*green code*" and had supplied information to several State authorities since 1973.
2. An infamous drug-trafficker strongly suspected of supporting the PKK (see paragraph 25 above).
3. Mr Anter, a pro-Kurdish political figure, was one of the founding members of the Party of the Work of the People ("*HEP*"), director of the Kurdish Institute in Istanbul, a writer and leader writer for, among other journals, the weekly review, *Yeni Ülke*, and the daily newspaper, the *Özgür Gündem* (see paragraph 22 above). He was killed at Diyarbakır on 30 September 1992 (see paragraph 24 above). Responsibility for the murder was claimed by an unknown clandestine group "*Boz-Ok*".

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As of 1992 he was one of the financiers of the newspaper, the *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 the *Özgür Gündem* was blown up with plastic explosives[1] 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*).

...

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[2]). Other journalists have also been murdered (*page 74*)[3]."

II. RELEVANT DOMESTIC LAW AND PRACTICE

47. The principles and procedures relating to liability for acts contrary to the law may be summarised as follows.

A. Criminal prosecutions

48. Under the Criminal Code all forms of homicide (Articles 448-55) and attempted homicide (Articles 61 and 62) constitute criminal offences. The authorities' obligations to conduct 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 the public prosecutor's office. 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 deceased has not died of natural causes, agents 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 virtue of Article 235 of the Criminal Code any public

1. See paragraph 26 above.
2. The appendix is missing from the report.
3. Ibid. for the page following this last sentence.

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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 shall be 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).

49. 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 1913 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, 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 board. If a decision not to prosecute is taken the case is automatically referred to that court.

50. By virtue of Article 4, paragraph (i) of Legislative-Decree no. 285 of 10 July 1987 on "the governor's authority in the region where a state of emergency has been declared", the 1913 Law (see paragraph 49 above) also applies to members of the security forces who come under the governor's authority.

51. 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 no. 1632, the criminal proceedings are in principle conducted in accordance with Law no. 353 on "the establishment of courts martial and of their rules of procedure". Where a member of the armed forces has been accused of an ordinary offence it is, in principle, the provisions of the Code of Criminal Procedure which apply (see Article 145 § 1 of the Constitution and sections 9-14 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 48 above) or with the offender's superior.

B. Civil and administrative liability arising out of criminal offences

52. Under section 13 of Law no. 2577 on "administrative procedure" anyone who sustains damage as a result of an act by the authorities may,

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within one year after the alleged act was committed, request compensation from them. If the request is rejected in whole or in part or if no reply is received within sixty days, the victim may bring administrative proceedings.

53. 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 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 this system, the authorities may be held liable to compensate anyone who has sustained loss as a result of acts committed by unidentified persons.

54. 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 53 above), provides:

> "No criminal, financial or legal responsibility may be claimed against the State of Emergency Regional Governor or a Provincial Governor in a region in which a state of emergency has been declared in respect of their decisions or acts connected with 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 unjustifiably sustained."

55. Under the Code of Obligations anyone who suffers damage as a result of an illegal or tortious act may bring an action seeking reparation for pecuniary damage (Articles 41-46) and non-pecuniary damage (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 damage 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 offender, without prejudice to the victim's right to bring an action against the authority on the basis of its joint liability as the offender's employer (Article 50 of the Code of Obligations).

PROCEEDINGS BEFORE THE COMMISSION

56. The applicant applied to the Commission on 12 July 1993, complaining of attacks in which he had been seriously injured and his uncle killed. He also complained that he had been ill-treated by the police while in detention and had not had access to a court or an effective remedy in respect of the attacks and ill-treatment. He relied on Articles 2, 3, 6, 10, 13, 14 and 18 of the Convention.

57. The Commission declared the application (no. 22495/93) partly admissible on 3 April 1995. In its report of 8 April 1997 (Article 31), it expressed the opinion that there had been a violation of Article 2 of the Convention (thirty votes to two); that there had been no violation of Article 3 (unanimously); that the applicant's complaint under Article 6 § 1 did not give rise to any separate issue and that there had been no violation of Article 10 (thirty-one votes to one); that the applicant's complaint under Article 13 did not give rise to any separate issue (thirty votes to two); that there had been no violation of Article 14 or Article 18 (unanimously). The full text of the Commission's opinion and of the two separate opinions contained in the report is reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT

58. The applicant decided not to proceed with the complaints he had made under Articles 3 and 6 before the Commission. In his memorial and at the hearing, he asked the Court to hold that the facts of the case disclosed breaches of Articles 2, 10 and 13, taken individually or jointly with Article 14, and of Article 18 and that those breaches were aggravated by the existence of a practice tolerated by the respondent State. In that connection, he invited the Court to accept the contents of the Susurluk report (see paragraph 46 above) as new evidence relevant to his complaints (see paragraphs 21-28 above).

1. *Note by the Registrar*. For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* 1998), but a copy of the Commission's report is obtainable from the registry.

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He also asked the Court to order the respondent State both to pay a sum by way of reparation for non-pecuniary damage and pecuniary damage he had sustained and non-pecuniary damage suffered by his uncle's close relatives and to reimburse the costs and expenses incurred.

59. The Government, both in their memorial and at the hearing, invited the Court to hold that the application should have been declared inadmissible because the applicant had no standing to make a complaint on behalf of his uncle and domestic remedies had not been exhausted. In the alternative, they submitted with regard to the merits that on the facts of the case there had been no violation of any of the provisions relied on by the applicant. At the hearing, the Government also asked the Court to declare that the Susurluk report was inadmissible in evidence.

AS TO THE LAW

I. SUBJECT MATTER OF THE DISPUTE

60. In their application to the Commission, the applicant's counsel had alleged a violation of Articles 3 and 6 of the Convention also (see paragraphs 1 and 56 above). In their memorial to the Court, however, they accepted the Commission's conclusions that there has been no violation of Article 3 and that no separate question arose under Article 6 § 1 (see paragraph 57 above). Since they did not pursue those complaints in the proceedings before it, the Court sees no reason to consider them of its own motion (see, *mutatis mutandis*, the United Communist Party of Turkey and Others v. Turkey judgment of 30 January 1998, *Reports of Judgments and Decisions* 1998-I, p. ..., § 62).

II. GOVERNMENT'S PRELIMINARY OBJECTIONS

A. Whether the applicant was a victim

61. As they had done before the Commission, the Government argued that Mr Eşref Yaşa had no standing to submit an application on behalf of his deceased uncle, as it had not been proved that they were uncle and nephew and, even if they were, that did not make them direct relatives. Given the small difference in age and the difficulty of establishing who was related to whom and how in Turkey, it was quite possible that the applicant and Mr Yaşa had merely been second, or even third, cousins. In the instant case, there had been nothing to prevent closer relatives of the deceased – of

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whom there were many – from taking part in the proceedings before the Convention institutions. In addition, the Commission's case-law on the subject contained no example of a nephew being allowed to exercise the right of petition under Article 25 of the Convention. Nor was it a valid argument to say that the Commission had based its decision on the business relations between the applicant and his uncle, since they did not carry on the same trade and the complaints made in the instant case were not of a commercial nature.

62. At the hearing, the applicant's counsel confined themselves to saying that throughout the proceedings before the Commission the Government had acknowledged that Mr Haşim Yaşa was the applicant's uncle.

63. In its report, the Commission said that when complaining of the killing of his uncle, the applicant "acts as a person who is himself ... affected ... and not as his uncle's representative" (see paragraph 88 of the Commission's report). At the hearing before the Court, the Delegate of the Commission expressed the view that if a relative wished to complain about a question as serious as the murder of one of his close relations, that ought to suffice to show that he felt personally concerned by the incident.

64. The Court reiterates that the object and purpose of the Convention, a treaty for the collective enforcement of human rights and fundamental freedoms, requires that its provisions be interpreted and applied in the light of its special character and so as to make its safeguards practical and effective (see the Loizidou v. Turkey (preliminary objections) judgment of 23 March 1995, Series A no. 310, pp. 26-27, §§ 70-72).

65. In the present case, the Government submitted for the first time in their written observations on the Commission's decision on admissibility that the applicant was not a victim (see paragraphs 13 and 86 of the Commission's report). The Court observes that the Government did not in those submissions dispute that the deceased was the applicant's uncle. They are therefore estopped from denying before the Court that the deceased and the applicant were so related. It should also be noted that in his application Mr Eşref Yaşa maintained that the facts of the case amounted to a violation, not only of his deceased uncle's rights under the Convention, but also of his rights.

As to whether the applicant and the deceased had business interests in common and the Government's affirmation – which is unsubstantiated – that it was highly likely in practice that Mr Haşim Yaşa had a number of close relatives, the Court does not consider it necessary to examine an argument whose outcome would be of no relevance in this case.

66. The Court shares the opinion of the Commission and the Delegate (see paragraph 63 above and paragraphs 84-88 of the Commission's report). In the light of the principles established in its case-law (see paragraph 64

above) and of the particular facts of the present case, it holds that the applicant, as the deceased's nephew, could legitimately claim to be a victim of an act as tragic as the murder of his uncle.

Consequently, the Court dismisses this preliminary objection of the Government.

B. Failure to exhaust domestic remedies

67. With regard to Articles 2, 3, 6 and 13 of the Convention, the Government objected that domestic remedies had not been exhausted as the applicant had not brought any of the ordinary civil, administrative or criminal proceedings that were available under Turkish law, despite the fact that they were effective.

The Government maintained that the Commission had not correctly decided that objection when considering the admissibility of the application. In particular, the Commission had not taken into account the "deliberate strategy" of the applicant's lawyers, who had sought to avoid seeking any remedy in Turkey and had made allegations of an "administrative practice" merely to provide a legal argument to cover the omission. However, the applicant, who alleged that he and his uncle had been assaulted by the security forces, could have brought administrative proceedings against the authorities to whom those responsible were accountable (see paragraphs 52-54 above) and civil proceedings for damages for the unlawful acts (see paragraph 55 above). Lastly, the applicant could have brought criminal proceedings (see paragraphs 48-51).

68. The applicant's counsel did not mention the issue of exhaustion of domestic remedies either in their memorial or at the hearing before the Court.

69. At the hearing, the Delegate of the Commission explained that the applicant had asserted that he had made a statement to the police at the hospital where he had been taken after the armed assault to which he had been subject, in which he had said that his assailants were police officers (see paragraph 16 above). With regard to the murder of the applicant's uncle, the Delegate of the Commission surmised that the applicant's arrest and the threats and ill-treatment to which he said he had been subject on the same day as the incident might explain why the applicant had not lodged a complaint with the public prosecutor. The Delegate also observed that whatever the scope of the applicant's complaint at the hospital had been, two separate criminal investigations had been started by the relevant public prosecutor's office. Accordingly, there was no need to require the applicant to have brought other court proceedings or to have waited until the end of those inquiries, which were still under way.

70. In view of its conclusion as to the scope of the dispute (see paragraph 60 above), the Court will consider the Government's preliminary objection only in so far as it concerns the complaints made under Articles 2 and 13 of the Convention.

71. The Court recalls that the rule of exhaustion of domestic remedies referred to in Article 26 of the Convention obliges applicants to use first the remedies that are normally available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged. The existence of the remedies must be sufficiently certain, in practice as well as in theory, failing which they will lack the requisite accessibility and effectiveness. Article 26 also requires that the complaints intended to be made subsequently at Strasbourg should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements laid down in domestic law, but not that recourse should be had to remedies which are inadequate or ineffective (see the Aksoy v. Turkey judgment of 18 December 1996, *Reports* 1996-VI, pp. 2275-76, §§ 51-52; Akdivar and Others v. Turkey judgment of 16 September 1996, *Reports* 1996-IV, p. 1210, §§ 65-67).

72. The Court notes that Turkish law provides civil, administrative and criminal remedies against illegal and criminal acts attributable to the State or its agents (see paragraph 47 above).

73. As regards a civil action for redress for damage sustained through illegal acts or patently unlawful conduct on the part of State agents (see paragraph 55 above), the Court notes that a plaintiff to such an action must, in addition to establishing a causal link between the tort and the damage he has sustained, identify the person believed to have committed the tort. In the instant case, however, it appears that it is still unknown who was responsible for the acts the applicant complained of (see paragraphs 29 and 35-45 above).

74. With respect to an action in administrative law under Article 125 of the Constitution based on the authorities' strict liability (see paragraphs 52-53 above), the Court reiterates that a remedy indicated by the Government must be sufficiently certain, in practice as well as in theory (see, among other authorities, the Yağcı and Sargın v. Turkey judgment of 8 June 1995, Series A no. 319-A, p. 17, § 42). However, the file supplied to the Court contains no example of any person having brought such an action in a situation comparable to the applicant's (see, *mutatis mutandis*, the Sakık and Others v. Turkey judgment of 26 November 1997, *Reports* 1997-VII, p. .., § 53). Furthermore, as the Court has already noted, an administrative law action is a remedy based on the strict liability of the State, in particular for the illegal acts of its agents, whose identification is not, by definition, a prerequisite to bringing an action of this nature. However, the investigations which the Contracting States are obliged by Articles 2 and 13 of the Convention to conduct in cases of fatal assault must be able to lead to the

identification and punishment of those responsible (see paragraphs 98-100 below). As the Court has previously held, that obligation cannot be satisfied merely by awarding damages (see, among other authorities, the Kaya v. Turkey judgment of 19 February 1998, *Reports* 1998-.., p. ..., § 105). Otherwise, if an action based on the State's strict liability were to be considered a legal action that had to be exhausted in respect of complaints under Articles 2 or 13, the State's obligation to seek those guilty of fatal assault might thereby disappear.

75. Consequently, the applicant was not required to bring the civil and administrative proceedings in question and the preliminary objection concerning proceedings of that nature is unfounded.

76. Lastly, with regard to the criminal law remedies, the Court notes that on 17 January 1993, at the Diyarbakır Social-Security Hospital, police officers took the applicant's statement on the incident which had taken place on 15 January (see paragraph 37 above). It would appear from the record that was drawn up as a result that the applicant was questioned – both as a suspect and a victim – about the firearm he was carrying (see paragraph 17 above). He said that unidentified persons had sought to kill him because he sold radical, left-wing newspapers and he requested that those responsible be found and punished. However, the record does not show that the applicant expressly alleged that his assailants were agents from the security forces (see paragraphs 16, 30 and 37 above). That statement nonetheless constitutes a complaint that was validly lodged in the manner laid down by the Code of Criminal Procedure (see paragraph 48 above). Irrespective of the content of that complaint, it is undisputed that two separate criminal investigations were begun by the judicial authorities, one concerning the assault on the applicant (see paragraph 35 above) and the other, the murder of his uncle (see paragraph 41 above).

77. The Court emphasises that the application of the exhaustion of domestic remedies rule must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting Parties have agreed to set up. Accordingly, it has recognised that Article 26 must be applied with some degree of flexibility and without excessive formalism. It has further recognised that the rule of exhaustion is neither absolute nor capable of being applied automatically; for the purposes of reviewing whether it has been observed, it is essential to have regard to the circumstances of the individual case. This means in particular that the Court must take realistic account, not only of the existence of formal remedies in the legal system of the Contracting Party concerned, but also of the general context in which they operate, as well as the personal circumstances of the applicant. It must then examine whether, in all the circumstances of the case, the applicant did everything that could

reasonably be expected of him to exhaust domestic remedies (see the Akdivar and Others judgment cited above, p. 1221, § 69, and the Aksoy judgment cited above, p. 2276, §§ 53 and 54).

78. The Court considers that this last limb of the Government's preliminary objection raises issues that are closely linked to those raised by the applicant's complaints under Articles 2 and 13 of the Convention.

79. Consequently, the Court dismisses the Government's preliminary objection in so far as it relates to the civil and administrative remedies relied on (see paragraph 75 above). It joins the preliminary objection concerning remedies in criminal law to the merits (see paragraphs 98-107 and 111-114 below).

III. ALLEGED VIOLATIONS OF ARTICLE 2 OF THE CONVENTION

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80. The applicant alleged that members of the security forces had attempted to kill him on 15 January 1993 and had murdered his uncle, Haşim Yaşa, on 14 June. He also complained that no adequate and effective judicial investigation had been conducted into the circumstances of either his assault or his uncle's murder. He argued that, in both his and the deceased's cases, there had been a breach of 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."

In support of his allegations, the applicant produced the Susurluk report (see paragraph 46 above).

81. The Government disputed that argument. The Commission considered that Article 2 had been infringed only in that the authorities had failed to carry out an adequate criminal investigation into the facts of the case.

A. Arguments of those who appeared before the Court

1. The applicant

82. The applicant asked the Court to follow the Commission's opinion that there had been a violation of Article 2 of the Convention in that there had been no adequate and effective investigation into the alleged facts. He also invited the Court to find that the assault he had suffered and his uncle's murder had been carried out by State agents.

83. In that connection, the applicant's counsel, relying on Article 28 of the Convention, complained that the Government had not communicated the relevant information to the Commission at the appropriate time, which would have made it easier to establish the truth. They requested in particular that the Susurluk report (see paragraph 46 above) be accepted at this stage of the proceedings as new evidence supporting the complaints made in their initial application. In their submission, that report – which had been commissioned by the Prime Minister, who had confirmed its content and credibility in televised interviews – destroyed the Government's case. Although it did not enable those responsible for the relevant attacks to be identified, the report contained very serious admissions and an acknowledgement that attacks for which no-one claimed responsibility and which were classified as "*faili meçhul*" (unknown perpetrator) had in fact been ordered by senior figures in the security forces. That information was directly relevant to the incidents at the origin of the present case. Since it called into question the State's denials as to the implication of the State machinery in the killings of and assaults on journalists and sellers of newspapers such as the *Özgür Gündem*, it deprived the statements made and evidence lodged by the Government earlier in the proceedings of all credibility. The Susurluk report was consequently of crucial importance in providing an answer to the question – which had been left open in the Commission's report (see paragraph 34 above) – whether the applicant and his uncle were victims of a campaign of violence waged with the State's connivance.

2. The Government

84. The Government maintained that the applicant's allegations were unfounded and that the file produced by him did not contain anything capable of explaining how responsibility for the alleged events could be attributed to the security forces (see paragraph 30 above). The only evidence that had been produced by the applicant's counsel were lists of alleged acts of repression against journalists, which had themselves been drawn up on the basis of press releases emanating from sympathetic organisations.

85. The Government said that they agreed with the Commission's conclusion that the alleged facts were not attributable to State agents. On the other hand, they contested the reasons which the Commission had given for concluding that there had been a breach of the obligation to carry out an effective investigation. The Government said that the investigations concerned were still pending (see paragraph 29 above) and maintained that the relevant authorities had to date conducted those investigations into the contentious events properly, in accordance with usual practice and in a sufficient and appropriate manner, in spite of the fact that the applicant had at no stage lodged a complaint setting out his allegations, either in his own name or on behalf of his uncle (see paragraph 30 above).

On that point, the Government contended that the Commission had been imprudent in applying Article 2 without "seeking to find out what measures had been taken by the national authorities to prevent a deterioration in security or what judicial and administrative investigations had been carried out to identify the offenders, whom [the Government] presumed were simply terrorists". Referring to the Commission's case-law (application no. 9360/81 Dec. 28.2.83, D.R. 32, p. 190), the Government submitted that regard should have been had in the present case to the principle that Article 2 could not imply a positive obligation to prevent any possibility of violence occurring.

86. The Government also submitted that the Commission had not had proper regard, either, to the fact that in the instant case the judicial authorities had – on the very day the incidents had occurred – initiated of their own motion judicial procedures with a view to identifying the assailants. Although the investigations had been unsuccessful as those responsible had not been identified, that did not of itself show that the Turkish authorities had sought to conceal or distort the events. The Government pointed out that in all European countries "there are crimes of murder or assault that are not cleared up, especially where terrorist or criminal organisations are involved".

Consequently, they submitted in the alternative that, as regards their obligation under Article 2 of the Convention, the authorities could not have been expected to do more since the events in the instant case had taken place in "the context of the fight against terrorists, who rarely return to the scene of their crime". In such circumstances, the police and the judicial authorities were "constrained to proceed with precaution and to wait until the results of the various investigations had been cross-checked, thus enabling the perpetrators of earlier crimes and acts of violence to be identified".

87. At the hearing, the Government representative contested the evidential value of the Susurluk report. The report currently had no official status. Furthermore, it was not relevant as it had no direct link with the

present case. It had been prepared with the sole aim of examining certain allegations so that judicial investigations could be carried out subsequently. It was not therefore the result of a judicial inquiry as such.

The Government representative also contested the argument under Article 28 of the Convention based on the lack of cooperation. She said that no document or item of evidence had been concealed and that all the Commission's questions had been answered, on the basis of information obtained from the Ministry of Justice.

3. The Commission

88. Referring to its conclusions (see paragraphs 32-45 above), the Commission emphasised that they had been reached on the basis of the written documents lodged on the case file, in particular those submitted by the Government concerning the police inquiries that had been made, and of the observations made by the parties in response to its questions. In the instant case, it had noted that the allegation that the events in issue had taken place as part of a campaign of attacks against people connected with certain newspapers, such as the *Özgür Gündem*, was the subject of fierce debate between the parties; that allegation was so serious that it was hardly likely that the facts that had given rise to it would be elucidated by the evidence of the people apt to be concerned.

The Commission had also noted that certain cases pending before it (applications nos. 22492/93, 22496/93, 23144/93 and 25301/94) likewise concerned measures taken against and attacks on the *Özgür Gündem*, and people connected with its publication and distribution.

89. Notwithstanding its acute concern about the explanations – which, moreover, had not been refuted by the Government – received about the murders of and attacks on several people who had taken part in the distribution of such publications, the Commission had concluded that it could not consider that it had been established beyond all reasonable doubt that agents from the security forces or police officers had been implicated in the shootings of the applicant and his uncle.

90. The Commission had nonetheless noted a number of factors that enabled it to consider that the particular circumstances in which the incidents had occurred imposed on the authorities an obligation to carry out an adequate and effective investigation, in order to determine whether the attacks on the applicant and his uncle could have been connected with actions on the part of members of the security forces. In that regard, the Commission observed that, despite the invitations it had sent to the Government, the latter had confined themselves to complaining of the deceitful nature of the allegations and, generally, of a lack of evidence, and had been unable to provide any satisfactory information at all on the measures that had been taken to verify the truth of the applicant's allegations (see paragraph 45 above).

For that reason, the Commission had concluded that there were deficiencies in the investigations such as to amount to a breach of the obligation under Article 2 of the Convention to protect the right to life (see paragraphs 101-107 of the Commission's report).

91. At the hearing, the Delegate of the Commission gave his view on the relevance of the Susurluk report to the determination of the facts of the case. He said that while he had doubts as to the weight the Commission could have attached to that document, in his view, it appeared to support the notion that the State had been implicated in a number of serious human rights' violations in south-east Turkey that were to a certain degree comparable to the attacks on the applicant and his uncle. However, reiterating that in such cases the liability of the State can only be inferred from facts that have been proved beyond all reasonable doubt, the Delegate concluded that the Susurluk report did not provide a sufficient basis for excluding such doubt and invited the Court to accept that the facts were as the Commission had found.

B. The Court's assessment

1. The attacks on the applicant and his uncle

92. The Court observes that neither the applicant's counsel nor the Government dispute in any material particular the facts as established by the Commission. On the other hand, those appearing before the Court completely disagreed about the conclusions to be drawn under Article 2 of the Convention on the basis of those facts.

93. It is important to remember in this respect that under the Convention system the establishment and verification of the facts are primarily a matter for the Commission (see Articles 28 § 1 and 31 of the Convention). Only in exceptional circumstances will the Court exercise its own powers in this area. However, 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 (see the McCann and Others v. the United Kingdom judgment of 27 September 1995, Series A no. 324, p. 50, §§ 169 and the Kaya judgment cited above, p. …, § 75).

In the instant case, the Commission was unable to conclude that the allegation that the attacks had been perpetrated by the security forces had been proved beyond all reasonable doubt (see, among other authorities, the Aydın v. Turkey judgment of 25 September 1997, *Reports* 1997-VI, p. 1889, § 72 and the Kaya judgment cited above, p. …, § 75). However, the applicant pleaded before the Court that new evidence that had not been before the Commission militated in favour of his version (see paragraph 83 above). In that connection, he referred to the Susurluk report (see

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paragraph 46 above), the evidential value of which was, however, firmly contested at the hearing by the representative of the Government (see paragraph 87 above).

94. The Court reiterates that in determining whether substantial grounds have been shown for believing that the respondent State has not complied with its responsibilities under the Convention, the Court must examine the issues raised before it in the light of the material provided by those appearing before it and, if necessary, of material obtained *propio motu* (see *mutatis mutandis*, the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 64, § 160 and the Cruz Varas and Others v. Sweden judgment of 20 March 1991, Series A no. 201, p. 29, § 75). Although the Court must refer primarily to the circumstances existing at the time of the incidents complained of, it is not precluded from having regard to information coming to light subsequently (see, *mutatis mutandis*, the Cruz Varas and Others judgment cited above, p. 30, § 76).

95. The Court notes that the Susurluk report – which was prepared at the Prime Minister's request – relates to a series of disturbing events that occurred in the south-east region of Turkey (see paragraph 46 above). The fate of certain newspaper-publishing companies, in particular the company which published the *Özgür Gündem*, is particularly alarming in that regard. According to the author of the report, the cause of that general situation, which has considerably troubled public opinion, has been the Kurdish problem and the means used to combat the PKK in that part of the country.

96. While it is true that the attainment of the required evidentiary standard (see paragraphs 34 and 91 above) may follow from the co-existence of sufficiently strong, clear and concordant inferences or unrebutted presumptions (see the Aydın judgment cited above, p. 1888, § 70 and the Kaya judgment cited above, p. .., § 77), their evidential value must be considered in the light of the circumstances of the individual case and the seriousness and nature of the charge to which they give rise against the respondent State.

In the present case, the Court considers that notwithstanding the serious concerns to which it gives rise, the Susurluk report does not contain material enabling the presumed perpetrators of the attacks on the applicant and his uncle to be identified with sufficient precision. Indeed, the applicant admits as much in his memorial (see paragraph 83 above).

97. Consequently, the Court does not consider that it should depart from the Commission's conclusions regarding this complaint. It accordingly holds that the material on the case file does not enable it to conclude beyond all reasonable doubt that Mr Eşref Yaşa and his uncle were respectively attacked and killed by the security forces.

It follows that there has been no violation of Article 2 on that account.

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2. Alleged inadequacy of the investigations

98. The Court recalls that the obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see, *mutatis mutandis*, the McCann and Others judgment cited above, p. 48, § 161 and the Kaya judgment cited above, p. …, § 86).

99. In the instant case, the Government maintained that there was no evidence that State agents had been implicated in the commission of the alleged acts (see paragraph 84 above). Furthermore, the applicant had at no stage made any explicit accusation to that effect, either in his own name, or on behalf of his uncle (see paragraphs 67 and 76 above).

100. In that connection, the Court emphasises that, contrary to what is asserted by the Government, the obligation is not confined to cases where it has been established that the killing was caused by an agent of the State. Nor is the issue of whether members of the deceased's family or others have lodged a formal complaint about the killing with the competent investigatory authorities decisive. In the case under consideration, the mere fact that the authorities were informed of the murder of the applicant's uncle gave rise *ipso facto* to an obligation under Article 2 to carry out an effective investigation (see, *mutatis mutandis*, the Ergi v. Turkey judgment of 28 July 1998, *Reports* 1998-…, p. …, § 82). The same applies to the attack on the applicant which, because eight shots were fired at him, amounted to attempted murder (see paragraph 36 above).

101. In the present case, there is no dispute as to what steps the authorities in charge of the preliminary investigation and the competent public prosecutor's office took following the events in issue (see paragraphs 35-45 above).

Following an armed assault on the applicant, a police investigation started that same day, namely on 15 January 1993. At the end of that initial stage, which lasted only two days, Mardinkapı Security Directorate concluded, in its report of 17 January 1993, that it had not been possible to find those responsible for the attack, or even to identify them. Consequently, on 20 January the Diyarbakır Public Prosecutor instructed the directorate to pursue its investigation and to arrest the suspects or, if it was unable to do so, to inform him of progress every three months. On 14 April the public prosecutor issued a second set of similar instructions in which he renewed his request to be informed every three months of the results of the police investigations until such time as prosecution of the offence became statute-barred. According to a note in the instructions, that

would have been on 15 January 1998 (see paragraph 39 above). Before the Convention institutions, however, the Government did not produce copies of the quarterly reports the police had been instructed to draw up (see paragraph 45 above).

The preliminary inquiry into the murder of Mr Haşim Yaşa also began on the day of that incident, namely 14 June 1993. By 21 June the authorities had among other things carried out an autopsy, obtained an expert ballistics report and heard three witnesses, including the deceased's son. The Court has no information on subsequent developments in that investigation (ibid.).

102. Yet the Government were aware of Mr Yaşa's application by 11 October 1993 (see paragraph 6 of the Commission's report) and the Commission invited the Government to provide it with more precise details concerning the investigative measures that had been taken following the attacks on the applicant, his uncle and other persons connected with certain radical periodicals (see paragraphs 34 and 90 above).

103. Despite those requests, the Government provided no concrete information on the state of progress of the investigations (see paragraph 90 above and paragraph 105 of the Commission's report) which, more than five years after the events, do not appear to have produced any tangible result. Admittedly, the Government said that the investigations were still pending, but they did not provide anything to show that they were actually progressing (see paragraphs 29, 35-45 and 86 above). In that regard, the last investigative step of which the Court is aware dates back to 21 June 1993, when the expert ballistic report in the investigation into the murder of Haşim Yaşa was prepared (see paragraph 44 above), whereas the Diyarbakır Public Prosecutor had on 14 April 1993 requested the police to inform him every three months of progress in the investigation (see paragraph 101 above). The only explanation given by the Government is that the investigations were taking place in the context of the fight against terrorism and that in such circumstances the police and judicial authorities were constrained to "proceed with caution and to wait until the results of the various investigations had been cross-checked, thus enabling the perpetrators of earlier crimes and acts of violence to be identified" (see paragraph 86 above).

104. The Court is prepared to take into account the fact that the prevailing climate at the time in that region of Turkey, marked by violent action by the PKK and measures taken in reaction thereto by the authorities, may have impeded the search for conclusive evidence in the domestic criminal proceedings. Nonetheless, circumstances of that nature cannot relieve the authorities of their obligations under Article 2 to carry out an investigation, as otherwise that would exacerbate still further the climate of impunity and insecurity in the region and thus create a vicious circle (see *mutatis mutandis*, the Kaya judgment cited above, p. ..., § 91).

105. In addition, the Court is struck by the fact that the investigatory authorities appear to have excluded from the outset the possibility that State agents might have been implicated in the attacks. Thus, the Public Prosecutor at the Diyarbakır National Security Court considered the incidents in question to have been merely "a settling of scores between armed organisations" (see paragraph 45 above and paragraph 61 of the Commission's report), whereas the Government considered that all responsibility for the attacks lay with "terrorists", even though the investigations are not over and no concrete evidence capable of confirming that to be a valid hypothesis has been brought to the attention of the Court (see paragraphs 85 and 86 above).

106. That approach has to be assessed in the light of the fact that the Commission found that there were a number of attacks involving killings in south-east Turkey on journalists, newspaper kiosks and distributors of the *Özgür Gündem* and that some of those incidents had even formed the subject matter of applications to it (nos. 22492/93, 22496/93, 23144/93 et 25301/94 – see paragraphs 52-59 of Commission's report). The Government have not disputed that the attacks occurred or that they were serious. The Commission also noted that many complaints and requests for protection had been made to the authorities by a journalist, Mr Y. Kaya, who at the time was the proprietor of the newspaper.

After considering all the facts of the case, the Commission did not consider that in the case before it "the authorities [were] or [could] have been unaware that those involved in the publication and distribution of the *Özgür Gündem* feared that they were falling victim to a concerted campaign tolerated, if not approved, by State officials" (see paragraphs 34 and 89 above).

Having carried out its own assessment of this aspect of the case, in the light in particular of the findings of the Susurluk report (see paragraph 46 above), the Court considers that observation to be well-founded. In the instant case, it was therefore incumbent on the authorities to have regard, in their investigations, to the fact that State agents may have been implicated in the attacks. In that connection, whether or not the applicant had formally identified the security forces as being the assailants was of little relevance (see paragraphs 30, 37, 76 and 85 above).

107. In short, because the investigations carried out in the instant case did not allow of the possibility that given the circumstances of the case the security forces might have been implicated in the attacks and because, up till now, more than five years after the events, no concrete and credible progress has been made, the investigations cannot be considered to have been effective as required by Article 2.

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108. In consequence, the applicant has satisfied the obligation to exhaust domestic remedies. It follows that the Court dismisses the criminal-proceedings limb of the Government's preliminary objection and holds that there has been a violation of Article 2.

IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

109. The applicant complained that he had not had an effective remedy within the meaning of Article 13 of the Convention, which reads as follows:

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

The Government contested that argument. The Commission considered that it was unnecessary to examine it separately as no separate issue arose under Article 13.

A. Arguments of the parties

110. The applicant, who disagreed with the Commission's conclusion, submitted that an independent examination from the one carried out under Article 2 of the Convention was merited in respect of this complaint. He asserted that the legal order and practice in south-east Turkey, which was subject to the state of emergency, had been changed in order deliberately to make the exercise of remedies against the State more difficult. The special legislation in force in that region had established a system which ensured impunity for the security forces, based on the authorities' strategy of denying the facts and any liability, in order to prevent effective access to domestic remedies.

111. Referring to their observations on the question of the exhaustion of domestic remedies (see paragraph 67 above), the Government confined themselves to saying that the applicant could not complain of a violation of Article 13.

B. The Court's assessment

112. The Court observes that Article 13 of the Convention guarantees the availability at a national level of a remedy to enforce the Convention rights and freedoms, as secured in the domestic legal order. The effect of this Article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of an

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"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 obligations under this provision. 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 Aksoy judgment cited above, p. 2286, § 95, the Aydın judgment cited above, p. 1895, § 103, and the Kaya judgment cited above, p. ..., § 106).

113. In the instant case, the Court has concluded that it has not been proved beyond all reasonable doubt that the attacks on the applicant and his uncle were carried out by State agents (see paragraph 97 above). That fact, however, does not necessarily mean that the complaint under Article 2 is not arguable (see, among other authorities, the Boyle and Rice v. the United Kingdom judgment of 27 April 1988, Series A no. 131, p. 23, § 52, and the Kaya judgment cited above, p. ..., § 107). The Court's conclusion as to the merits does not relieve the State of the obligation to carry out an effective investigation into the substance of the complaint, which, for the reasons mentioned above (see paragraph 106 above), was arguable.

114. It is also necessary to reiterate that the nature of the right that is alleged to have been infringed has implications on the extent of the obligations under Article 13. Given the fundamental importance of the right to protection of life, Article 13 imposes, without prejudice to any other remedy available under the domestic system, an obligation on States to carry out a thorough and effective investigation apt to lead to those responsible being identified and punished and in which the complainant has effective access to the investigation proceedings (see, *mutatis mutandis*, the Kaya, Aksoy and Aydın judgments cited above, § 107, § 98, and § 103 respectively).

115. The Court reiterates that the authorities had an obligation to carry out an effective investigation into the circumstances of the attacks (see paragraph 107 above). However, five years after those attacks took place, the investigations have still not produced any results. For the reasons set out above (see paragraphs 98-108 above), the respondent State cannot be considered to have conducted an effective criminal investigation as required by Article 13, the requirements of which are stricter still than the investigatory obligation under Article 2 (see the Kaya judgment cited above, p. ..., § 107 – see paragraphs 98, 112 and 114 above).

Consequently, there has been a violation of Article 13.

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V. ALLEGED PRACTICE BY THE AUTHORITIES OF INFRINGING ARTICLES 2 AND 13 OF THE CONVENTION

116. Referring in particular to the Susurluk report, the applicant maintained that there existed in Turkey an officially tolerated practice of violating Articles 2 and 13 of the Convention that had aggravated the breaches of which he and his uncle had been victims. In south-east Turkey, criminal proceedings were bound to fail and were incapable of preventing unlawful acts and abuse of power by the authorities. By systematically denying any breaches of the Convention, the authorities were safe from any proceedings brought against them.

117. The Court considers that the material on the file is not sufficient to enable it to determine whether the authorities have adopted a practice of violating any of the Articles relied on by the applicant.

VI. ALLEGED VIOLATION OF ARTICLES 10, 14 AND 18 OF THE CONVENTION

118. Relying on Article 10 of the Convention, the applicant submitted that the attacks on him and his uncle constituted an aggravated violation of their right to freedom of expression, since they had been carried out because they sold the *Özgür Gündem* and were part of a campaign of violence tolerated by the State. He also said that both in his and his uncle's cases there had been a violation of Article 14, taken together with Articles 2, 10 and 13, through discrimination on grounds of ethnic origin and political opinion. Lastly, the applicant complained of a violation of Article 18 in that the facts of the case revealed clear abuses of power by the State.

119. The Government contested the applicant's arguments. The Commission concluded that there had been no violation of Article 10 and considered that the complaints made under Articles 14 and 18 were unfounded.

120. The Court notes that those complaints arise out of the same facts as those considered under Articles 2 and 13. In the light of its conclusion with respect to those Articles (see paragraphs 107 and 115 above), the Court does not consider it necessary to examine those complaints separately.

VII. APPLICATION OF ARTICLE 50 OF THE CONVENTION

121. The applicant sought just satisfaction under Article 50 of the Convention, which provides:

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> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

The Government contested the applicant's claims in several respects. The Delegate of the Commission had no specific comments.

A. Pecuniary damage and non-pecuniary damage

122. The applicant requested the Court to award him 54,000 Deutschmarks (DEM) in total, by way of pecuniary damage: DEM 4,000 for his treatment in hospital and DEM 50,000 for loss of earnings following the attack on him. He also claimed on behalf of Haşim Yaşa's family a sum of DEM 50,000 for loss of earnings and costs entailed by his death.

The applicant claimed a total sum of 150,000 pounds sterling (GBP) for non-pecuniary damage, which he justified as follows:

(i) GBP 70,000 for himself as damages for the attack (GBP 50,000), the failure to protect his right to life (GBP 10,000) and the failure to provide an effective remedy (GBP 10,000);

(ii) GBP 70,000 for the family of the deceased in respect of the latter's murder (GBP 50,000), the failure to protect his right to life (GBP 10,000) and the failure to provide him an effective remedy (GBP 10,000);

(iii) GBP 10,000 for himself and for the deceased as victims of a practice of violations of Article 13 of the Convention.

123. As its main submission, the Government maintained that no redress was necessary in the present case. In the alternative, they invited the Court to dismiss the claims for compensation made by the applicant as being exorbitant and unjustified. As regards the non-pecuniary damage, the Government firstly argued that the claims should not have been split up. They also submitted that there was no causal link between the complaints and the alleged damage. The Government firmly opposed the deceased's family being awarded compensation on the ground that it had not taken part in the proceedings before the Strasbourg institutions.

More generally, the Government maintained that the sums sought had been put forward without regard to the social conditions in south-east Turkey, or to the minimum wage levels in force in the country. On that point, it said that compensation for non-pecuniary damage should not constitute a source of enrichment.

124. The Court observes that it has not been established that the applicant was attacked or his uncle killed by agents from the security forces (see paragraph 97 above). It cannot therefore accede to the claims made in that connection for pecuniary and non-pecuniary damage. Secondly, as it has not been established either that there has been a practice of violations of the Convention (see paragraph 117 above), no compensation can be paid under that head.

Like the Government, the Court observes further that the application was lodged by Mr Haşim Yaşa's nephew only (see paragraph 63 above).

In these circumstances, the Court considers that only Mr Eşref Yaşa is entitled to just satisfaction for the non-pecuniary damage suffered as a result of the violations of Articles 2 and 13 of the Convention (see paragraph 107 and 115 above). Ruling on an equitable basis, the Court decides to award the applicant the sum of GBP 6,000, to be converted into Turkish liras at the rate applicable at the date of payment.

B. Costs and expenses

125. The applicant claimed GBP 16,426.42 in reimbursement of the costs and expenses incurred in the preparation and presentation of his case before the Convention institutions. In his schedule of costs, he set out his claim as follows, after deducting the sums received by way of legal aid from the Council of Europe:

(i)	fees of the British representatives	GBP 13,190.70
(ii)	fees of the Turkish advisers	GBP 725.00
(iii)	various administrative expenses	GBP 985.72
(iv)	administrative costs incurred in Turkey	GBP 250.00
(v)	interpretation and translation costs	GBP 1,440.00

The applicant's counsel requested that any sums awarded in respect of costs and expenses be paid to their bank account in the United Kingdom.

126. The Government opposed reimbursing the costs incurred by the fact that foreign lawyers had been instructed, as the sole result had been that the costs of the case had been inflated. In addition, the amount claimed for costs and expenses was excessive and not supported by documentary evidence.

127. The Court reiterates that, as applicants are free to select legal representatives of their choice, Mr Yaşa's recourse to United Kingdom-based lawyers specialising in the international protection of human rights cannot be criticised (see, *mutatis mutandis*, the Kurt v. Turkey judgment of 25 May 1998, *Reports* 1998-..., p. ..., § 179). 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 12,000 together with any Value Added Tax (VAT) that may be chargeable, less the 8,045 French francs

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(FRF) which the applicant has received by way of legal aid from the Council of Europe.

C. Default interest

128. The Court considers it appropriate to take the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment, namely 7.5% per annum.

FOR THESE REASONS THE COURT

1. *Dismisses* by eight votes to one the Government's preliminary objections;
2. *Holds* unanimously that it has not been established that the applicant was attacked and his uncle killed in violation of Article 2 of the Convention;
3. *Holds* by eight votes to one that there has been a violation of Article 2 of the Convention in that the authorities of the respondent State did not conduct an adequate and effective investigation into the circumstances of the said incidents;
4. *Holds* by eight 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 Articles 10, 14 or 18 of the Convention;
6. *Holds* by eight votes to one:
   (a) that the respondent State is to pay to the applicant, within three months, the following sums:
      (i) 6,000 (six thousand) pounds sterling for non-pecuniary damage to be converted into Turkish liras at the exchange rate applicable on the date of settlement;
      (ii) 12,000 (twelve thousand) pounds sterling for costs and expenses together with any sum due by way of VAT, less 8,045 (eight thousand and forty-five) French francs to be converted into pounds sterling at the rate of exchange applicable at the date of this judgment;
   (b) that simple interest at an annual rate of 7.5% shall be payable from the expiry of the above three months until the date of settlement;
7. *Dismisses* unanimously the remainder of the claim for just satisfaction.

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Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 2 September 1998.

Signed: RUDOLF BERNHARDT
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 § 2 of the Convention and Rule 53 § 2 of Rules of Court A, the following partly dissenting opinion of Mr Gölcüklü is annexed to this judgment.

Initialled: R. B.
Initialled: H. P.

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PARTLY DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

(provisional translation)

To my great regret, I am unable to share the opinion of the majority on the following points.

1. There have been cases in which distant relatives, such as cousins or nephews, claiming to be victims within the meaning of Article 25, have lodged applications with the Commission, which has held that that provision had been complied with. Although Article 25 enables certain blood ties to be taken into account in construing the concept of who is a "victim", it is however necessary to ask oneself how far that approach can be taken without a risk of converting the right of individual petition into a sort of *actio popularis*. In the instant case, no one more closely related to the deceased (such as his wife or children) than the applicant, who was only his nephew, took part in the proceedings before the Convention institutions (see paragraph 123 of the judgment). It must not be forgotten that behind all these cases, which are similar and come from south-east Turkey, are to be found the Diyarbakır Human Rights Association and the Kurdish Human Rights Project from London, which bodies pursue political ends rather than defending the rights of alleged victims. In my opinion, it is therefore going too far to hold that the applicant was also a "victim" of his uncle's death and that the application included that claim too.

2. Likewise the applicant has not in this case exhausted the domestic remedies, that are both effective and efficient, provided by Turkish law. On this point I refer to my dissenting opinions in the judgments of: Akdivar and Others v. Turkey of 16 September 1996, Aydın v. Turkey of 25 September 1997, Menteş and Others v. Turkey of 28 November 1997 and Selçuk and Asker v. Turkey of 24 April 1998. Consequently, I consider that this conclusion makes it unnecessary for me to decide the issues raised on the merits in the present case.

3. Furthermore, with regard to the conclusion that Article 2 has been infringed because of the lack of an effective and efficient investigation into the circumstances of the death, I consider, like the Commission, that no separate issue arises under Article 13. On this point I refer to my dissenting opinions in the Kaya v. Turkey judgment of 19 February 1998 and in the Kurt v. Turkey judgment of 25 May 1998.

4. Lastly, given the particular and specific features of this case, I find the sums awarded to the applicant by the majority to be excessive, as regards both non-pecuniary damage and costs and expenses. To my mind, it was neither absolutely necessary nor helpful for three British lawyers to act in this case, as it did not give rise to any special difficulty.

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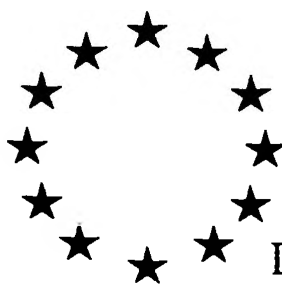

COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

EUROPEAN COURT OF HUMAN RIGHTS

COUR EUROPEENNE DES DROITS DE L'HOMME

Strasbourg, 21 April 1998

Cour/Misc (98) 269
Or. Eng. and Fr.

No. 76711

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CASE OF YAŞA v. TURKEY

(63/1997/847/1054)

VERBATIM RECORD

of the hearing held on 21 April 1998

(Document not revised by the registry of the Court and subject to corrections in accordance with Rule 47 § 2 of Rules of Court A)

(English version)

Present:

Court:

Mr R. Bernhardt, **President,**
Mr Thór Vilhjálmsson,
Mr F. Gölcüklü,
Mr R. Pekkanen,
Mr L. Wildhaber,
Mr D. Gotchev,
Mr J. Casadevall,
Mr M. Voicu,
Mr V. Butkevych, **Judges,**
Mr F. Matscher,
Mr G. Mifsud Bonnici,
Sir John Freeland,
Mr P. Jambrek, **Substitute Judges,**
Mr P.J. Mahoney, **Deputy Registrar;**

Government of Turkey, Party:

Mrs D. Akçay, **Co-Agent,**
Ms A. Emüler,
Ms M. Gülşen,
Mr Ş. Özkan,
Ms A. Günyakti, **Advisers;**

European Commission of Human Rights:

Mr H. Danelius, **Delegate,**
Mrs K. Reid, **Secretariat;**

Applicant:

Mr K. Boyle,
Ms F. Hampson,
Ms A. Reidy, **Counsel.**

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(The hearing was opened at 9.30 a.m. by Mr Bernhardt, President of the Court.)

THE PRESIDENT: I declare open the public hearing in the case of Yaşa v. Turkey. The case was brought before the Court by the European Commissions of Human Rights on 9 July 1997. In pursuance of Article 43 of the Convention, a Chamber of the Court was constituted on 27 August 1997 to hear the case.

In reply to the Registrar's enquiry made in accordance with Rule 33 § 3 (d) of Rules of Court A, Mr Eşref Yaşa, being the applicant who had lodged the complaint on his behalf and on behalf of his deceased uncle, Mr Haşim Yaşa with the Commission under Article 25 of the Convention indicated that he wished to take part in the proceedings now pending before the Court. In accordance with Rule 30, he delegated Mr Boyle and Ms Hampson, barristers-at-law from the University of Essex and Mr Baydemir, a lawyer practising Diyarbakır, as his representatives.

The Government are represented by their Co-agent, Mrs Akçay, Deputy to the Permanent Representative of Turkey to the Council of Europe and as advisers by Mr Kaya, Ms Emüler, Ms Gülşen, Mrs Özkan and Ms Günyatkı. The Commission is represented by Mr Danelius, as Delegate, assisted by Mrs Reid, member of the Secretariat. The applicant is represented by Mr Boyle, Ms Hampson and Ms Reidy, also a barrister-at-law.

I welcome the representatives in the name of the Court.

Having consulted the Agent of the Government, the Delegate of the Commission and the representatives of the applicant, I have determined the order of addresses as follows: Mr Danelius for the Commission will speak first, then Mr Boyle for the applicant and finally Ms Akçay for the Government.

I call Mr Danelius.

Mr DANELIUS: Thank you Mr President. The newspaper *Özgür Gündem* was a daily newspaper which was published in Turkey in the Turkish language. It did not only publish news but was also aimed at reflecting certain opinions among Turkish Kurds. *Özgür Gündem* was a controversial newspaper in Turkey, and it experienced serious difficulties and finally ceased publication. The present report in the Yaşa case in paragraphs 52-59 summarises information which has been provided by the applicant about serious attacks which were carried out on the journalists of *Özgür Gündem* and on distributors of the newspaper as well as various other difficulties experienced by *Özgür Gündem* and its staff.

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We cannot know of course what were the precise circumstances regarding all these events, but it is hardly contested that there were a number of serious incidents in which the victims had some link with *Özgür Gündem*. As pointed out in paragraph 81 of the report, there is another case still pending before the Commission in which the Commission is called upon to examine whether *Özgür Gündem*, its owners and some of its journalists were victims of violations of their freedom of expression. In yet another case which was heard by your Court as late as last month, the case of Tekin v. Turkey, the question was whether a reporter or rather a former reporter of *Özgür Gündem* had been exposed to torture or ill treatment during his detention.

I have mentioned this background element as a general introduction to my comments on the present case because it is possible and perhaps even probable that the attacks which injured the applicant Eşref Yaşa and killed his uncle Haşim Yaşa had some connection with the fact that Eşref Yaşa had a newspaper kiosk in Diyarbakır where *Özgür Gündem* and some other controversial newspapers were sold, and also with the fact that his uncle assisted him in this newsagent business.

Eşref Yaşa tells us that he had been threatened by the police because he sold those newspapers. He also states that in November 1992, that is a few months before the attack upon him, he had been visited by two police officers, one of whom he mentions by name, and they had told him that they would burn down his shop. About one week later his shop was actually set on fire and burnt down and a couple of months later on 15 January 1993 Eşref Yaşa was shot at in the street in Diyarbakır. He was then injured but he survived.

On a few months later on 14 June 1993, Eşref Yaşa's uncle, Haşim Yaşa, who had taken care of his nephew's newsagent business for some time was shot and killed. Eşref Yaşa alleges that he was himself arrested, assaulted and threatened on the same day as his uncle had been killed and that he was told by the police that he had been the intended target when his uncle was killed.

The Government deny in the present case that there was any involvement by the authorities in the attacks against Eşref and his uncle.

The first question on which I would like to comment is of a formal nature. Is Eşref Yaşa competent under the Convention to complain not only about the attack on himself but also about the killing of his uncle? In other words, is he to be considered in this respect a victim within the meaning of Article 25 of the Convention.

It is an established practice according to the Commission's case-law that when a person has been killed, a close relative is competent to complain of the killing. The only question is whether Eşref Yaşa as a nephew is a sufficiently close relative.

The Commission's view on such matters is in general rather liberal, and its position in the present case has also been liberal. When a relative wishes to complain about such a serious matter as a killing, this shows in itself that the relative feels personally affected. There is therefore a rather strong presumption that he or she should be accepted as a victim who is entitled to complain under the Convention. In the present case, it also not clear if there were any other - and closer - relatives who could have introduced an application. Moreover, there is a special feature in the present case in so far as it is claimed that there was a link between the attack on the applicant Eşref Yaşa himself and the killing of his uncle. This also shows that Eşref Yaşa has a special personal interest in having the whole series of events examined, and it speaks in favour of allowing him to complain of both events. For all these reasons, I think that the Commission was justified in accepting him as an applicant as regards all parts of his application.

Another formal problem which arises concerns the exhaustion of domestic remedies. The Government consider that the domestic remedies have not been exhausted, and on this matter I would like to make the following remarks.

When a person has been the victim of a criminal offence, he can usually choose between different domestic remedies. He can make a complaint to the police or a public prosecutor in order to have criminal proceedings instituted against the perpetrator. He can also institute civil proceedings in order to obtain damages from the perpetrator or from someone else who is responsible for the act, for instance the State in case the crime has been committed by a public official. There may also be other avenues open to him.

But I submit that it would clearly be unreasonable to require a person to use all these remedies cumulatively, one after the other. If, for instance, he has chosen to make a complaint in order to have criminal proceedings instituted and he is unsuccessful in obtaining such proceedings, he should not be required under Article 26 of the Convention also to institute civil proceedings in order to claim damages or also to engage in administrative proceedings, which is possible in some countries, including Turkey, when a claim is raised against a State.

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In other words, if the victim has tried to have criminal proceedings instituted, this should normally be considered sufficient as exhaustion of domestic remedies for the purposes of Article 26.

Now it happens frequently that a criminal investigation is instituted *ex officio* by a public prosecutor, an investigation which will normally lead to prosecution if the perpetrator can be identified. In such a case, it cannot be necessary for the victim also to complain to the prosecutor and ask for criminal proceedings to be instituted, but he should be entitled to rely on the criminal investigation which has already been initiated and wait and see what will be the outcome of that investigation.

This is in fact the way the Commission has looked at the issue of exhaustion of domestic remedies in a large number of cases.

In the present case, the applicant, Eşref Yaşa, has stated that, in regard to the attack on himself, he made a statement to the police at the hospital in which he claimed that his assailants were from the police. This is what he affirmed before the Commission, and there could of course be some doubt as to what he actually told the police on that occasion, since we do not have any record of this conversation. In the applicant's memorial to the Court on page 23, reference is also made to the applicant's declaration to the Human Rights Association on 8 June 1993. In this declaration he states that, despite the fact that notes had been taken for referral to the prosecution when the police took his statement at the hospital, the applicant himself also went to the prosecutor, apparently after he had been discharged from the hospital. He then found out, he says, that no inquiry had been opened in relation to the attack against him. On the contrary, he was himself prosecuted for possession of an unlicensed firearm.

In regard to his uncle's death, I do not think that Eşref Yaşa claims to have made any specific complaint to the police. His allegation is rather that on the same day as the killing occurred he was himself arrested, assaulted and threatened by the police, and he was also told that he had been the intended victim. If it is true that he was treated in this way, this could explain why he did not make a specific complaint to the police on that occasion.

But whatever complaints the applicant may have made to the police and the prosecutor, we know that in any case an investigation was initiated by the public prosecutor in Diyarbakır in regard to both the shooting of the applicant and the killing of his uncle and we are told that it has still not been possible to identify the perpetrator or the perpetrators of these crimes.

In these circumstances, it would follow from the Commission's case-law in regard to exhaustion of domestic remedies that Eşref Yaşa was not required to take any further action. Nor was he obliged to await the outcome of the investigation any longer since, as the Commission points out in its decision on the admissibility of the application, more than two years had elapsed since the attack on himself and more than 20 months since the killing of his uncle at that time when the decision on admissibility was adopted. We know that at present about five years have elapsed since these events and there is still no result of the investigation.

I may add that, in the circumstances prevailing in South-East Turkey, there can often be some doubt about the effectiveness of domestic remedies in cases where accusations are levelled against the military or the police. This also speaks in favour of a flexible and not too strict application of the exhaustion rule in cases of this kind.

May I add here a few remarks on the comparison which the Government have made in their memorial with another case, the case of Raif v. Greece, decided in 1995 and reported in Decisions and Reports Vol. 82, page 5. That case concerned a disciplinary sanction against a teacher, who had appealed to the highest administrative court in Greece, the equivalent of the Supreme Administrative Court. However, neither the teacher nor his lawyer appeared at the hearing before the Supreme Administrative Court. Because of their absence, the Supreme Administrative Court declared the appeal inadmissible. The Commission considered that in such circumstances the teacher had not exhausted the domestic remedies because he had failed to appear or to be represented before the High Administrative Court after first having himself appealed to that court.

It is indeed difficult to see that this situation can in any way be compared with the facts of the present case. On the contrary, I do find the circumstances to be entirely different. Consequently, in my opinion there could be no inconsistency in the way the Commission decided that case and in the present case.

This being said, I come to the merits of the present case. On the basis of the evidence in this case, the Commission could not find it proven that the Turkish authorities were responsible either for the shooting at the applicant or for the killing of his uncle. It had therefore not been shown that there was any Government responsibility for these acts.

This finding is now contested by the applicant, who considers that there is sufficient evidence for concluding that the attack on the applicant, Eşref Yaşa, was the work of State agents and that his uncle was also killed by State agents. In his memorial to the Court, the applicant attaches

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considerable weight to an official report which has become available after the Commission dealt with this case and which could therefore not be taken into account by the Commission. This report, the so-called Susurluk report, refers *inter alia* to direct and indirect involvement of State forces in killings and other crimes in South-East Turkey at the time when the events of the present case took place, more or less.

It is, however, difficult for me as Delegate of the Commission to make any specific remarks on this report. First, as I said, the report was never examined by the Commission and I therefore do not know what weight the Commission might have attached to the report. Secondly, there have been no comments from the respondent Government on the significance of the report. My very preliminary view, however, would rather be that this report lends support to the view that there has been State involvement in a number of serious human rights violations which occurred in South-East Turkey, some of which had some resemblance to the attacks carried out against Eşref Yaşa and his uncle. On the other hand, in order to justify a finding that there was State responsibility also in the present case, the involvement of the State authorities or of State agents must be proven beyond reasonable doubt, and I do not think that the Susurluk report provides a sufficient basis for excluding any reasonable doubt as far as this specific case is concerned.

There then remains, however, the question of whether the serious attacks on Eşref Yaşa and his uncle have been adequately investigated by the Turkish authorities. We know that no perpetrator has been identified, but that does not in itself show that the investigation was ineffective. As the Government rightly point out, there are many crimes in respect of which the criminals remain undetected.

As a point of departure for the examination of this aspect of Article 2, the Commission took your Court's judgment in the case of **McCann and Others v. the United Kingdom** into account. According to that judgment, Article 2 requires that there should be an effective investigation where a person has been killed as a result of force by agents of the State.

This case-law has later - and after the adoption of the report in the present case - been confirmed and even extended in the case of **Kaya v. Turkey**. In that case the circumstances of the applicant's brothers's death were unclear, and the investigation which was carried out was found to be insufficient. Your Court concluded that the failure of the authorities to carry out an effective investigation into the circumstances surrounding the applicant's brother's death constituted a violation of Article 2 of the Convention.

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I may also refer here to another case which was pleaded before your Court last month, the case of Güleç v. Turkey. This case concerned the killing of a young man during a demonstration, and the Commission found in its report that the failure of the authorities to make a thorough and impartial inquiry into the circumstances of the killing constituted a violation of Article 2 of the Convention.

It is clear from all this case-law that Article 2 has a procedural aspect. An adequate investigation must be made when death has occurred in suspicious circumstances, and in particular, when there is a suspicion of the authorities' involvement and responsibility.

In the present case, an investigation was opened into the killing of the applicant's uncle Haşim Yaşa. However, we have not been told that any investigation measures were taken beyond those mentioned in paragraph 47 of the Commission's report which only included the gathering of information from two persons who had been close to the place where the killing occurred and also from Haşim Yaşa's son who was only 7-8 years old and had been together with his father when he was killed. A ballistics report was drawn up but proved inconclusive.

Also in regard to the shooting at Eşref Yaşa himself, few measures were apparently taken to find the perpetrator. In fact, more interest seems to have been devoted to Eşref's own offence of being in possession of a weapon without a licence.

In paragraph 102 of the report (paragraph 105 of the corrected version), the Commission has enumerated a number of deficiencies which it has found in regard to the investigation. I do not find it necessary to repeat them here but may simply refer to the contents of the report. The conclusion was that the investigation did not satisfy the standards required by Article 2.

Since the attack on Eşref Yaşa and the killing of his uncle seemed to be connected, the Commission did not make any distinction in its evaluation of the two investigations but looked at them together as a whole. In view of the fact that Eşref's uncle was killed and that the attack on Eşref himself was apparently an attempt to kill him, the Commission found that the failure to make a proper investigation constituted in regard to both events a violation of the procedural part of Article 2 of the Convention.

As to the remaining findings in the Commission's report, Eşref Yaşa now states in his memorial that he refrains from invoking Articles 3 and 6 of the Convention and I shall therefore not comment on these Articles.

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As regards Article 10 of the Convention, the Commission referred to its finding that it had not been proven that the attacks on Eşref Yaşa and his uncle had been carried out by agents of the State. On this basis, the Commission also found that it had not been proven that in this respect the State had violated Eşref Yaşa's and his uncle's freedom of expression.

Eşref Yaşa now objects to this finding. He considers, first, that the Susurluk report, if it had been available, should have made the Commission weigh the evidence differently and find that there was State responsibility. On this point, I have nothing to add to what I have already said as my general view about the significance of that report in relation the present case.

Eşref Yaşa, however, has also a second objection. He refers to the fact that the Commission found a procedural violation of Article 2 and states that the failure to investigate attacks on journalists and vendors of newspapers also represents a procedural interference with the right to freedom of expression. This is an interesting argument, but I believe that once the Commission has found that the failure to make proper investigations in the present case violated Article 2 of the Convention, it would be neither appropriate nor consistent with usual practice to found that the same failure also violated another Article, in this case Article 10. The usual reply given by the Commission and indeed by your Court in analogous cases is rather that it is not necessary to decide separately whether a second Article has also been violated. Any violation of that second Article is so to speak included in the primary violation of the main Article at issue.

As regards Article 13, the right to an effective remedy, the Commission applied a similar kind of reasoning. Since the Commission had found that the absence of an effective investigation constituted a violation of Article 2, it was not, as the Commission saw it, appropriate to reach any separate conclusion as to a possible further violation of Article 13. Finally, the Commission did not find any substantiation for the complaints of violations of Articles 14 and 18 of the Convention.

Mr President, the Commission is of course well aware of the difficult situation prevailing in South-East Turkey where for a long time there has been considerable terrorist activity and generally an unstable security situation, which has affected both ordinary citizens and public officials. Nevertheless the Convention requires that human life shall be respected even in the most difficult circumstances and this also means that where persons are killed, serious attempts must be made to identify the perpetrators and bring them to trial. The reasons for making full and effective investigations are particularly compelling in cases where accusations are levelled against the state authorities. In such cases, the confidence which these authorities should enjoy amongst the population is at stake and that confidence may to

a large extent depend on how the authorities react and respond to such accusations against them.

Thank you, Mr President.

THE PRESIDENT: Thank you, Mr Danelius. Mr Boyle, you now have the floor.

Mr BOYLE: Mr President, Members of the Court, I shall focus my speech on the applicant's principal claims. These are firstly that it was agents of the state who were responsible for the attempt to kill him on a public thoroughfare in Diyarbakır on 15 January 1993 and who were responsible for the murder of his uncle, Haşim Yaşa, on 14 June 1993 in the same city. Secondly, that these incidents occurred in the context of a covert campaign directed or tolerated by State agencies against people like the applicant and his uncle who were linked to the newspaper *Özgür Gündem* and to other pro-Kurdish left-wing publications. In their case, the link was no more than that they sold those newspapers from a street kiosk.

The applicant submitted to the Commission in support of these claims an extensive list of violent incidents over the years 1992 and 1993 in the Diyarbakır region, incidents of shootings, killings, injuries, threats, disappearances of persons and damage to property. All of these incidents, he claimed, were connected with the distribution, sale and production of newspapers such as *Özgür Gündem*. As you have heard from the Delegate, the Commission considered these claims. It acknowledged, to quote its report, "the seriousness of the allegations being made against the authorities in the South-East with respect to acquiesence in a campaign of targeted attacks". It clearly placed weight on the fact that the Government did not deny that any of the actual incidents documented by the applicant had in fact occurred. It found that the Government was at fault, as you have heard, in that it had not acted to verify whether State officials, as alleged, or other persons were responsible for this catalogue of crimes, but on the evidence available to it, the Commission did not find that the claim of direct State responsibility for the incidents in which the applicant was shot and his uncle killed had been substantiated.

He did however, Mr President, accept that the series of incidents and attacks on those involved in 1992 and 1993 in certain newspapers had occurred.

The applicant seeks to have the Court consider and to weigh additional evidence that was not available to the Commission. It is his case that had this new evidence been available to the Commission when it adopted its report, it may well have come to a different conclusion about his

complaint. It may well have found that the State was responsible for or had acquiesced in shootings which injured him and killed his uncle.

Before considering that fresh evidence, I would like to direct the Court to the evidence already established in connection with these attacks, of which the applicant has claimed evidence in the report of the Commission.

There is no issue between the parties as to the characteristics of these attacks. That is to say that the Government agrees that they were neither accidental nor isolated shootings. The authorities, forensic investigation of the shootings of the applicant determined from the bullets recovered that the gun had been used in the shooting of two other named local people. The shooting of the applicant was therefore a deliberate planned assassination attempt by people who had killed one person before that attack and one person after it, according to the Government evidence. The shooting occurred in a public thoroughfare in the morning hours in a city with a substantial volume of traffic when people were on their way to work. As you have heard, a few months later in a similar attack, gunmen succeeded in murdering the applicant's uncle. The applicant was a news vendor when he was shot, his uncle was looking after the applicant's newspaper kiosk when he was killed. After the complaint of the applicant was introduced a younger brother aged 13 was killed and another brother with him survived a shooting attack in precisely similar circumstances on 10 October 1993. They were shot early in the morning on their way to sell newspapers at the applicant's stall.

After this incident, the applicant, having seen two members of his family murdered, and two members, including himself, having survived murder attempts in the space of ten months, sold his business as a news vendor.

There is agreement between the parties that between the years 1991 and 1993 there was a wave of such mysterious killings and shootings in this city and region. The gendarme authorities in their official records of the killing of the applicant's uncle term it as a *faili mechul* killing, or in the English translation for it has come to be accepted in the reports of international NGOs and of the United Nations, a "unknown perpetrator killing".

According to these sources, hundreds of these killings of this nature occurred in these years. The Commission rightly laid emphasis on the fact that the Government did not deny the existence of a series of attacks on those connected with certain newspapers in the emergency region. It is clearly established that the range of incidents detailed in the Commission's report submitted by the applicant did occur.

The sheer scale of these incidents in a concentrated period of time in one city and region needs to be emphasised. The details are set out as you have heard in paragraphs 52-59 of the Commission's report, and I will mention but a few: paragraph 54 lists a series of arson attacks on newsstands; paragraph 55 lists ten newspaper distributors or vendors besides Haşim Yaşa who sold the *Özgür Gündem* to this paper or other left-wing newspapers were murdered in the same year.

These incidents including the attacks on the applicant and his uncle were connected, it is submitted, by one fact alone, that the target of attacks were the staff, distributors or street vendors of certain newspapers including *Özgür Gündem*. The volume of such incidents, their focus on the common involvement with that newspaper, their concentration in time and place can be interpreted only in one way. Some agency hostile to this newspaper was responsible for a systematic campaign of attacks against it. It is the applicant's case that the agency responsible for those attacks was the State. In particular elements in the security forces in the emergency region.

It is unnecessary Mr President to underline that the State regarded the *Özgür Gündem* newspaper as hostile to it and pro-PKK. The Commission in its report noted the range of legal measures, searches, arrests, prosecutions, closures, confiscation of issues of this paper, taken against *Özgür Gündem* in 1993-94. Indeed, from the appendices submitted by the applicant to the Commission, it is possible to calculate that on virtually every day of the year 1993 some official act of interference occurred in connection with this newspaper.

It is thus clear that the authorities were pursuing a vigourous campaign against the newspaper through the legal process. The other question is, was the State, at the same time as it used overt legal measures to confront this hostile paper, also involved or tolerating on the ground a covert campaign of violence and intimidation against, among others, vendors of that newspaper.

The Commission considered this question directly and very carefully as you have heard and in the light of the evidence available it determined that it could not find it established that State agents were responsible for the attacks on the applicant and his uncle, although it acknowledged and expressed concerned about the implications of the evidence as to the pattern of violent attacks. But what it did find established is interesting. It decided that the Governmental authorities knew that all those victims associated with the newspaper, such as the applicant, believed that they were, to quote the report, "the target of a concerted campaign tolerated if not approved by State officials". Further, the Commission held that the Government knew of their fears that they were targets of such a campaign.

What was the Government's response in this application to the evidence of a major series of clearly targeted firearms attacks linked to that newspaper? It adamantly denied any involvement, and it went further. It offered an alternative theory as to what explained these widespread and concerted attacks. The Government submitted a document to the Commission drawn up by the State Security Court prosecution office in Diyarbakır. It is noted at paragraph 61 of the report. That document states that all of the incidents drawn to that Office's attention, including the applicant's complaints, were the result of internecine conflicts within terrorist organisations. It was the prosecutor in charge of investigating the attacks on the applicants who gave this professional formal opinion to the Ministry of Justice. He wrote that the shootings and the entire range of incidents complained about could be explained by internal feuding or armed conflict between terrorist groups.

The letter from the Security Prosecutor does not expand on the logic of this argument, but it does entail the extraordinary implication that the applicant and his uncle, as well as the dozens of other victims mentioned in the Commission's report were themselves suspected of terrorism or somehow were implicated in terrorism. Not a shred of evidence is offered to support this extraordinary claim. No motive is offered to explain why groups such as the PKK should attack the media that is critical of State efforts to suppress such groups. But the theory that the attacks were terrorist-linked was put into practice, as it were, because the task of investigating the shooting of the applicant and the killing of his uncle was lodged with the Diyarbakır State Security Court prosecutor's office. The State Security prosecutor deals only with terrorist acts. It follows that he cannot investigate any suggestion that the security forces might be involved in a murder or attempted murder.

Mr President, the fact is that there was not and there has not been any investigation of the claim that the applicant or his uncle were victims of State violence.

And in any event, as the Delegate has noted, there have been no results from the activities of the prosecutor investigating the incidents as terrorist acts.

The Commission's report notes that the Diyarbakır State Security Court prosecutor formally denied the allegation that the attacks of which the applicant had complained were the work of State officials. He is quoted in the report again at paragraph 61, as informing the Ministry of Justice in Ankara that there were no State assassins in South-East Turkey. In this letter, indeed, he states that labelling individuals who carried out these crimes as State assassins are "ugly claims".

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Mr President, I now turn to the evidence which has been submitted to the Court and was not available to the Commission. What the Diyarbakır prosecutor described as "ugly claims" of State assassins operating in South-East Turkey and indeed elsewhere in that country, if that evidence is to be believed, is shown in fact to be true.

The evidence consists of the report of an official investigation prepared, on the instructions of the present Prime Minister of Turkey, Mr Yilmas, by his Prime Ministerial office. It was the Prime Minister who directed that this report - but with some pages withheld - be published in January this year, after it had in fact been leaked to the press. He adopted it publicly in an extensive television interview. The interview in question was reported on subsequently in the newspapers in Turkey and international newspapers such as the International Herald Tribune.

The report is known as the Susurluk Report, and stems from the revelations that followed a road accident at Susurluk in western Turkey. A senior police officer, a Member of Parliament who was the tribal head of a large number of village guards, a gangster who had escaped from prison in Switzerland where he had been convicted of drug-smuggling in 1990 and the gangster's girlfriend, were in one of the vehicles involved in the crash. The only survivor of the accident was the MP, Sedat Bucak. The details of the scandal that broke out in Turkey as a result of the disclosure of the identities of the crash victims are set out in the memorial of the applicant and need not be opened here. It is sufficient to note now that this extensive report, which also exposes high-level corruption linked to drug-trafficking, regrettably but openly and unambiguously admits and gives detailed accounts of politically-motivated murders by State officials, or by direction of State officials. These murders were linked to, in the report, counter-insurgency activities in South-East Turkey. The report documents State involvement in plots to kill and the actual killing of prominent Kurdish businessmen, intellectuals, lawyers, journalists and other professionals. It confirms, for example, that the Kurdish MP Mehmet Sincar, from the now suppressed Democracy Party, was murdered by State agents. This killing occurred on 4 September 1993 at midday in the town centre of Batman. Because of the status of the victim as a publicly elected representative, the killing provoked strong international reaction at the time. Reports on that killing by human rights organisations at the time, including Amnesty International, concluded that the gunmen who claimed responsibility - a hitherto unknown group called Turkish Revenge Brigade - might be linked to the security forces. Mr President, this report confirms that they were linked to the security forces.

What emerges from the report is strong evidence that elements in the security forces operating outside the law, were engaged directly or through criminal gangs in a policy of eliminating those considered enemies

of the State. The victims of torture, rape and summary execution mentioned in this report are said to have been killed either by criminal gangs of confessors, or former terrorists, working for the security forces or directly by gendarme units. The intelligence agencies MIT military intelligence and JITEM, the parallel gendarme intelligence agency, are mentioned frequently throughout this report. In some cases the killer or killers are actually named. Several of the victims identified are the subject of applications to the Commission as set out in the memorial.

The main response to date in Turkey following publication of this report is that criminal proceedings have been opened against one former Government minister, Mehmet Agar, the Minister for the Interior at the time, and Sedat Bucak, the Kurdish member of parliament who survived the crash. Both have been charged with operating criminal gangs following the removal of their parliamentary immunity by vote of the Turkish Grand Assembly. They have not, however, been indicted with respect to any particular killing identified in the report.

I now come to the question, what exact significance does this report have for the present application? It is submitted that it has direct strong, evidentiary value in support of the applicant's claim that he has been a victim of violence in which the State is implicated. It is true that the applicant is not named in the report as having been a target of State-supported gangs.

It is nevertheless worth mentioning that one of the several lawyers identified as having been killed by the security forces in the Susurluk report was advocate Güzin Hüsniye Ölmez. This advocate was Eşref Yaşa's lawyer and in the supplementary information and observations submitted by the Government on 18 April 1995, there is included a statement of Eşref Yaşa in the presence of his lawyer, Güzin Hüsniye Ölmez taken at the social security hospital of Diyarbakır. At page 38 of the Susurluk report it is stated that on 20 October 1993, advocate Güzin Hüsniye Ölmez was killed on the Bismil Way. The report acknowledges that it is not comprehensive.

But, Mr President, an officially commissioned report addressed to the Prime Minister which openly acknowledges that the State's military organisation blew up the *Özgür Gündem* building in Istanbul adding the detail that this was done with plastic explosive, cannot be ignored. A report that the State killed Behcet Canturk, the financial director of *Özgür Gündem* and a report which lists eight journalists murdered in the Diyarbakır region who wrote for *Özgür Gündem* and other pro-Kurdish newspapers, cannot be ignored. Such a report, it is submitted, must be central to any assessment of the accusation of State involvement in the campaign, such as the campaign against vendors of the newspaper *Özgür Gündem*, such as this applicant.

A report at this level of the State, endorsed publicly on television by the Prime Minister which quotes a gendarme officer as telling the Inquiry that he "could kill who he liked" in the emergency region and that his team adopted the technique of "*faili mechul*" murders - that is, unacknowledged or unknown perpetrator killings, cannot simply be dismissed. This admission is all the more striking where the killing of Haşim Yaşa, the applicant's uncle, is described in the official reports as an unknown perpetrator killing.

It is submitted that the Susurluk report confirms that there was a campaign of State-sponsored or tolerated killings in Turkey in 1992 and 1993. It has been criticised because it was not a judicial inquiry that assembled and presented detailed evidence for its conclusions. It has even been said to have been politically motivated. But from the standpoint of the Convention it is submitted that the fact that the highest governmental authority in the State, the Prime Minister, directed this Inquiry to be conducted and publicly before the people of Turkey promised that the guilty would be pursued. That two politicians have been indicted as a result of the inquiry gives weight to be given to it in the issues before the Court.

It is submitted that it is central to a reassessment of Articles 2 and 10 of the applicant's claim as well as Articles 14 and 18 and the question of practice.

It is further submitted that the official nature of this report, from the highest level of the civil authority, imposes an onus on the Government to give an account of how such serious admissions as it contained adopted by the civil authorities are to be reconciled with previous adamant denials that such things had or could happen. The failure of the State to answer that question must be material in the assessment of the weight to be given to this report as evidence for the claim of the applicant that State agents killed his uncle and attempted to kill him because he sold certain newspapers.

The Court has noted that it is only in exceptional circumstances that it will exercise its powers of establishment and verification of the facts. It is submitted that this is such an exceptional case. The question as to whether the attacks complained of by the applicant were the work of State agents and were motivated by his involvement in selling certain newspapers, including Özgür Gündem, are the central issues in the application he introduced.

I turn to Article 2: the Commission has found a violation arising from the failure to investigate the shooting incidents of which the applicant complains. The applicant asks the Court to confirm that finding. Should the Court find that there is direct State responsibility for the shootings as claimed by the applicant, the result would be a finding that Article 2 was also violated through the use of arbitrary force within the meaning of

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Article 2 § 2. The Commission has in fact come to such a finding that Article 2 had been violated in both respects in Ergi, the application to be considered later today. It has also so decided in Aytekin, a case pending before the Court.

Just one further point in Article 2: the applicant survived a murderous attack and he asks the Court to find that he was a victim of a violation of Article 2. He submits that an attack which was intended to be lethal, but which he survived, leads to a violation of Article 2 provided that it is established that his assailant was an agent of the State. He submits that Article 2 is concerned with the protection of the right to life and that it cannot be the case that it is violated only when an intentional and unjustified shooting is successful, but is not violated when an intentional and unjustified shooting is unsuccessful, when someone survives a deliberate and unjustified attempt to kill him by agents of the State.

As regards Article 10 the Commission, as you have heard, decided that no violation arose because it was not established that State agents were responsible for the attacks on the applicant and his uncle. But for the moment ignoring the Susurluk report, the applicant submits that the reasoning of Mr Loucaides, who dissented, is to be preferred. It is submitted that it cannot be in dispute that the reason the applicant was a target was because he sold certain newspapers. No other possible motive was suggested beyond the general claim that it was the PKK which was responsible, which clearly did not impress the Commission. If the Government's position was as stated by the Commission that it was unnecessary to do more by way of investigation than to require the police to maintain their enquiries and to report, then as Mr Loucaides states this approach to investigation which caused the Commission to find a violation of Article 2 also represents a violation of Article 10. The failure properly to investigate the incidents of which the applicant has complained represents an unjustified interference in his freedom to impart information.

It is submitted that in the light of the Susurluk report the existing evidence from his own statement to the police that the motive for the attack on his life and the killing of his uncle was because he sold left-wing papers, finds strong corroboration. He therefore asks the Court to find that Article 10 was violated by virtue of this attack as well.

Mr President, I turn to the claims dismissed in the Government's memorial that the applicant's Kurdish origin or supposed political opinions are irrelevant to the case. The Susurluk report identifies some thirty persons who were victims of State assassination or attempted assassination. They had this in common: they were Kurds. The report is quite explicit about the fact that those killed were Kurds. A reading of this report makes clear that

any one in 1992 and 1993 who was Kurdish and who was identified as critical of the authorities' policies was vulnerable to attack. Many examples are given in the report itself, such as the revered Kurdish intellectual Musa Anter whose murder in broad daylight in Dıyarbakır by State agents is regretted in the report. It is not difficult to infer that such a policy extended to news vendors such as the applicant who was engaged in selling a newspaper considered to disseminate PKK propaganda. The evidence is compelling that the applicant and his uncle were victims of discrimination in conjunction with the other rights they claim have been violated under the Convention. The applicant asks the Court so to hold.

The applicant has made substantial submissions on Article 12 as well as a practice of violation of Article 13 on which he relies. With respect to Article 13 he relies also on the judgment and reasoning of this Court in the **Kaya v. Turkey** judgment of 19 February 1997. On the particular facts of this case he draws the Court's attention to only one matter, that is, the contrast between the speed and the competence shown by the gendarmes and prosecutorial authorities in the investigation, the prosecution and trial of Eşref Yaşa for the offence of having an unlicensed pistol - a pistol he had used in self-defence when attacked - and the investigation into the incident of attempted murder of which he was a victim. The contrast is more fully set out in the applicant's memorial. No one has ever been charged with that shooting and contrary to the claims of the Government in their memorial that the incident is still being investigated in fact the file is closed. As noted in paragraph 46 of the Commission's report the file was closed on 15 January 1998.

The applicant also asks the Court to hold that the new evidence submitted establishes forcibly the existence of an admitted practice of violation of Articles 2, 10 and 14 of the Convention and gives rise to a violation of Article 18.

If the Susurluk report means anything, then it is regrettably this: that in a Council of Europe member State counter-insurgency policies were pursued that constituted a practice of wholesale violation of human rights, in particular of the foremost right, the right to life. The applicant and his uncle, it is submitted were victims of that practice.

In concluding, Mr President, the applicant has set out reasonable claims for just satisfaction and reasonable claims as to costs which he asks the Court to award in the terms set out in his memorial, should it find in his favour. I thank you, Mr President.

Mrs AKÇAY (Interpretation): Mr President, Members of the Court, Delegate of the Commission, representatives of the applicant, before starting

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my comments on this case, might I perhaps make a slight introduction, which is mandatory after having heard the applicant and also after having heard the representative of the Commission.

This whole case was presented as having as its focus the sale of *Özgür Gündem* newspaper in a stand on a main thoroughfare in Diyarbakır. At the beginning of this whole case is that sale which is considered as constituting the cause which has led to all these allegations, to all these facts.

Mr President, Members of the Court, the sale of that newspaper, for years, was not a monopoly for the applicant and his uncle. This newspaper is freely sold in all kiosks in Diyarbakır and its neighbourhood. It sometimes happened that it was seized by judicial decision, never administratively, and as long as it was not seized, it was freely on sale. The applicant was simply the proprietor of a kiosk, selling *inter alia* newspapers that were not extremist. He also sold cigarettes, lighters etc., so there is no specificity of that *Özgür Gündem* story with Mr Yaşa, who is a small vendor, nor as compared with the alleged facts that have been proved by the applicant party or in terms of freedom of expression, as I shall explain in the course of my observations.

After this small introduction, which I considered mandatory, I shall begin with my observations. This case raises many preliminary questions, even at the stage of the Commission's report. To those questions is added another important question which the applicant party has just submitted in reply to our memorial, namely the so-called new evidence, the report called the "Susurluk Report" which the applicant party now presents as a *deus ex machina*.

Firstly, in the main and independently of the belatedness of that so-called evidence, the Government wishes to stress that that report has no official standing at the moment. Its publication, following on leaks in the press, or at least of certain passages of an internal document, which was prepared at the instigation of the Government, cannot be used against the Government and cannot even be discussed. I underline that this is not a judicial investigation. It is simply a question of calling into question a certain number of allegations, listing them so that criminal investigations be instituted, but to repeat, this is not evidence that can be used against the Government, because it has no official standing.

Secondly, in the alternative, and there I would recall what was said by Mr Danelius, the Government insists on the fact that even as such, the so-called report contains no element which would directly or indirectly have any connection with the present case and this appears from long analysis

conducted by the applicant, who had been simply trying to use this report to enhance his well-known arguments.

It is true that the Court, in the case-law cited by the applicant, has made clear that it was not prevented from taking account of further information coming to light after the report of the Commission (paragraph 76). However, in all the cases which have been cited, the Court has only taken account of facts which had directly to do with the applicant. Thus, for instance, in the case of **Cruz Varas and Others v. Sweden**, it has taken account of the fact that the applicant, during his stay in Chile, seemed not to have been able to find witnesses, nor other evidence capable of establishing the reality of his clandestine political activities.

In passing, I would correct the quotation made by the applicant, who explained that it was paragraph 108. It is in fact paragraph 79.

As to the **Klaas v. Germany** case, which has also been prayed in aid, the Court has taken account of no further information.

Thus, in conclusion on that first preliminary question, the Susurluk Report at the present time is not a document that could be used against the Government. It has no official standing and in the alternative, that so-called document has no evidential value. It has nothing to do directly with the present case.

Subject to that first comment, the Government still believe that Mr Yaşa was not a victim as provided for by Article 25. In connection with his uncle, the parentage is not direct neither laterally nor vertically and we have no document, by the way proving that he was his uncle. It may very well be that he might be an even more remote relative. Let us not forget that the difference of age between the two persons was not large and it may well simply be a cousin, second or third removed. As we have cited in our memorial, the case-law presented by the Commission in its report does not go as far as the uncle but concerns cases of legal representation which is of course an entirely different situation.

As to the argument of economic links, that argument should not hold, not under Article 25, which has specific legal criteria. Not only does this economic connection have nothing to do with the legal entity but the complaints have no economic connotation in as much as the case-law or the supervisory body has not recognised the right of *actio popularis*. The applicant cannot be a victim of a complaint concerning his uncle and nothing prevented the uncle's family, which was directly concerned and which we suspect to be large, taking part in the proceedings as applicants. The Government, on the basis of case-law in the field which authorises raising the

problem of quality of victim at any stage of the proceedings, repeat their objection on this point.

From the outset, the Government note, as we have done in our memorial, the absence of compelling evidence as to the facts that have been alleged and the desperate desire to fill that gap by press-cuttings and bulletins which have been prepared and published by sundry organisations. It is obvious that we are not here to discuss the condition of the press in Turkey or to project the conclusions of such a debate on the proprietor of a newsstand but in order to try and determine whether or not the security forces were involved in the attack and the killing. It is obvious that the arguments of the applicant cannot prove the reality of the facts. The Commission concluded by the way in paragraph 94 of their report that:

> "the Commission finds that there is no evidence before it which would permit a finding that agents of the security forces or police were involved in the shooting either of the applicant or of his uncle".

Now there is another argument which the applicant systematically uses, according to which there is no evidence because the Government have not adequately cooperated. Firstly, the Government have not concealed any document, any evidence; each time the Commission requested an element of information such was immediately forwarded to the Ministry of Justice, which forwarded information to us on the development of the procedure. Secondly, it is obvious that the burden of evidence cannot be the same as the one which is incumbent upon the Government when the applicants are under their direct control, as is the case of police custody for instance and that was demonstrated by the Court in **Tomasi v. France** and in **Klaas v. Germany**.

Thirdly, if the burden of proof was incumbent systematically and only on the Government, what would be the meaning of the rule of non-exhaustion, since the inactivity on the part of the applicant would suffice to trigger off the supervisory mechanism. The Government believe that the absence of evidence in this case is of such a magnitude that even the allegations of the applicant concerning the protection of life and the absence of investigations concerning those complaints cannot be taken on board, and this I will develop at a later stage.

I shall not go into the facts again. They have been largely described in our memorial. I would just like to draw the Court's attention to a number of points. There is one which is important, namely that the preliminary investigations were triggered off immediately after the attack and the killing. According to procedural rules in force nothing was neglected and that without the applicant having turned to any judicial authority. And according to

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information received even yesterday from our incumbent authorities and contrary to the allegation by the applicant, the investigation was not closed on 15 January 1998. It is still under way.

Another fact which deserves to be pointed out is the ballistics report, according to which the bullets shot at the applicant came from the same weapon as the one used in the murder of two other persons. There again, no ambiguity, no omission. In addition, there is a fact which should be gauged and this is that Mr Yaşa was carrying a weapon, an unlicensed weapon, with which he retaliated on several occasions.

Regarding the non-exhaustion of domestic remedies, the Government regret having to repeat yet again their preliminary objections concerning that question.

In this case, the applicant has presented claims concerning Articles 2, 3, 6, 10, 13, 14 and 18. And no judicial action was undertaken by him in Turkey, but he claims he has written to important politicians such as the Prime Minister or other Ministers.

How can one account for such a contradiction between the fact of turning to politicians and not being afraid of reprisals as he alleges. And as is noted in the Commission's decision on accessibility, and on the other hand, not turning in any way to the judiciary. It is interesting to note that the applicant himself in his statement on 8 June 1993 to the Human Rights Association in Diyarbakır said that he was not going to turn to the judiciary, that he did not trust the State nor the judiciary. How come then that he would turn to Government personalities? Are these not responsible for the facts which he alleges? That position adopted by the applicant shows that it is a perfectly political stance, and he does not care about exhaustion under Article 26 of the Convention.

Mr Danelius referred to the cumulative effect: the non-necessity of cumulative appeals. But we are facing here, not something that is cumulative, but a total absence of any remedy, the negation, as declared by the applicant himself, and so clearly, the applicant himself turns to high-ranking politicians, instead of turning to the judiciary. How could any redress be possible on the part of the State without any remedy? Which politician would be able to solve the problems of the investigation and the establishment of criminal liabilities other than the judiciary?

The Government would note that the reading of Akdivar and Others v. Turkey does not allow such a systematic extrapolation which would dispense the applicant from exhaustion of domestic remedies. That judgment is fully aware of its limits under the rule where it says it limits itself to the

"circumstances of the case". But that would not mean that all applicants would be exempted from the rule, and sight should not be lost of the fact that the Court reaffirmed the rule of exhaustion recently in the cases of **Cardot v. France** and **Ahmet Sakik v. Greece**. It said that formal domestic procedures had to be instituted, but the claims brought to the Commission should have been put first to those judiciary bodies nationally. And Mr Danelius referred to the Raif v. Greece judgment which is extremely important here, because that decision was taken after Yaşa, and the Commission merely stated that it did not suffice to show that there was a judicial decision on the part of the Greek Supreme Administrative Court to be able to presume the non-effectiveness of such a procedure.

It is also important as regards the lawyer because Mr Raif claimed that it was because of "manoeuvring" by his lawyer that he did not appear, and his lawyer had not appeared. One does see that the manoeuvring of the lawyer was not considered as special circumstances that would dispense the applicant from the obligation of exhaustion of domestic remedies in the case of Raif, whereas in the case of Yaşa the deliberate attitude of lawyers of the applicant to shirk any remedy in Turkey was not taken into account.

The argument of the fair reprisal which the Commission has modelled on the **Akdivar and Others v. Turkey** decision is without any substantiation. Apart from the statements by the applicant which had determined his avoidance of the domestic remedies, we have no proof of his allegations. His statement to his counsel, Mr Aslantaş, Mr Yaşa had claimed that it was because he was selling *Özgür Gündem, Özgür Halk* and *Yeni Ülke* etc., that he had been attacked and his uncle had been assassinated by police officers. However, it is to be noted as I have just said that all these papers and periodicals were on free sale in scores, in hundred of newsstands in Diyarbakır and elsewhere.

Unfortunately the Commission has not determined either the link between all these allegations with the applicant itself and the exhaustion of domestic remedies as it did in Donnelly. It has not taken account of the fact that he turned without fear to political authorities and the applicant had to have recourse to Turkish justice because he thought he had been attacked by State officials though not only for that reason but because, in addition, he also raised complaints under Articles 6 and 13 which have to do with the judicial procedure. In that case, he was all the more forced to have recourse to the judiciary.

As to the merits, first we shall analyse in two parts the complaint under Article 2. We shall start with the so-called responsibility of the members of the State forces.

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The Government share the conclusion reached by the Commission in paragraph 94 of its report which we have quoted above and we also add that in the same report it was said that "any presumption as to involvement of State agents or of any direct responsibility of the State for the attacks which are the subject of this application", so this part too was proved.

In the instant case, the memorial of the applicant does not have any element which could show that the forces of the State were responsible. Mr Yaşa's claims received some substantiation after the "hearing" before the lawyer of the Human Rights Association of Diyarkbakır. It has to be noted that even the Amnesty International communiqué was issued two months after the evidence given by Mr Eşref Yaşa to his lawyer.

The applicant only claims that Mr Yaşa would have been attacked because he was selling leftist news and claims that even the killing of his uncle was actually targeted against him. These allegations are meaningless because as I said there was no specificity as regards the sales of these newspapers by Mr Yaşa in a newsstand as there are dozens of others like this.

So I am not going to repeat this part. I simply wish to say that after reaching the result that nothing proved that the alleged facts by the applicants stemmed from facts to be imputed to the forces of order of the State, the Commission stresses the obligation for the State to protect the right to life which is the second aspect of Article 2.

The Government do not dispute the fact that this aspect could also be covered by Article 2. However, they think that in the absence of any case-law of the Commission in agreement with this ceases and that the application and the interpretation of this aspect requires great caution.

The decision to which the Commission refers is a decision of inadmissibility which only in *obiter dictum* spells out a principle which apparently has not been applied.

In the application in question (Application No. 9348/81) the murder of the brother of the applicant by terrorists, although evaluated in the framework of Article 2 saying that each person has to be protected by law, the Commission has simply said that "this does not mean that one can deduce from this provision a positive obligation to prevent any possibility of violence".

Moreover, in this application, the Commission has not taken into account the existence or not of domestic measures able to prevent the deterioration of the applicant's security nor the existence of judicial or

administrative investigations carried out to look after or to arrest the perpetrators of the crime which were qualified from the outset as terrorists.

Mutatis mutandis the Government think that in this case as well, the Government have not been negligent or made any omission in order to trigger off the necessary investigations and the previous conclusions should *a priori* be retained.

Very briefly, let me say that as regards the attack against Mr Eşref Yaşa, the minutes of the facts were published 15 minutes after the event. The expert report was drawn up on the very day of the attack. Mr Eşref Yaşa's statement was requested the day after at the hospital and then the day after his evidence was taken again. On the day of the incidents, there were three arrests and the statements on these three attacks were taken down. The medical reports were very rapidly obtained. On 17 January 1993, the police concluded that the same weapon had been used in two other murders. The expert report of the criminal police laboratory of 11 February 1993 also showed that the weapon used had already been used in other killings, in other murders.

The prosecutor has regularly renewed the orders to continue this investigation. As regards the killing of Haşim Yaşa, an account of the facts, the map of the place where the killing took place, the autopsy, and all the details were established on the same day.

From the map of the premises it has been shown that the killing took place in a very popular place area the crossing of two streets, nothing was hidden, and he was not afraid of being identified and the statement of two eye-witnesses were also taken very quickly after the incident. The testimony of Haşim Yaşak's son showed that the aggressor did not want only to attack but to assassinate the victim since he was still shooting after the victim fell to the ground.

The ballistic report was obtained sixteen days after the incident. The two cartridges were so distorted that it was not possible to find out whether bullets were shot from one or several weapons.

All these documents were submitted to the Commission.

It is also important to precise about some peripheral allegations made by the applicant. For instance, the allegation of intimidation by commissioner Kemal İnan who was not prosecuted.

We have only the statement of the applicant, nothing else, there was no complaint lodged. Eşref Yaşa's newsstand was not searched by the tax

services of the police, as it was claimed. The fire which was started on 15 November 1992 in the Bulvar shop was not of criminal origin. This fact was not established arbitrarily but arrived at following investigation 1992/8378. There was a dismissal order from the 8 December 1992 proving that the incident actually happened because of some electrical short circuit.

This shows that no negligence, no fault can be attributed to the Turkish authorities in this case. If the investigations were not concluded because of the non-identification of the perpetrators of the attack or the murder, it is clearly shown that the Turkish authorities were not intentionally negligent in order to conceal or modify the facts as they occurred.

We have heard Mr Boyle tell us about killings made during those times. I also could tell you about thousands of persons who have been killed by the PKK and I am sorry that Mr Boyle did not use the word "terrorism" because this is what it is all about, terrorism. I can tell you about thousands of people and the first victims were citizens of Kurdish origin, and they did not spare children or old people, but of course, the applicant did not say a word about this.

The fact that these investigations were not finalised is perfectly explained in the context of terrorists, and who are trained in special camps in neighbouring countries, or even in Europe, as it is shown in documents submitted in another application presently considered by the Commission. I think that there is no question about it. On the other hand the police authorities working in conformity with specific laws and practices must be very cautious, and wait for the different investigations to confirm each other in order to enable them to detect perpetrators of crimes and felonies previously committed in other countries, unfortunately European countries. Killings, aggressions, murders, are not elucidory either, the more so when terrorist organisations or criminal organisations are involved.

We also heard before something about Article 2, and apparently a parallel was drawn with the **McCann and Others v. the United Kingdom** case. I do not think that **McCann** can be quoted in this case, because it was established from the outset that it was the responsibility of the British services which planned deliberately this operation in order precisely to arrest the three terrorists. So here the responsibility of the British Government was quite different because one knew that they committed the aggression, but they did not know whether they were responsible in terms of protection of life. But that is a different matter.

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As regards the complaint under Article 3 of the Convention, here we are just going to reproduce our observations on Article 2 and point out that the allegations were not substantiated either.

As to the complaint regarding Article 6 of the Convention, we are not going to repeat our previous observations, which concern also our arguments regarding non-exhaustion.

As regards the complaint under Article 10, the Government share the Commission's analysis, first of all in principle that it has not been proved at all that the fact could be imputed to the State and its agents and even less that the attacks and the killing were related to the sale of extremist newspapers. Alternatively as to the commercial sale of publications, I give you all the qualification at the beginning of my presentation. This has no specificity in terms of freedom of opinion, the sale of newspapers in this case is a simple commercial act and there is no reason to apply Article 10 § 1 or 2.

Regarding Article 13, the applicant has deliberately as shown from his statement, not used any of the judicial domestic means, therefore he certainly could not claim that there was a violation of this article.

Regarding Article 14, the applicant also claims that he was the victim of discriminations where the Turkish Government vigorously object and the Turkish provisions are clear. There is no discrimination based on ethnic origin. On the other hand, Turkish citizenship is not an ethnic or racial concept. Article 10 of the Constitution is quite clear on this. All persons are equal before the law, without discrimination of language, race, colour, sex, political opinion, philosophical belief, religion, sect or other similar grounds.

The allegations of ethnic discrimination put forward by the applicant who cannot give the slightest evidence and has not used any legal means, and pretends to have been attacked because he was selling newspapers which could be freely sold should not be considered because this is imaginary and only invoked in order to exert some political pressure on Turkey.

As regards Article 18, nothing in the memorial justifies this allegation.

The Government repeat their conclusions as presented in their memorial. As regards the claims of the applicant, we fully repeat our written observations which were already submitted to the Court and in any event we think that the claims are exaggerated and unjustified. My Government think

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that in this case the practice of the Court in granting all amounts regarding just satisfaction and expenses should be strictly observed.

Thank you, Mr President.

THE PRESIDENT: Mr Danelius, would you like to add anything?

Mr DANELIUS: I do not find it necessary to add anything. Thank you.

THE PRESIDENT: Thank you. Mr Boyle?

Mr BOYLE: Yes, Mr President, if I may. With respect to the Government's assertion that there was no basis for asserting that the reason for the attacks on the applicant and his uncle was the sale of the *Özgür Gündem* newspaper, because it was sold in lots of other places and that the applicant sold other things.

It may be pointed out that the applicant submitted evidence that he was threatened before the attacks that occurred and also that the relevance in this regard of the fact that ten other vendors of newsagents were killed. A large number of news kiosks were burned down. These are hardly random events that are explained by the fact that these agencies sold cigarettes. It is submitted that, in the context of all the other evidence, it reflects the fact that they were targeted because of the journal that they sold.

One other matter respecting the relationship between Article 10, in the light of the finding of the Commission and Article 2, points raised by Mr Danelius. In the case of Article 2, the issue is the failure to investigate the attack. The target issue is not relevant - whether it was a doctor or a plumber or whoever - but in Article 10, it is submitted, the issue is relevant. The question is the target of the attacks, given the importance of protecting the exercise of the journalistic functions, including the functions of selling newspapers, disseminating and imparting information, in the case-law of this Court.

The Government treated the Susuruk report in particular ways. Firstly, it said it was not a judicial inquiry and cannot be invoked against the Government, because it has not acquired the status of an official report. The fact is that the preface of this report makes clear that its truthfulness, wrongness and shortcomings will be evaluated only by the Prime Minister and the Prime Minister, in public, adopted this report, I quote from the *International Herald Tribune* of 27 January 1998, in which, reporting that on the previous night he had said on television that between the second half of 1993 and 1996 many crimes were committed, Mr Yılmaz said, "This is

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worse than disgraceful. It is the mother of all disgraces". Mr Yılmaz said that the core of the scandal involved the relationship of the state with drug smugglers, casino owners and wanted men. "I am personally committed to further investigating these events", he said. "I have only one worry, which is harming the State. I do not want to harm the State." The Prime Minister therefore himself has underscored the relevance of this report and in fact the report is the basis for the investigation of proceedings against a former minister and a member of parliament. The prosecuting authorities in Turkey think that the report can be used as the basis for such proceedings, which relates to its evidential relevance.

The Government have raised questions as regards the applicant's uncle, or whether he was his uncle. May I just point out that throughout the case the Government in its submissions has accepted and referred to Haşim Yaşa as the applicant's uncle. The Government's own documents, and I refer to the autopsy report of Haşim Yaşa of 14 June 1993, Appendix 15 of the Government's documents submitted in April 1995, which confirms without a doubt that Eşref's father is the brother of Haşim Yaşa.

That, Mr President, concludes my submissions.

THE PRESIDENT: Will you take the floor again?

Mrs AKCAY (Interpretation): Thank you very much, Mr President. I shall be very brief. Regarding the sale of *Özgür Gündem*, as I have just said there is no specificity from the standpoint of Article 10. It is not a question of information or whatever, it is a mere sale of which the applicant has no monopoly. There might have been an original feature in what he was selling, but this is not the case. This is something which is sold everywhere else, so there is no monopoly and no question of Article 10. Therein lies the problem. Otherwise it would be about a violation or no violation but there is no question under Article 10. As for the report, well, we do not deny the existence of such a report but it is not official yet. And it has no evidential value, as Mr Boyle has just very rightly stated. These are investigations which are being carried out. It is not the product of a judicial investigation. On the contrary, this is something as it were trying to find replies to allegations that were made at various levels and this is what matters in the Susurluk report and it cannot be used at this juncture of the procedings. Secondly, there is no nexus or connection *stricto senso* between the Susurluk report and the instant case. After having established that there is no responsibility of the State in the case, how could one possibly extrapolate from something like that onto other allegations. In another case, the facts themselves have not been established. There is no possible extrapolation of the kind and I repeat again, there is no connection between the two.

As to the question of the uncle, in Turkish it may very well be that there is a confusion between uncles and cousins. Questions of parentage are highly complex in Turkey but this is not the problem. The uncle is a very remote relative under Turkish law and you can even marry your uncle. It is remote parentage and there is no case-law proving that an uncle can be deemed a representative here. Thank you very much.

THE PRESIDENT: Questions from the Members of the Court? There do not seem to be any questions. I thank those who have pleaded this morning during this audience: Mr Danelius for the Commission, Mr Boyle for the applicant and Mrs Akçay for the Government. The hearing is closed.

(The hearing was closed at 11.15 a.m.)

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THE SUSURLUK REPORT

(Provisional translation)

PREFACE

This report is not an "Investigation" report. Neither it is a case summary, or an inspection report. As explained in the introduction section, our presidency has no technical or legal authority to prepare an investigation report. The premiership confirmation that is submitted in Appendix 1 is enclosed within this framework.

The report has been prepared solely to inform the premiership authority and make recommendations. It's rights and wrongs and incompleteness will only be appreciated by the premiership authority. The Inspection Commission reports generally bear the note "Confidential" and public opinion could only be informed with the permission and approbation of the relevant authority. From that point of view this report will not bear such a suggestion and will be submitted solely for the esteemed Prime Minister without any suggestion that the information be submitted to authorities relevant to public opinion.

INTRODUCTION

This report has been prepared on the basis of the esteemed Prime Minister's confirmation dated 13 August 1997, and numbered TEFTIS.M: 139, and it may be understood from the referred to confirmation that the esteemed Prime Minister's verbal directives were obtained and this was followed by their written order.

Along with the excitement and the interest in this matter created by public opinion it will also bear importance from the inspections point of view because, from the legal point of view, the matter known as Susurluk accident/ incident is essentially a traffic accident. This matter has become a judicial matter and nothing else, in other words no bureaucratic matter remains. However, public opinion is disturbed by the illegal activities of those politicians, underground world [networks- tn] and public institutions which involve large scale money, personal interest and desire for power. As such activities have been represented as "the fight against terrorism and for the country's interest", and have been hidden behind this curtain this is another matter for concern.

This framework, which is shared by public opinion, is in fact the general framework of the "Susurluk". In previous months the inspectors who were employed by Prime Minister Erbakan and the Turkish Grand National Assembly Inspection Commission have worked within this framework and have drawn up their reports on these grounds. This expected and the Prime Minister's inclination is also within this framework as he underlined in some of his speeches.

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Therefore our presidency has determined its approach and jurisdiction within this context and concentrated its efforts on such points.

Whilst this approach is the correct and the generally acknowledged framework it also creates the legal grounds for new duties [appointments- tn]. Otherwise, all the matters related to the Susurluk incident having been covered the judicial stage would have created an impossible situation for our presidency once appointed [charged-tn] on this matter.

The Presidency of the Premiership Inspectorate Commission could have been totally excluded from the relevant subjects once it became involved with the Susurluk incident, having considered that the Interior Ministry Inspectorate Commission solely handled 18 investigations/ examinations, the General Directorate of Security carried out 16 investigations/ examinations, that the Susurluk accident as a traffic accident is the subject of a court trial; that from the point of view of the formation of a gang an investigation had been conducted by the SSC [State Security Courts], that the murder incident of TOPAL is the subject of another court trial, that numerous other cases are being processed in various judicial institutions, that Ministries of Finance, Justice and Tourism have been carried out their own investigations, and also that all the indirect matters have been handled by relevant authorities. The only remaining grounds [for involvement] on this matter are the illegal relationships which were submitted above and which would form an answer to the expectations of public opinion. At this stage it will be useful to deal with this specific matter.

Those who participated in the Susurluk accident were together in different locations until the accident occurred, such as Istanbul, Yalova, Izmir and Kusadasi. In addition, according to S.E.BUCAK's statement, their protection police officers were anxious about being followed, and for this reason they had decided to leave Izmir first then Kusadasi, and having decided to return to Istanbul the traffic accident occurred in Susurluk. However, due to the media and public opinion reaction and [the participants in the accident] having spent time together prior to the accident, and since occurrence of the accident was examined from every aspect and became a matter for the judiciary therefore [the accident itself was] not dealt with here in order to avoid unnecessary repetition. One of other most basic considerations was to bring the predominantly illegal network to light under the title of the "Susurluk Incident" without getting lost in police matters, and we therefore introduced the incident as a whole.

The Susurluk matter, which needs to be taken in its entirety, has been divided into parts as briefly described above, and therefore the content and nature was lost, especially at the judicial stage.

When Mehmet Ali YAPRAK was kidnapped, the incident reached the judiciary. The Gaziantep Public Prosecutor requested that the Istanbul Prosecutor take statements and dispatch them. Statements were taken and dispatched, and a decision not to prosecute was made. The

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Gaziantep Public Prosecutor dispatched a decision for an identification parade but at later stages this had not been carried out.

Mufit SEMENT's fingerprints were found in the vehicle with which Mehmet Ali YAPRAK was kidnapped but the matter was contained so as not to reach the judiciary. A high ranking authority of a public institution had cut in [interfered/ initiated -tn]. In February 1997 the premiership requested in a correspondence that the Ministry of Justice follow up the matter. The Minister, Sevket KAZAN, gave the instructions and the matter was put on hold at the General Directorate of Penal Affairs. The matter was remembered only after our written request in September 1997. The Ministry of Interior carried out an investigation on the issue of the missing weapons but for some reason, although all the information and documents were collected, the matter was limited to 10 missing Beretta.

Our correspondence, which was prepared for the Ministry of Interior and also dispatched to the Supreme Consultative Court "for information", has caused a reaction because of a reference to the matter "having been examined by the Supreme Consultative Court" when it had not reached the referred to authority. (It is obvious that the stage that follows the case being confirmed by the Ministry is the Supreme Consultative Court's examination). As a result five security officials, whose involvement and offence is doubtful, were referred to the judiciary, a weapons purchase issue involving million of dollars was left idle, the warning indicating an incomplete investigation and wrong judgment was not taken into careful consideration by the Ministry and, although with a new report the initial study was claimed to have been a correct one, the Supreme Consultative Court's attribution of crimes to the members of the Special Operations became the evidence of the Ministry's incomplete inquiry. However, even at this stage the issue of weapons purchases amounting to millions of dollars could not be concluded by the Ministry.

These examples will be increased and detailed in the evaluation section of this report. The matter which needs to be stressed is that the entirety has been fractured and that a point was reached where no authority was capable of unifying it.

The Premiership Inspectorate Commission has carried out a study to return to the entirety by paying special attention not to enter into the judicial area and if possible to assist the judicial process.

Anyone who is aware of the system within which the state and the Inspectorate Commission works will understand that (at this stage) there is no possibility of "investigating" the Susurluk incident in every aspect.

One of the points that needs to be stressed earnestly is that some matters are within the sole jurisdiction of the police and there are difficulties for inspectors in reaching any conclusion.

Omer Lutfi TOPAL's house was searched shortly after the murder. The presence of an individual who spoke with an obviously Eastern Anatolian accent and who claimed to be the

chief of the search party was established. A claim has been made that no security precaution existed around the house for a lengthy period after the murder.

This matter necessitated some police work. A request was made to the General Directorate of Security to carry out a necessary study in order to submit findings to the judiciary. The study carried out by the security concluded that nothing was wrong or incomplete. However, the matter which our correspondence contained concerning MIT [Milli Istihbarat Teskilati-Turkish Intelligence Service-tn] Istanbul Regional Presidency, warning the security about TOPAL's murder and the alleged reasons to accuse a group of police officers, were not answered.

[This part of the Report has not been released]

Eximbank was credited for 2 hotels in Turkmenistan. The final conclusion revealed that these two hotels and their gambling clubs were run by the Emperyal Company and that therefore the debtor is Emperyal. Despite this information Eximbank confirmed a request for extension of debts. They were reminded that the inspection would not interfere with the implementation of duties, however, despite the existing information, sensitivity is required if and when further extension of credit is requested by Emperyal.

Another matter that is interesting and relates to the Susurluk incident is that institutions are ready to forget their own mistakes and be very careful in accusing others. The military, however, looked into the state of affairs in complete silence. However, the Gendarme should have had lots of things to say. Especially YESIL, the matter of confessors and the reasons and method of Cem ERSEVER's murder should have been investigated and, even if public opinion was not informed, the Premiership should have been informed.

Politics [politicians] also were not impartial on Susurluk. In the political arena the state of affairs was confused to the degree that it was not possible to conceive whether the matter concerns the government or the country.

One esteemed Minister of State made a criticism that "Despite all the accumulation the Premiership Inspectorate Commission had not applied to him/her". This statement was made in an announcement to the newspaper.

Although his/her announcement revealed two days later (Secret services, CIA etc), of course it was not possible to respond that his/her point of view was different. In addition even the Prime Minister did not suggest or impose upon us that we should see matters through his political party or personal point of view. The esteemed Minister's request for an interview, which would not go beyond ensuring that his/her personal point of view was reflected in the pages of the media, only confirmed the correctness of our institution's reluctance.

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Another matter is as follows: After taking upon a task every inspector who had worked for many years at the Inspectorate Commission would start working with the relevant institution and legal authority. For the first time - and possibly the last time - the esteemed Prime Minister has promptly met the application we have made in order to overcome any difficulty we may come across. He provided all the attention and aid in order for us to obtain any information which may aid our study directly or indirectly.

When the appointment was made in July he did not hesitate to accept our wishes that no interference with the Inspectorate Commission should occur and if this was attempted he would personally intervene, and any discomfort/ disturbance which might be caused by the bureaucracy should be avoided. Not only did the esteemed Prime Minister more than met this condition, he also did not request information at various stages of our study. Upon seeing that the situation was causing dismay amongst the Members of the Government and the Members of the Parliament, we stated to the esteemed Prime Minister (on the 20 November 1997) that we had established numerous connections with the Government and that there were numerous reforms which needed introducing into the State Institutions, and a necessity has arisen to say that by implementing such recommendations both the Government and public opinion would relax.

Having referred to the "Gang" connections with the State it will be useful to mention the matter briefly.

Only the armed and murderous reflection of the Gangs and groups which traffic drugs are being debated and brought up on to the agenda. This outlawed structure is a vision that any state can easily overcome, as they appear and are being identified around the world and in any prudent state, especially where there is a public reaction, dissolving them is possible. However, in our country the matter of Gangs has indicated two separate developments. First, the organisation of Omer Lutfi TOPAL, which is organised on the international scale in a mafia style. The second type of groupings are the ones not involved in the use of weapons and force, who consist of well educated and respected individuals and who could be described as those wearing ties.

Omer Lutfi TOPAL was murdered after he became capable of receiving an income of hundreds of billions TL, had gone from the stage, when he infiltrated the State, of having work done for him by paying bribes, to the level of giving orders to Public Officials. Therefore for the first time in the history of the Republic an American type mafia process that had no fear from the Police, Gendarme and the Judiciary, was interrupted. No other group reached that level.

In addition, "Omer of Findikzade, the gambling-den operator" dissolved his gambling clubs and started investing, buying factories and even starting factories, and by doing so clearly expressed his preference to become Mr. Omer. However, he did not have the opportunity to realise his projects. As a consequence the halo surrounding him being so wide and effective he felt that he did not need protection, or to have three to five vehicles when he went into the street,

and no security precaution was needed to protect his person. Whenever he noticed that his men took precautions without his knowledge he showed very strong reactions.

This preference did not cause his murder. The system that murdered him was so strong that no precaution would have been effective enough to save him.

The second type of organised gangs, which were much more effective than the first and concerns our subject, is the fact that the State power and authority were directly being organised and used for this purpose. The banks will be given as an example.

The Premiership Inspectorate Commission has carried out an evaluation on three public banks and a disturbing picture has emerged. It seems that the return of millions of dollars and billions of TL to the banks may not be possible. It is certain that the long-term guarantee letters will be cashed. Banks financed certain individuals and companies at the cost of reducing their profitability. Leasing and off-shore credits are exactly like swamps [bankrupt enterprises- tn]. Buildings are extremely expensive. In the following sections group activities, predominantly consisting of politicians and bureaucrats, will be referred to by indicating relevant names.

It is necessary to indicate that some respected individuals did not carry out proceedings contrary to the Banks Act, and that they carried out the activities within the jurisdiction of the SSC's [State Security Courts]. The monetary dimensions of the incidents involving banks exceed the accumulated effects of the set of incidents known as "Susurluk" in the public perception. There is a conviction that it is not a misguided view that sees the bank incidents as neither the cause nor the result of the general contamination, but as one of the accelerating catalysts. Because the aim of the contamination is money and the power accrued from money.

There is a shared opinion that this is the framework of the Susurluk incident. The final matter that will be referred to in this section is the Premiership Inspectorate Commission that carried out this study. All the aspects of this study occurred under the Presidency's preferences completely. The content was also established in this framework. At times all the commissions' inspectors and their assistants have participated [in the study]. Osman Nuri ODUNCU, the deputy president, has especially carried a large section of the workload and head inspectors Mehmet AKIN and Aysegul GENC worked for months. Despite this, due to decisions and preferences which were made by the Presidency any incomplete and incorrect aspects all belong to the Presidency.

However, the basic claim of this study is the point that no preference was made willingly, intentionally and with awareness of making a mistake. The referred to Inspectors have carried out depressing and difficult examinations and took over collections and evaluations at every single stage of this study.

DEVELOPMENTS CONCERNING SUSURLUK

As submitted and described in the introduction section, the Susurluk incident is a unique incident included within a chain of events. The bombing of Ozgur Gundem Daily in Istanbul, the murder of Behcet CANTURK, author Musa ANTER's murder in Diyarbakir, the Tarik UMIT incident in Istanbul and a revolution attempt in Azerbaycan, Hikmet BABATAS murder in Bodrum, the Mehmet Ali YAPRAK kidnap incident in Gaziantep and the bank credits reaching trillions are in fact various aspects of the incident which occurred in Ankara.

Whatever esteemed Hayri KOZAKCIOGLU, Member of Parliament, was referring to when he said: "Whilst being the Governor of State of Emergency Region I had Mahmut YILDIRIM, code name YESIL, excluded from the region", this is the same as our understanding from the Susurluk incident. Mr. KOZAKCIOGLU indicates that the named individual YESIL is not useful for the works of the State of Emergency Government, but harmful. However, the same individual is not harmful for the Gendarme and the MIT, but useful. So much so that the Security Director of Kocaeli applies for YESIL's intermediary role to achieve the named gang leader Hadi OZCAN's surrender.

This individual is so useful that when mistakenly (or as a warning to the MIT) he was taken to a station and interrogated by the police, they [MIT] were told to come and collect their man and he was released. His cracked ribs were treated by the MIT.

What is the Susurluk incident? After November 1996 incidents involving unknown perpetrators stopped as if they were cut by a knife [came to a sudden halt]. That is Susurluk.

A senior official stated in September 1997: "... came from abroad and became our problem. He needs to be forfeited/ made to disappear, but circumstances are not favourable". If this is not Susurluk, what is?

Probably the beginning of the Susurluk incident is hidden in the sentence of the Prime Minister of the time, CILLER. She said: "We have in our hands the list of businessman who aid the PKK". Then the executions began. Who decided the executions? It was inevitable that deterioration would occur and personal interests would replace the national interests, and they duly did so. This report conceives of the Susurluk incident thus.

The circumstances in eastern and south-eastern Anatolia were very slippery. Confessors, protectors, tribe chiefs have already formed a complicated structure. Once we add the difficulty in finding a clear yardstick to separate the PKK terrorists from an ordinary citizen it will be easier to understand the difficulty of our young policeman and soldiers who risk their lives for their country in that region.

However, the emergence of individual interest and its pursuit came much later.

Since the struggle in the region and the PKK attacks created an ever increasing reaction even in the Western regions it is possible to understand and excuse some of the attitudes of

martyrs, the reaction and anger of the State Forces who fight with the PKK, and those who live in the State of Emergency Region. It is in fact inevitable. However, it is necessary to detail the incidents that took place in this complicated structure and the institutions which participate in this natural, however complicated, scenery. By doing so it will be possible to see the country's fight with the PKK and connection stretching to Istanbul, Ankara and financial relationships.

GENERAL DIRECTORATE OF SECURITY

In the 1980's the struggle with the PKK was left to the Armed Forces. Even in political debates a criticism was repeatedly made that the Government did not have any precaution against terrorism, and that the matter was referred to and was left with the Military. It is not possible to suggest that a change in the essence of the fight against terrorism has taken place after this period or at the end of 1991 when power changed hands. No noticeable even minimal difference emerged in the practice and the appearance. The dominant activities of 1992, however, were: cadre changes in the state and debates with the President, especially over the files of KOSKOTAS. The most important reports in newspapers and the press, and the Government's attention, were on such matters. 1993 brought radical changes onto the agenda, and the era of the Hawks began in the fight against terrorism.

The Prime Minister introduced the fight against the terrorism as the priority activity. Mehmet AGAR was appointed to the position of General Director of Security and a serious choice was made. The police were brought to a more active position in tackling terrorism, and the Special Operation Teams emerged onto the front line.

Many things have been said for or against Special Operation Teams. However, a very important view may be established upon examining the routine correspondence in Security Files. Provincial Governors requested that Special Operation Teams should take over in every important incident that necessitated Special Security and that they should be on duty at the minimum level. In addition many Governors have signed numerous communications aimed at speedily filling incomplete cadre positions which had been vacated due to appointments.

The Special Operations were initially organised as regional group chiefdoms in Ankara-Istanbul- Izmir Provinces and with the Bureau Directorate at the centre.

The Bureau Directorate was formerly placed under the Public Order Bureau Presidency at the General Directorate, but was later transferred to the Presidency of the Fight Against Terrorism and Operations Bureau. A cabinet decree dated 26 July 1993, which was not published in the official Gazette, formed a Special Operations Bureau Presidency. In addition a Decree Empowered as an Act dated 12 August 1993, amended the Act and the way was prepared to open a Special Operations Police School to train special personnel.

The rule book regulating the Bureau's operations bear the sign of "Top Secret".

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According to this rule book the Bureau was directly attached to the General Directorate.

The Special Operations Bureau was formed for "carrying out operations, raids, explorations, ambushes, and rapid responses in order to liberate locations, vehicles, planes, kidnapped individuals, and to neutralise terrorist organisations in urban and rural areas where pressure, force, violence, terror, threats, or acts to pacify (neutralise) were being used with the intention of destabilising the basic values of the Republic and undermining the unity of the country and the nation, and where subversive methods were applied against the constitutional regime, by targeting the economic, social, political and legal foundations of the state". Upon completion of their course the personnel who were appointed to the Special Operations Unit could not be employed in services other than their Bureau without the confirmation of their Bureau Director.

The Special Operations Teams are formed from a minimum of 20 Special Operations Personnel and their areas of responsibility are "within Provincial Police Boundaries and in rural areas outside police boundaries". However, outside the police boundaries of responsibility they may operate under the responsibility of the Military authorities upon the latter's request.

The examination of the existing correspondence openly reveals the privileged position of the Special Operations Bureau. The main problems are referred to in the Bureau's briefing file dated 30 June 1997. The number of trained personnel is 8,443 in total and 2,043 personnel have left for various reasons. The conditions of duty, rest and annual vacations of the teams in general necessitate very heavy and laborious practices. Compensations are paid for this reason. (1)

The distribution of the Special Operations Personnel has posed serious problems in a short space of time. As a result of the appointments, upon completion of duty in the year 1998 throughout Turkey but outside the region a total number of 5000 personnel will accumulate, as opposed to only 1600 personnel who will remain in the State of Emergency region. If the personnels' own preferences were considered they would concentrate in five Provinces in the west. This situation shows that the Special Operations Bureau went beyond its function in a short period of time.

The briefing report openly [stated that]: "Due to the unbalanced distribution amongst the provinces a big vacuum will be caused in our Eastern and South Eastern Provinces where the main workload is. Against this, problematic bureaus with a swollen number of personnel will be created in our western Provinces. As can be acknowledged, although it may be possible to meet the demand in the East by starting new courses it will not be possible to prevent accumulation in Western Provinces. Nevertheless the financial burden of the new courses is relatively high".

This realistic observation explains the general and insolvent problems of the Special Operations Bureau. However, there is a deeper and more radical problem accompanying the personnel problem and this is described by numerous authorities by using the expression "South

East Syndrome"; the Special Operations police officers who had armed clashes with the terrorists and surveyed those individuals who aided the terror, following them in the mountains, villages and hamlets, come across the same individuals when appointed in the west. Moreover those individuals whose houses and villages he searched migrated to areas of his appointment, and were "living in groups" not far from the street next to his new house. Upon seeing this he needs to take "precautions" for himself and his family.

Shortly afterwards Special Operations Teams are formed but this time for defense purposes. At this stage there is a critical matter; Security Directors attend to their new appointed provinces with their own cadres, assistants of their own choice, "teams". Therefore the Southeastern "team" is being formed once again in the West and the old solidarity "relationship" continues as before.

There are two important elements in the continuation of these relationships; the first is protection and security, the second is the kind of work which was widespread and inevitably became natural in the State of Emergency Region.

It needs to be openly expressed and confessed that whilst clothing an sacks full of provisions were found in shelters, and that whilst weapons, ammunition, equipment, explosives and wirelesses were seized on the apprehended or dead members of the PKK, money and foreign currency is never found. Money or foreign currency to meet urgent needs was not even found on those whose code names were established, who were apprehended and who were in charge of a region or a team.

The officials who worked in the region are rightly of the opinion that both the life and properties of the PKK terrorists are deserved by the state.

However, at a later stage those Kurdish groups who migrated from the East and were indicated by the Police and Public Order officials to be not "sitting comfortably" [meaning causing trouble- tn] in the Western Provinces, become targets of Special Teams. In actual fact, bringing under control those Kurdish groups which take over markets, shopping centres and various activities of the underground world by force, and becoming partners of their illegal earnings, become a deserved involvement.

The protector and confessor groups, especially in the East, are part of a process of the widespread formation of gangs because of the uncertainty of their future, and these businesses necessitate sharing as described by YESIL in the following words; "Be wise. Do not have it all. Share it. Otherwise they would not allow you those earnings. They would make you throw up".

Such a process of formation of gangs could not be solely limited to the eastern and southeastern Provinces. Neither was it. Extensions were made towards the big city centres, and this process turned into one that decayed institutions and damaged the State. (2)

This result, which took months of interviews [to unearth] is to be submitted to the

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esteemed Prime Minister. The groups which took part in this contamination can be listed in a logical order, - however, in the absence of documented proof. Although they are limited to a few hundred people, the doings of confessors entitles them to be number one. The protectors, although very large in numbers and very large in the number of illegal activities, are proportionately secondary. Police take the third role, which is followed by the Gendarme.

There is a need at this stage to touch on a sensitive point. As openly explained in a meeting presided over by the Prime Minister at the MIT, none of the officials or civil servants no one who reaffirmed their trust towards us, brought any claim against the units and levels of command outside of the Gendarme and under the command of the Chief of Staff for having participated in any of these actions.

Whereupon leaving the region the specially trained Special Operations Staff brought the conditions of the Southeast to the West, the Commandos who were subjected to special training by the armed forces returned to their houses- villages- businesses upon their discharge. It is observed that the effect of the Southeast Syndrome has not been apparent on the military and the regular units where discipline is dominant.

Our subject in this section is the security organisation. However, before detailing some matters there is a need for a general explanation.

Our police organisation consists of 150,000 individuals. It would be unthinkable to accuse and bring suspicion upon tens of thousands of individuals who risk their futures, professions and lives at any given moment by means of sacrifice and hard work along with the very well trained specialists. However, it would not be a realistic attitude to suggest that there is the present thin line has always been taken into consideration at each stage of our study. no connection between the police organisation and the Susurluk incident.

After the Prime Minister changed and in the second half of 1993, the police and intelligence system went through a change which attracted the public's close attention. It was later realised that this change had deep and radical effects.

A bright and dynamic name was brought to the post of General Directorate of Security: Mehmet AGAR. Although a change in the post of the MIT undersecretary had been brought up, this operation could not be realised and the return of Mehmet EYMUR surprised many people. Because Mehmet EYMUR is as bright and dynamic an individual as his namesake. However, the gap between the two is wide beyond repair, and passing years revealed the depth of this gap.

In the process the Prime Minister's interesting exercises continued. Nuri GUNDES, one of the former presidents of MIT, was brought to the post of Premiership Intelligence Senior Advisor, and there was a past between Nuri GUNDES and Mehmet EYMUR which is not friendly. (3) Mehmet AGAR however brought retired lieutenant Korkut EKEN, who is a close friend of EYMUR's, as an advisor and instructor of the Special Operations Teams. (K. EKEN's

temporary appointment location prior to security was at the Premiership). By doing so a very new and effective framework, consisting of bright names, was formed around the Prime Minister. MIT undersecretary Sonmez KOKSAL's project of rejuvenating MIT was obstructed by this circle. Nuri GUNDES especially has been very effective due to his close relationship with the Prime Minister's spouse. It is widely known that Mehmet EYMUR has also used the same channel.(4)

As a result of Ibrahim SAHIN being brought to the Presidency of the Special Operations Bureau the influence of Korkut EKEN has unnaturally increased over this bureau. Ibrahim SAHIN's instruction to his section was as follows: "The requests made by Korkut EKEN are to be carried out as if my own instructions". More importantly the whole organisation and the Provincial Directorates were made aware that Korkut EKEN would be employed as the advisor to the General Director.

In this period the Special Operations Bureau grew stronger and bigger in numbers, and their success and the effectiveness of Special Teams reached the peak in the east and the Southeast.

The General Director Mehmet AGAR achieved a truly effective power, as we have known in other examples within the bureaucracy, with the Prime Minister's support and the organisation under his command. The countrywide function of the Police Organisation elevated this power to extraordinary dimensions.

The facilities provided to the Police Organisation have increased. However, the most important aspect is the Prime Minister's support and trust.

In this context the Police Organisation took up a very important project, the capture or murder of the PKK leader Abdullah OCALAN. The realisation of this project would increase the organisation's prestige and would create political advantages. (In the meantime, Tarik UMIT started following the traces of Dursun KARATAS in Holland, Belgium and England. Drugs trafficker and imaginary exporter, Nurettin GUVEN, is also in the same team).

Funds were made available from the discretionary fund. MIT transferred a cash sum of $12.5 m from its own sources to the General Directorate of Security in one transfer (this payment was not detailed because its allocation could only be by the Prime Minister's instruction). This sum was later increased by the means of a discretionary fund. Although claims were made that a $ 70m sum was allocated, our Presidency is of the opinion that this sum was around $40-50m. This opinion was formed as a result of the interviews with relevant authorities and other gathered additional information.

According to the narrative of Max BRETSCHER, Swiss resident General Director of arms salesman, Ertac TINAR [Ertac TINAR refers to a fund of approximately $70m, and arms and equipment which could not be obtained by the Turkish Government are to be procured with

this sum]. Although this may have been the case, it is almost certain that all of this $70m did not go abroad. Ertac TINAR is the proprietor and the manager of HOSPRO company which is based in London. HOSPRO is an off-the-shelf company with an invested capital of £100. It functioned in the health sector for many years. It sold equipment worth Billions of TL to Turkish Hospitals and various medical institutions of Istanbul University. The formed opinion is along the lines that hospitals, and especially heart and vein surgery units, were seriously abused when procuring this equipment.

Until 1994 Ertac TINAR acted in Turkey in the capacity of a representative of a foreign investment company with a Cypriot passport. For some unknown reason the Foreign Investment Bureau did not see any problem in granting a work permit to a Turk who was born in GEYVE simply because he produced a Cypriot passport. The Foreign Investment Bureau's work permit is turned into a residential permit by the General Directorate of Security almost automatically.(5) As a result the Turkish Citizen Ertac TINAR, was included in the status of foreign personnel working in our country.

In late 1993 or in 1994, Ertac TINAR made an application to the General Directorate of Security expressing his wish to donate weapons and his application was deemed appropriate. In the meantime he participated in a few tender offers. Although from the classical inspector's point of view the contracts he was granted could not be said to be without any problem, this matter was not investigated by our Presidency. The only remark which will be made on this matter is the recommendation that the practice should be abandoned of not following the classical tender methods as applied by the General Directorate of Security and based upon the decrees empowered as acts at the stage of the formation of the Governorship of State of Emergency region.

The General Directorate of Security confirmed Ertac TINAR's request to donate, and as a result weapon and equipment parcels started arriving in the country from 1994 onwards. (Ertac TINAR obtained a Turkish passport almost within a day with the intermediary role of his personal friend Deputy General Director of Security Ertugrul OGAN, and following this he showed an interest in becoming the honorary representative of the Turkish Republic of Northern Cyprus in Geneva).

According to the General Directorate of Security records HOSPRO donated 154 entries of equipment worth TL 82 Billion, and only 10 Beretta and their silencers were lost. According to Ertac TINAR's colleague Max BRETSCHER; TINAR paid his house in Divonne in one year, bought an apartment in Versoix, bought a house for 1.7m, a 600 Mercedes, one Chrysler Voyager and one Mercedes 320 for his wife. These were all bought from the $70m within one year.

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DONATED WEAPONS AND EQUIPMENT

There are two major characteristics of this matter.

1. The procured weapons, ammunition and equipment.
2. The relationship established with Israel- Mossad

Solutions to both issues were developed by Ertac TINAR, the owner of HOSPRO company. HOSPRO procured weapons from Israel and transferred them to Turkey as a donation and they were recorded in the Security records as a donation.

This matter needs detailed attention.

HOSPRO is a limited company established in Britain. Ertac TINAR, who appears to be a partner in and owner of the company, is a Turkish citizen, born in Geyve. He has subsequently changed to TRNC [Turkish Republic of Northern Cyprus] citizenship. He obtained permission from the Foreign Investment Bureau as the representative of HOSPRO company and started working in Turkey.

Ertac TINAR, carried out activities in the health sector until 1993 and sold various medical equipment to the Ministry of Health. TINAR formed a partnership with Prof. Dr. Bulent BERKARDA, the Rector [Chancellor] of Istanbul University in a company called METSAN and probably continued to take part and play his role in medical equipment trade.

The above referred to individual has later applied to TRNC in order to become their honorary council for Geneva, and indicated the Justice Minister Mehmet AGAR as a reference.

HOSPRO is a shop sign [off the shelf] company established in Britain. Its capital is £100. This capital has not been changed in years and the shares were divided equally between Director Ertac TINAR and the Company Secretary Nurdan BERGEMAN - later became TINAR.

Detailed information was obtained from Company House, the Central Registrar of British Companies. Documents of as many as 150 pages were translated, examined and evaluated from the trade- finance and activities point of view by a team of experts.

The team of experts have indicated that the company was established with a comical sum of £100, that up to the present no increase has been made on the capital, that the company often changed address, that the shares were divided between an administrator and a company Secretary, that none of the items concerning their activities were indicated in their balance sheets, that the balance sheet has increasingly shown a deficit [loss], that the debits have always been much more than its active [credits], that it is considered that the company could not be a genuine company, that the Company House have notified the company four times that it was going to be struck off from records and therefore abolished, that this was withdrawn afterwards (probably due to appeals), that the auditing company was also based in the same address and therefore the auditing was carried out as a matter of routine.

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The company manifest declared in 1991 that it was involved with international trade of medical equipment however, trade activities were not in their thousands of pounds and instead around hundreds [of pounds]. Again, the company intended to open a branch in Turkey and transferred a long term invested capital of TL 70 million. As a result a company was established in Istanbul with TL70 million.

The balance sheet belonging to various years does not indicate any trade activity. The tax return form dated 31 December 1995 indicates a sum of £7046 in the credit/ deficit account. The one year long term credits were indicated to be £135.446. According to the information gathered from the Ministry of Health HOSPRO's connection with the health sector go as far back as 1978. The Dr. Mursit KORYAK asthma hospital has bought medical equipment from the company numerous times between 1978- 83. When at a later stage it became the Kosuyolu Heart- Vein Surgery Centre, and as long as Dr. KORYAK continued to be the head doctor, the relationship continued

University hospitals have also maintained a relationship with HOSPRO and Mediterranean University bought Lung Pumps from the company. At a later stage the company started taking patients to Britain.

The Siyami ERSEK Heart and Vein Surgery Centre granted various contracts to the company between 1988 and 1992.The Ministry of Health did not inspect all the contracts and a doctor's examination at the Centre, Ankara was deemed sufficient.

The important point is as follows; HOSPRO, which carried out activities in the health sector could not be seen in the referred to sector since 1992. From this date onwards this company and Ertac TINAR surfaces in the General Directorate of Security records.

Ibrahim SAHIN, the chairman of the Special Operations Bureau indicated a "very urgent" need for certain equipment on the 23 February 1994, and the contract was granted to HOSPRO company on the basis of negotiations by taking advantage of exceptions indicated in Article 3 of the decree empowered as an Act number 285. General Director Mehmet AGAR confirmed the contract on the 27 February 1994. The relevant authorities of the Bureau said that they did not know HOSPRO and Ertac TINAR and the names furnished from the "authority" [common reference to the General Director- tn].

Article 3 of the Decree empowered as an Act No.285, which concerns the establishment of Governorship of State of Emergency, regulates the procurements and meeting the requirements of the Governorship structure and public institutions. The Article cannot necessarily be interpreted to procure any external [imported] products for the General Directorate of Security from one company, on the basis of negotiation and on the prices deemed appropriate.

In addition, the ways in which HOSPRO Limited was found is not clear.

On the following day, i.e. 28 February 1994, the tender commission assembled and

applied a 3% discount to the tender offer of $1,040.850.- and as a result a decision of procurement was finalised and confirmed as $1,009.000. GENERAL DIRECTOR MEHMET AGAR confirmed the decision and the company obtained the equipment from Israeli sources. The Central Bank transferred TL 32.5 Billion which is the equivalent of $1,009.000.- on the 18 June 1994.

Although the speed of this procurement should be appreciated the same speed cannot be observed in other matters.

In addition, another request was made on the same date, 28 February 1994 and this became a matter of procurement for the sum of $1,211.214.

One more procurement was made for the sum of $203.000. Each of these three procurements were supplied by HOSPRO company and the standard 3% discount was applied.

Confirmations of the tender commission were numbered as 150, 151 and 152 and were signed by the General Director Mehmet AGAR on the same date.

The basic matter that attracts attention is the sudden involvement of the HOSPRO company. It is interesting that a shop sign company donated weapons and equipment worth Billions of Turkish lira to the Turkish Security Organisation.

If the donation was made by the state of Israel the system had to be established by another institution of the state. However, if the procedure that was stage as a donation was truly a matter of procurement, no reasoning can explain the situation. The haphazard (casual) procedures of the Security Organisation could not be explained [excuse] by the fight against terrorism or fighting for the country. In addition, as described above, there are numerous ways of speedy procurements and it is possible to act at great speed.

Problems concerning the weapons did not end. The quantities of weapons and equipment are not certain. The special operations bureau did not keep records of the transferred weapons, and in addition it requested from the maintenance and provisions bureau that the original packaging of the parcels should not be opened and inventory records were made months later. From our point of view records were kept "according to their wishes".

However, due to the pressure from public opinion the investigation into the missing items of Beretta with silencers, which were located as a result of the Susurluk accident, was limited to 10 missing Beretta.

The facts concerning the types of weapons and equipment imported could not be established up to the present day.

There is a set of mistakes from the procurement to the record keeping, over this donated equipment. The main subject that the General Directorate of Security concentrated on at the time was to establish contact with MOSSAD. The aim of payments, Ertac TINAR's involvement, and the visits to Israel were establishing contact with MOSSAD and the intended operation against

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Abdullah OCALAN. In addition has been suggested that there is an intention to use the donated equipment as a camouflage for payments made and future payments for/in return for OCALAN. However, there is a clear point. Payments were made to Ertac TINAR and the service was expected from Israel.

In the meantime, according to the information received from national intelligence agency [MIT], Ertac TINAR is after the sum of $10-15 million which he has not yet collected. Since the service has not been carried out it is only natural that the payment has not been paid.

However, there is another problem here. The weapons were obtained from another country with the guarantee letter belonging to HOSPRO. The payment has not been made therefore the transfer of weapons had not been made either. The guarantee letter was cashed and paid by Ertac TINAR.

Due to the changed conditions the Turkish party does not pay or is unable to pay, and the weapons that are paid for remain in the hands of TINAR. The claims that the payments were made for the Israeli support and the intelligence service carried out by MOSSAD loses credibility.

The important point here is the choice of the police when they took over an important operation abroad. When this choice was made and sources were appointed the Government authorities ought to know of it and give their confirmation. It is also necessary to consider the exclusion of MIT from such an operation as being misguided. Nevertheless MIT has also carried out preparations for such an operation, however, the preparations took a lengthy time and even then OCALAN was saved from the operation alive. An installation was blown up in Syria and, although OCALAN's conversation on the telephone was interrupted, when he started speaking on the wireless 20 minutes later it was understood that he was saved.

Syrian Military Units blockaded the operation location. This operation was attributed to the CIA or MOSSAD by the Syrian authorities.

The division of power and facilities has primarily caused failure. At a later stage both organisations demeaned each others efforts. And this situation limited their collaboration capabilities to the degree of non- existence.

The visit of the President of MOSSAD to the General Directorate of Security, and the CIA representatives visit to the security, caused another adverse effect. Upon a claim being made amongst the intelligence organisations that the Prime Minister gave the task to the Security and not the MIT, this increased the dimensions of the quarrel and has become an element blocking the performance of duty.

In the meantime another claim was made that the military intelligence has reached to abroad [opened up to abroad] and this situation has indicated the depth of the opposed developments which are supposed to complement each other.

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This division created repetitive spending in technical investment and equipment. On the one hand an excessive waste of resources occurred, and on the other institutions started charging each other with falling behind and a lack of capability.

According to the MIT's expression: "Confusion in execution in the intelligence field had added dimensions" and the problems take shape in the connection of Police- Gendarme- MIT.

"Amongst the practices directed against MIT sources up until the present time are; exposure, appointing to tasks by means of pressure and threat, arrest, and along with such incidents victims of murders with unknown perpetrators are often seen.

It is observed that the referred to incidents are concentrated in OHAL [State of Emergency], region that incidents of pressure and murder have been on the increase since 1992, that they increased to a noticeable level in the years 1994- 1995- 1996, and that the trend decreased considerably in 1997.

Since 1992, and up to the present date, in excess of one hundred MIT sources were taken into interrogation by the security units, and an important portion of them were subjected to pressure inclusive of violence, approximately 25 sources were exposed. 15 of them lost their lives for this reason or by becoming victims of murder by unknown perpetrators".

There is an open accusation against the police in these sentences. In addition this also reveals how low the level of collaboration had become.

In its response to the questions which MIT was requested to answer the organisation detailed its views, and this confirmed our statements concerning the relationship between the MIT and the politicians.

It has been stated that MIT resisted the pressures with their own methods but nevertheless, despite their meticulous efforts, unwanted interventions were made and in examples the names of Mehmet EYMUR, Tolga Sakir ATIK, Nuri GUNDES and Korkut EKEN have been mentioned.

The General Directorate of Security overtook the MIT as a result of it being clearly preferred by the politicians. Even in the matter of equipping themselves the security authorities said in a cynical manner; "They learned from us", "They started after us".

THE NATIONAL INTELLIGENCE ORGANISATION [MIT]

The claim that MIT participated in the Susurluk incident seriously hurts the senior administrators of the organisation. Members of the organisation justly expressed their hurt and sorrow. However, the opinion formed by the public can be understood as not having been taken seriously by the MIT because the cause of such an opinion is the MIT itself.

The announcement made by the TV stations only 15 minutes after the Susurluk accident that Abdullah CATLI was in fact the individual carrying an identity card by the name of Mehmet

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OZBAY who died in the accident has been rumoured, whispered and published to be the result of information released by the MIT. Following developments proved that MIT was aware of the true identity of Mehmet OZBAY for a lengthy period. It has also established that in July 1996 Mehmet EYMUR allowed reporters to take notes from a report prepared by himself.

It is also known that Mehmet EYMUR had meetings with Mahmut YILDIRIM, code name YESIL, and that at these meetings they talked about CATLI; that CATLI met with Hadi OZCAN concerning the "Petrol business" for BAYSA company; that Hadi OZCAN, who is the Kocaeli gang, decided to murder the council leader; that Security Director Mr. AFFAN said that it is time that Hadi OZCAN should surrender, and that numerous meetings were held in order to inform each other.

According to a record of an interview, dated October 1996 but only only submitted for the MIT undersecretary's information in December 1997, Duran FIRAT, a MIT employee, had an interview with Fatih BUCAK and there a claim was made that Omer Lutfi TOPAL was murdered by the police.

Moreover Mehmet EYMUR and his group had meetings [interviews/ conversation- tn] with the YAPRAK group in order to save Mufit SEMENT (from the Drej Ali group) whose fingerprints were found in the vehicle which Mehmet Ali YAPRAK was kidnapped [with/from]. And in addition Mufit SEMENT debated and negotiated with YAPRAK's representative from EYMUR's telephone in MIT. The details of this meeting [conversation] is a cause of dismay for the country. The representative of the YAPRAK gang spoke in an "aggressive and threatening manner and said that they promised EYMUR that this would not be police business, that they would keep their business and they would be in control of their own region".

MIT representatives put up with the scandal, and the police officer who was listening to YAPRAK's telephone kept his silence, and the state took part in this shame.

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 such an individual.

It is possible to understand that a respected organisation such as MIT may use a lowly individual. However, close relationship such as familiarity and collaboration need explaining.

For whatever project or action might have been undertaken abroad it is not an acceptable practice that MIT should have used YESIL several times, because YESIL's relationship with the Special Intelligence Bureau is not one of respect, fear and obedience to the organisation, but at the point of familiarity.

However grave it is that all kinds of scandals were carried out under the Public Order Army- Corps in the OHAL region, it is just as grave that YESIL opened an account at Ziraat

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Bankasi, Heykel Branch at the centre of Government [meaning Ankara, the Capital- tn], under the name of Ahmet DEMIR in order to collect extortion money.

The existence of this account was discovered from the State Archives. The fact that heroine smugglers have also put money into this account, coupled with the YESIL's logic "Not to eat alone", can only bring one question into one's mind; who were YESIL's partners? Who was he sharing with?

The answer will be short and logical; whomsoever was protecting him ....

YESIL, who carried out activities in Antalya under the name of Metin GUNES (Sakalli Haci) [Bearded Pilgrim- tn], 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 MIT. Whilst listening to his telephone calls and surveying his activities both parties established evidence on each other's connections- however involuntarily. The State Security Organisations are aware of the incidents and connections, they establish actions which constitute an offence according to the TCK [TPC- Turkish Penal Code] and ... they keep quiet. This is the Susurluk incident.

As a result of the State's silence the field is left to the gangs [to roam- tn]. Page 27(Stamp)

Despite the MIT, which is aware of everything, and despite the 150 thousand strong police which is in charge of the public order, it is not possible to bring bullies [scoundrels- tough guys] who gathered 15-20 people around them, to account.

By denying themselves, in the end these institutions hit a lorry [Susurluk accident involved a lorry-tn]

GENDARME

South and Southeast Anatolia is under the control of the Public Order Army Corps. The military struggle dimension of the Terrorism is beyond our interest, knowledge and authority. However, it is a fact that incidents that occur in the region could not possibly be understood independently from the Gendarme. Having acknowledged the fact that the Susurluk accident was not only a traffic accident and that it was a chain/series of events of which Ankara is at the centre and that here the confusion was at its maximum level, it would have been serious negligence if the OHAL region and officials within that region had not been examined seriously.

Even if Gendarme General Command denies it, the presence of JITEM is not a reality that could be forgotten.

JITEM was forfeited, dissolved, its personnel were appointed to other units and documents might have been dispatched to the archive but many officials who worked in JITEM are alive. Furthermore the presence of JITEM does not form a mistake, in fact JITEM emerged

out of a necessity.

Protectors and confessors carried out an effective duty by providing ease to the Security Forces in the struggle against the PKK. This situation increased the sympathy for the Security Forces.

The ability to move authoritatively, effectively and freely in the terrain pointed the Special Teams to practices beyond their duty and gave them a tendency to tolerate those who committed offences.

It has been observed that a group by the name of JITEM was put into action within the Gendarme in order to co-ordinate the appointments and administration of the Special Teams.

JITEM carried out effective work in the region and the majority of this was without the knowledge of the local Gendarme units. In due course the activities of civilian and military individuals, who were on duty within the framework of JITEM, had attracted attention in the region. Due to containing large numbers of protectors and confessors in its rank and file, the proportion of individual offences increased.

Those elements that left the region in due course continued their activities in favourable circumstances.

Two individuals who were in this group became extraordinarily well known. One is Major A. Cem ERSEVER and the other one is Mahmut YILDIRIM -YESIL.

CEM ERSEVER

Cem ERSEVER is the Gendarme officer who formed and administered the Intelligence Unit of the Gendarme in southeastern Anatolia known for short as JITEM. He resigned in March 1993.

ERSEVER took part in all the intelligence and guerrilla work dealing with the PKK throughout the duration of his lengthy duty in Southeastern Anatolia. He personally participated in armed clashes and administered all the activities, maintaining contact with individuals and groups pro and against the PKK. He administered all this with full authority and under direct orders of the Command.

As being an officer and being in charge of intelligence, he either participated in all the activities within the region or had knowledge about them.

ERSEVER had primarily carried out his duty as an average Gendarme Officer and afterwards, due to being empowered with very important authority, he developed contacts with all the institutions and outlawed groups within the region. His contacts went beyond the borders. He had always been close to Barzani, between TALABANI the leader of KYB [Patriotic Union of Kurdistan- PUK] and Barzani the leader of IKPP [Kurdistan Democratic Party- KDP] he played an important role in maintaining contact between Ankara and both leaders respectively.

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As a result of originally being from Kirkuk, he had close contacts with Iraqian Turcomans. He also had contact with the Iraqian Intelligence Service [Istihbarat/ Mukhabarat]. He personally did not deny that this relationship started in 1976 when he was appointed to the region. He dedicated this contact to the struggle against the PKK. The fact has always been assumed that he had contact with the British and US intelligence groups in Northern Iraq where he often went.

After retiring he developed a reaction and started a campaign to rouse public opinion on matters where he thought there was incompetence, incompleteness and wrongdoing in the struggle against the PKK. Publications such as Tempo, Aydinlik, Tercuman and Daily News published some reportage and announcements of him. In the meantime, he rented (or used) a flat [apartment] from Hayrullah SALIH, the Ankara representative of IKPP, which they used as the bureau of the party and started the preparation of publishing a political magazine. He wrote 2 books under the pen name of Ahmet AYDIN and as a result of his announcements in Tempo Magazine a case was opened in the Military Tribunal. Along with matters concerning the region and the Kurdish question, ERSEVER made announcements criticising in detail the Gendarme General Command and Public Order Army Corps on matters concerning appointments, mode of conduct and execution of duties.

However, developments were not in the manner he expected - he did not gain support, the armed forces reacted and he was distressed financially and from the security point of view.

Cem ERSEVER's murder is still amongst the incidents with unknown perpetrators. According to the MIT, Hanefi AVCI "summoned Mahmut YILDIRIM and told him that he had talked with the relevant authorities, and that as a result of his latest activities Cem ERSEVER had needed removing/wiping out, that they obtained the collaboration of Mustafa DENIZ and Neval BOZ (his lover/wife) and that they, in turn, delivered Cem ERSEVER to the execution squad under AVCI's directors".

The Aydinlik Magazine had placed the murder of ERSEVER within a logic of its own and made an announcement as follows: "Due to being a member and witness to drug trafficking he was interrogated by Abdullah CATLI and his team in the Premiership Shooting Gallery, and was murdered along with his friends Mustafa DENIZ and Neval BOZ in November 1994". The MIT's explanations are far from the truth. However, the logical and consistent announcement was made by Hanefi AVCI, who for some reason MIT always accused.

In his explanation to the TBMM [Turkish Grand National Assembly] Susurluk Commission on the 4 February 1997 AVCI stated thus; "Cem's archive was stored in a house belonging to Kemal UZUNER, (Gendarme Personnel), the driver of Ali Balkan METEL, the Customs Director. The Gendarme took the material from Kemal's house to the archive, apprehended ERSEVER, who had a rendezvous with Kemal, and Mustafa DENIZ and Neval

BOZ who came to the house were also captured".

A claim that Mahmut YILDIRIM (YESIL) was amongst those who did the interrogation is widespread. In the end MIT made a logical explanation and said: "It was known that ERSEVER and his friends were very experienced about the way terrorists behave and very careful about their own safety. It is noticeable that despite this, they were captured by the murderers without any sign of a struggle. This situation strengthens the possibility that ERSEVER and his friends were captured by those who they thought "trustworthy" or with an intermediary role.

The way the action was carried out and the fact that three of them were not subjected to any compulsion diminishes the PKK possibility in the murder. The PKK would not be expected to murder someone who knows so much before having them "talked".

It is therefore not misleading to accept the comments in the press as having some truth in them when saying that a struggle existed within the State and the State, and that the state was incapable of protecting those who were in very effective positions or who could easily give them away [sacrifice them]. Many police officials held light upon the incident by saying: "We were guessing that Cem was not going to be murdered but being frightened by being interrogated for his recent actions".

Kemal UZUNER, the driver of the Customs Organisation, told us in the interview that Cem came to his house and took his sealed suitcase, and the others also came to the house and went away. He also revealed his relationship with Cem that goes back for years. However, he could not explain Cem and his friends' disappearance outside the house at this [unusual] hour although Cem was inclined to, and used to, armed struggle.

In actual fact, having interviewed dozens of individuals, we should not have had any suspicion over the course of this incident. It is certain that ERSEVER became harmful, increasingly targeted the State and its institutions, his wrong relationships increased in size and he deserved a punishment before the judiciary. By narrating this incident at length we would like to attract the esteemed Prime Minister's attention to the elementary point that this is an indicator which shows the atmosphere in Ankara in that period.

In MIT's expression those who captured Cem and his friends handed them over to the "Execution Squad". In our opinion, the expression: "Execution Squad" is the crucial point. Who may give orders to the "Execution Squad"? Who may form such a squad? If this has authority with the State how will the system will work? And for what purpose will this system be put to work?

This fact is known. The level of authority for such a decision had been reduced to Sergeant Majors, Assistant Superintendents and more importantly went down to the level of the former terrorists who are the future's potential criminals, i.e. the confessors. The initiative of the

Army Corps Commander to bring an end to this mess in 1996 has stopped the casual nature of murdering people to an important degree. Because it is obvious that when those individuals who, in connection with a matter which was brought before the courts, were handed over from one place to another whilst being in the hands of the State, and were then found dead under a bridge, such an incident cannot possibly be caused by unknown perpetrators.

With such incidents happening in the OHAL region, Cem ERSEVER and his friends' victimisation by unknown perpetrators in Ankara is one example that this has reached dimensions beyond the public good and created harm to the public.

MAHMUT YILDIRIM (YESIL [Green-tn])

It is deemed useful to submit the MIT's facts concerning YESIL to the Prime Minister without any explanation. The relationships which are not stated here, and which are the evidence of behaviour by institutions of the State which cause dismay and must be corrected, are going to be dealt with at a later stage.

The following expressions are quoted in full from the National Intelligence Organisation without being altered.

MAHMUT YILDIRIM CODE NAME YESIL

Real name: Mahmut YILDIRIM

Code Names: AHMET YESIL- MEHMET KIRMIZI

Tire- SAKALLI- TERMINATOR

Son of Salih and Derdi, dob. 1953, Bingol/ Solhan.

He was put to good use by the Bingol/ Genc District Gendarme Command commencing from 08 April 1973. From that date on, due to difficulties in evaluating the information he furnished, the referred to command handed him over to our organisation effectively on the same date.

Our Tatvan District Directorate put him to good use effective from that date.

Due to doing his military service between October 1973 and November 1975 the contact was not possible. However, after his return from military service he became useful on the Nationalistic View [A radical Islamic party's well known policy- tn]. However, due to various complications he created in May 1989 his contact with our organisation was cut off.

Subsequently the individual took part in operations along with the security Forces in Nazimiye and Ovacik regions for, and under the command of Tunceli Gend. Reg. Command in order to gather intelligence information.

As a result of this work, and due to being exposed before the residents of the region, he was withdrawn to DIYARBAKIR by the Gendarme Public Order Command. The referred to

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individual, who met one of our personnel in Tunceli Gend. Brig. Com., said that he carried out rural activities under the command of the Gendarme Public Order Commanding Officer in DIYARBAKIR.

In a conversation with an official from our relevant unit, the individual who carried out activities in connection with Tunceli Security Officer in March 1992 expressed that he was going to illegally interrogate Aysel DOGAN who administered PKK activities in TUNCELI and if she did not talk he would have her disappeared. Upon this our personnel convinced him "Not to carry out such an action". On the 17 March 1993 our relevant units were instructed "to take maximum care not to contact the individual in any capacity due to his tendency to create complications".

On the 27 May 1992 5 members of the PKK who were apprehended by the Security Forces in MUS Province were murdered by the referred to individual whilst being taken to the Special Operations Bureau Directorate in order to be interrogated. There is a correspondence dated 28 May 1995 that contained the names of 2 personnel from our Bingol unit along with the name Ahmet YESIL, his signature and the title "Official at Public Order Army Corps Command".

In the aftermath of the incident, according to the received information relevant to the individual, our Bingol Unit witnessed an incident in the Office of Bingol Provincial Gendarme Commanding Officer where the Public Order Army Corps Deputy Commander was present, and where the recognised and referred to individual demanded money and Public Order Army Corps Deputy Commander ordered that money should be given.

On 5 May 1992, the referred to individual participated in the Provincial Security Meeting where the Governor of Mus, the Director of Security, the Provincial Gend. Co. and the Provincial Regional Director were present. He said that he did not receive any help from our Bingol unit at that meeting.

The individual who came across [to one of our personnel] in the Interrogation Bureau of Elazig Directorate of Security on the 7 December 1992 insisted on having a meeting. As a result of the meeting he said that along with the Gendarme Units, they captured 3 dead terrorists who were preparing for an action against the Gendarme Station in Mus- Bulanik District in 1991. He also added that in the same year he engaged a woman (Probably Neval BOZ) from Hatay, who was the courier of A. OCALAN who was located in Mus, and he introduced her to a Major (Cem ERSEVER) who was a Gendarme Officer working at JITEM.

[M. YILDIRIM] expressed his wish to work with our organisation. His offer was not accepted.

On 27 January 1993, he sent two of his men with the disguised PKK militants to demand money from a named individual Celal YASAR, who was previously suspected of being one of the individuals in TUNCELI whom the PKK demanded money from, and therefore detained and subsequently released him.

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On 16 February 1993, Diyarbakir JITEM Group Acting Commander had an interview with our relevant unit expressing that the referred to individual wanted to establish a relationship with our organisation, that he had the person in charge of MUS Region with him, that he was planning to murder Semdin SAKIK and he requested a guarantee to go to SWITZERLAND after the action. The offer was not accepted.

On 7 August 1993 a named PKK member Salih DERVIS, who surrendered to the Gendarme in ELAZIG/ Karakocan, indicated in his statement that Mahmut YILDIRIM, whom he was introduced to by the Gendarme Commander, "told him that he was working for MIT and was charged with the responsibility of Southeast Anatolia and he {M.YILDIRIM] was going to train and employ him [S.DERVIS] in MIT".

Regarding 1994, Muhsin GUL (Cod name: KELEC- PEPE- METIN) who was under arrest in Diyarbakir Prison gave statements to Diyarbakir Homicide Bureau concerning Ahmet DEMIR between 22 July 1994 - 16 August 1994 as follows.

"The kidnap of Bayram KANAT on the 6 April 1994 from Diyarbakir, Sehitlik Mahallesi, 75 Sokak No: 31, and whose body was found under the Ongozlu Kopru [Bridge] on the Mardin Road on 01 June 1994, was planned by Ahmet DEMIR who was working at the Diyarbakir Gendarme,

During the kidnap of Bayram KANAT a Star make of pistol and Uzi make of automatic pistol were seized from the individual's house and, along with Ahmet DEMIR, the Ali and Kemal code named Gendarme Officials participated in the incident and himself (Muhsin GUL) took part in some of the Gendarme duties from time to time,

Retired Major Ahmet Cem ERSEVER, was murdered nearby Elmadag District, Ankara by Ahmet DEMIR (Code name YESIL) confessor Alaittin KANAT (Code name general ZINNAR), Ibrahim BABAT (code name METE) an approximately 35 year old short individual speaking with an Antep accent and wearing glasses called Hoca (name unknown).

Following this, and the murders of A.C. ERSEVER's friend Mustafa DENIZ and lover Neval BOZ in the same manner, the referred to individuals returned their weapons to the Gendarme Intelligence in Ankara Aydinlikevler neighbourhood and were sent to their destinations in a coach.

Code name YESIL always told them that "He was doing these jobs for 23 years and those he murdered were Communists" and by labelling his victims as communist he brain washed the confessors and other individuals around him,

In addition, named individuals Mesut MEHMETOGLU and Serdar OD were brought to Ankara in a plane in order to be used in the C. ERSEVER incident. However, upon the referred to individuals stating that "They would not participate in this incident" their weapons were taken and they were sent back. This information could be confirmed with the plane records,

Zeynep BABA, the daughter of the fixed range taxi driver in Istanbul, who is the elder brother, of the mayor of Hosgeldi Village, Bulanik, Mus and Sukran MIZGIN (Her father is a carpenter) from TATVAN District, BITLIS Province were interrogated by the Diyarbakir Gendarme Interrogation Section and as a result were referred to State Security Court. After their initial interrogation (and following their release) A. DEMIR and code name REZZAK, a resident of ELAZIG, took these individuals and for some time tortured and violently raped them. They murdered Sukran MIZGIN under the bridge at the city entrance to MUS. What they have done to Zeynep BABA is unknown.

A. DEMIR and A.KANAT collected money from Ahmet KAYA, the director of Yildiz Yapi Koop, and Musa FIDAN, one of the senior figures in the same co-operative, with the intention of starting a private public transport company in Diyarbakir in March 1994. Along with these individuals they collected a total sum of TL 3 Billion from those individuals they deceived. They collected TL 600.000.000 from Ibrahim YIGIT, the chairman of Diyarbakir Province MHP [Nationalist Action Party] and in the first stage TL 600 million of this monies were put into a bank account opened by the name of A. DEMIR at Elazig Ziraat Bank (3003-30) and that referred to individual had trillions of Turkish Liras in this account.

By March 1994 A. KANAT started introducing himself as the person in charge of the Southeastern region for MHP. At this stage his relationship with Ibrahim YIGIT, the chairman of Diyarbakir Province MHP, went bad and around that time A.DEMIR and A.KANAT took I. YIGIT from the touristic hotel at which he was staying in order to murder, him but at a later stage for some unknown reason released him and they took a certain amount of money in this fashion from Ibrahim YIGIT for the relevant company.

That specialist sergeant (Gultekin SUTCU) code name KURSAD from Devegecidi, confessor Ismail YESILMEN and confessor Burhan SARE were witnesses to this incident.

(Alaittin KANAT, Mesut MEHMETOGLU, Ismail YESILMEN and Ahmet DEMIR, code named YESIL planned and murdered Mehmet SINCAR, Member of Parliament in Batman) and after the incident A. KANAT had said, "He had a paper with a guarantee and signature on it."

A. DEMIR sometimes told him (M. GUL) and his friends that "He ruined the Istanbul Mafia and he planned and had murdered Behcet CANTURK and the other mafia and PKK supporters who died in the same manner."

That A. DEMIR personally planned and executed the murder incident of Vedat AYDIN and Musa ANTER. A. DEMIR and A. KANAT collected large sums of money from Diyarbakir and surrounding provinces with PKK headed threatening letters, and amongst this collection of money he (M.GUL) personally delivered the letters to the "Cezayir Ticaret, Oz Diyarbakir, Diyarbakir Sur, Diyarbakir Itimat" white goods companies and "Ceylan Insaat, Intim Insaat"

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companies in Melik Ahmet Caddesi in 1993. The collection of money was made by Mesut MEHMETOGLU and A. KANAT.

In 1993, by indicating the reason that Abdulkerim AVSAR, who was under arrest in Diyarbakir E Type Prison in a PKK trial and who was the brother of the proprietor of "Sedef Trading Company", was transferred to the confessors dormitory, A. KANAT collected TL 1 billion from Sedef Trading. They repeated their demand in 1994 and upon a refusal to pay the money they murdered M.Serif AVSAR, a partner in the company, and this incident surfaced for some unknown reason.

In accordance with the planning carried out by Ahmet DEMIR, code name YESIL on the 10 September 1993 a contact was maintained with Lokman ZUHURI (son of Abdurrahman, DOB. 1977, Lice) and his paternal cousin Zana ZUHURI (18 years old) under the disguise of PKK militants and Mesut MEHMETOGLU, Alaittin KANAT and 2 soldiers in civilian clothes took the referred to individuals from their house in Sehitlik Mahallesi by using a 81-82 wireless code they had on them. After a brief interrogation they murdered them in a location 4km after Saran Brick Factory, Pagivar Beldesi.

On the 20 September 1993, Serdar OD, M. MEHMETOGLU and himself (M.GUL) were given a task relevant to the murder of Adv. Husniye OLMEZ in Bismil Road and that he (M.GUL) was personally ordered to carry out the murder action of H.OLMEZ, however the action was not carried out.

He received directives to murder Fethi GUMUS, the president of Diyarbakir Bar and Suphi KOC, a teacher appointed to Elazig, Karsiyaka, Fen Lisesi [college] however both actions were not carried out.

The planning and execution of all these incidents were made by Abdulkerim KIRCA who was known as Major Kerim at the Gendarme Intell. Ahmet DEMIR and Alaittin KANAT.

Along with himself [M.GUL] confessors Adil TIMURTAS, Ismail YESILMEN, Burhan SARE and Serdar OD left the group after discovering that they had been deceived into thinking these actions were to take the country to better days and wipe out terrorism, whilst they [the deceivers] were doing this business for their personal reasons, raping women and girls and living in luxury and buying properties with the money they extracted.

- However, due to not having any source of income they entered into robbery and usurpation.

- After every execution major Kerim, YESIL and A.KANAT gave them a TL 10 million pocket money and they were told that the rest [of the money] was transferred to the organisation.

- A house was rented in "Ofis, Gevran Cad., Yeniceri Apt. Kat:2 No:6" for residential purposes for himself (M.GUL), A. DEMIR, I.YESILMEN and B. SARE and the black reference book/calendar in the house had numerous secrets of YESIL in it.

- The ERNK headed money collection receipt book in the shape of a notebook, which was found on a member of the PKK who was apprehended on a plane in Ankara 1.5 years previously, was forwarded to A. DEMIR by the Ankara Gend. Intell. and the referred to individual and his friends used these receipts to collect cash. YESIL, KANAT, YESILMEN and M. MEHMETOGLU decided the mode of threat and the sum of money they were going to demand with these receipts.

On the second day of him (M.GUL) being put in prison A. DEMIR approached him and asked "why had he told the Security Director of the matter concerning a Czechoslovakian make 16 rounder" and also asked " What else did you tell about me?" and in response he [M. GUL] said that he could not stand the torture and talked.

That he did not know the open identity of YESIL, however he had established that he was a retired colonel.

The donated moneys for the private public transport buses were collected by A. KANAT, YESIL and Ibrahim YIGIT and himself (M.GUL) Dalyan AY, Hakan PAMUK, and Mustafa PAMUK were eye witnesses to this money.

That A.Y. Dalyan was murdered with a cleaver on 5 August 1994 thus the witness stated via the intermediary role of a personnel of our Bingol unit, an offer was brought in June 1994 that, if requested, some actions can be carried out by a group which is operating in some European countries as contractors, and himself (M. YILDIRIM) can make the arrangements as an intermediary. He requested that this matter be submitted to Mehmet EYMUR and a request for an interview was made. Upon this a contact was maintained with the referred to individual in September 1993.

The individual was taken into custody by Ankara Directorate of Security in January 1995 and during his interrogation continually asked questions about his relationship with our organisation, the identity of his contacts and the nature of the information given by him. These questions were personally asked by Orhan TASANLAR, Director of Ankara Security. The referred to individual told TASANLAR that he wanted to know why he was being interrogated and that he found it strange that in a unit belonging to the 'Turkish Security Organisation was asking questions about an institution in charge of the National Security. During the referred to interrogation the individual's personnel weapon was used in aimless shootings and the interrogators threatened the individual by saying empty cartridges could be dropped into an incident location which may occur in the future, and by doing so the individual was threatened. Upon the individual's arrival at our organisation to inform us on this matter, his ribs, which were cracked during the interrogation, were treated. (6)

We did not have any relationship with the referred to individual from 30 November 1996.

These are MIT's explanations and it is obvious that there is a relatively reticent manner in

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this narrative.

One issue is to be repeatedly submitted to the esteemed Prime Minister. Our explanations are not intended to criticise and therefore exhaust the MIT, Gendarme, Security or Ministry of Tourism or any individual. With their common sense the People of Turkey have established some of the mistakes committed by the State in the Susurluk incident. They are waiting for the acknowledgment of these mistakes and perhaps an apology. Our sole intention is to submit the truth we have established or the truth we were capable of establishing to the esteemed Prime Minister on this matter.

The above referred to Mahmut YILDIRIM had other businesses which were not referred to in the 10 pages submitted above.

According to the report drawn up by Etibank Inspection Commission dated 27 November 1997 and numbered 3/29 "Mahmut YILDIRIM, code name YESIL" was employed at Etibank Elazig Ferrocrom Installation between February 1977 and February 1997 as a labourer, received salary and paid retirement contributions.

YESIL, who work as a record keeper was appointed to Elazig Communications Bureau in 1981. Despite the statements from his colleagues and superiors that he regularly attended his shift, each director of the installation looked into Mahmut YILDIRIM's file shortly after being appointed and without any further procedure returned the file, and no further reference was made to the name of Mahmut YILDIRIM. His redundancy papers were not served.

Ahmet DEMIR opened a Ziraat Bankasi account in Heykel Branch and some of the extortion monies collected from threats, blackmail and murder were kept in that account.

Ziraat Bankasi Inspectorate Commission established the following matters in their evaluation.

"The named individual Ahmet DEMIR opened an account in Ziraat Bankasi Heykel/ Branch by depositing TL50.000 - He first gave an address in Aydinlikevler which was later changed to Bahcelievler and completed various procedures with an identification card". From 20 June 1994 the account was flooded with money.

Deposits to these sums were made by the following people: Mustafa ANK 200 million, Aga YILDIZ 250 million, Hursit HAN (drug trafficker) 250 million, Salih AYTEN 249.7 million, Yusuf TAN 250 million, Mehmet Isen KUL 659 million, Saban BALA 100 million, Ahmad Esma EYILI DM 300.000 and $50.000, an individual who stated that is an official from Elazig Yapi Kredi Bankasi 500 million, Dicle Tourism Company in a transfer from Diyarbakir Branch 110 million, Mehmet Isen KUL 995.6 million and 737.2 million in TL. YESIL withdrew these monies on various dates. Withdrawals were made from Ankara and from Elazig and all in cash. (Heykel Branch account no: 301009- 39782- 9).

YESIL is to be thought wandering around with billions of Turkish lira in his pocket.

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When detained by the Ankara police note cards concerning the price and discounts of a Bosch fridge were discovered in his pocket. His labour concerning 2 -3 million TL is a proof that whilst he was collecting billions the collected monies did not remain with him.

When detained by the police numerous phone numbers were found on him. Mehmet EYMUR (Home, work and mobile), Ibrahim SAHIN (Work, car, car private, mobile, pager and Istanbul home) Gendarme Commanders of various provinces and districts, Sultan Textile, Aydin Ipekli and from the same numbers Mehmet OZBEY (a note added as CATLI), Sirri SAKIK (Home and bureau), Farma Medical Equipment Limited Liability Company and others (The telephone communications on the number 542- 211 89 82 which was used by YESIL were investigated. A concentrated telephone communication with the MIT and the Gendarme was observed. He had connections with the ERTEM company, the contractor cleaners of the General Director of Security.

On one hand members of the mafia and on the other hand special individuals of Institutions of the public with importance attached to them.....

The list of Ankara, Antalya, Elazig, mobile and pocket telephone communications of YESIL are a thick book. Only the list of individuals who called YESIL from the above stated number are enclosed within (Ek:2) and this was especially submitted for the Esteemed Prime Minister's examination.

YESIL carries other documents as well. A driving licence prepared for the name of Hasan TANRIKULU and an identity card belonging to the Ministry of Interior Intelligence Bureau. There is also a record on this card that it is valid until retirement. He also has a blank card belonging to the Premiership Intelligence Bureau.

In the conversations recorded by the Antalya Directorate of Security Surveillance Unit, YESIL has conversations with Mehmet EYMUR and Duran FIRAT which were liberally peppered with swearwords within a framework that a civil servant can only be ashamed of, telling them that he was partners with CATLI in TOPAL's gambling club at the (Old Sheraton) hotel, and discussing how they could prevent Veli KUCUK's activities.

The Security Organisations, MIT and Gendarme know and survey this individual closely and archive the data. But yet they do not apply the breaks and stop him. Why? The most logical answer to this question is that the affairs and actions of YESIL are not contrary and contradictory to the preferences of the public institutions. Therefore there is no reason for a precaution like the one taken against ERSEVER to be conceived of for YESIL.

The National Intelligence Organisation says "We ended our connection with the referred to individual from 30 November 1996". In actual fact it is understandable that MIT is to be questioned on its relationship with this individual given the depressing information in its archives. The situation of the Gendarme authorities is identical. It is worth checking every single

procedure until 30 November 1996 whereby these individuals (the MIT) appointed this individual to State duties. After he was given a new passport on the 9 February 1996, the reason for apparently losing the file belonging to Metin ATMACA, whose true identity was known to Ankara Police, amongst one million other files, is obvious. It could also be investigated which State problem the MIT, which obtained this passport, thought they had solved.

It is a rightful and well placed question which asks which State duty the four individuals were fulfilling who had diplomatic passports of MIT, namely Murat TUNC, Gurcan BORA, Metin ATMACA (YESIL) and Vahdet OZER, who were sitting in seats number 3A, B,C and D on the Istanbul bound plane flight no TK 137 on the 23 November 1996 and who transferred in Istanbul to a Beirut bound plane flight no TK 320 flying with the VIP - premiership sign and seated in seats 5B,C,D and F.

In the meeting with MIT which the esteemed Prime Minister presided over on the 30 November 1997, when we indicated our criticism on this matter and stated that MIT was a respectable institution and that these kind of affairs bring sorrow, the esteemed Undersecretary Sonmez KOKSAL asked us a question as follows:"Do you think that MIT always works with respectable individuals?"

An attempt was made to explain to them that MIT should gather information from those knowledgeable and appropriate. However, neither should such individuals gain respect by serving MIT nor should MIT reduce itself to the level of such individuals. However, YESIL's address to Mehmet EYMUR as Father, Daddy, and his discussion with Kocaeli Director of Security concerning Hadi OZCAN, are the kind of relationships which indicate the presence of a problem. Various claims however indicated the seriousness of this problem. This is the incident which surfaced in recent years and which we call the Susurluk incident. The thinking that sends an individual who needs to be wasted from a VIP [reception] hall to State duties is the thinking of Susurluk.

The matter and connections are not only limited to YESIL. One section of the telephone conversation between Hadi OZCAN and a MIT official would have been more effective than all that is written on these pages.

-------- : - Sir [Hello]

Hadi : How are you elder brother [sign of quasi- respect. Does not necessarily indicate kinship]

-------- : - Oooo, my Hadi Hodja, is that you?

Hadi : It is me elder brother....

Hadi : Elder brother, I have a favour to ask

-------- : - Tell me

Hadi : Now this Colonel Veli is putting abnormal pressure on, he is putting pressure on especially after this Kursad incident. I reckon they made a connection with/ about Sedat PEKER

or Kursad might have told him something.

-------- : - It must have happened through Sedat's channel.

Hadi : Perhaps, well elder brother, can't we have something said to him.

-------- : - Now how is the situation between the Colonel Veli and Haci (YESIL). Is he well with him?

Hadi : You see brother we are 30-40 people here. We earned at least 10 billion lira within one month in the tombola affair. Now he knows this. Selling women is unrestricted. They obstruct tombolas. Now is the wintertime. If you pay 50 million each to 40 people it comes up to 2 billion. I distributed 4 billion. No one has a lira, I swear in the name of Allah elder brother.

-------- : You tell Haci. He knows lots of people in the Gendarme. I swear to God I don't.

Hadi : This Colonel Veli does this intentionally.

This telephone conversation is the answer to the esteemed Undersecretary's question concerning respect.

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OMER LUTFI TOPAL

TOPAL who became the king of gambling clubs and who started his career in the tombola business, was known to be the man who brought cocaine into Turkey, and who spent time in Belgian and US prisons between 1978- 1981 and 1981- 1984 respectively for drug smuggling. TOPAL who earned his living by running illegal gambling clubs and was known when his gambling club in his Yesilyurt- Istanbul started running the Caddebostan Grand Club from 1990 onwards. After this date he formed companies in partnership with Israeli individuals and he became the owner of a wealth worth $1.1 billion embodied the Emperyal Company. (real estate and personal assets that consist of numerous pages were established by a commission of consultant accountants).

TOPAL is the proprietor and the founder of numerous companies operating in the industrial, construction, petrol, energy, food, currency exchange, securities trade, insurance, travel agency and casino sectors both within the country and abroad. (7) (A list of companies is enclosed within Ek:5)

TOPAL's trade activities developed to incredible dimensions in the 90's. Moreover, the 4 Turkish Airlines technicians who were caught with drugs in European airports between 1993-1994 (Senol TUNC, Sadik KARA, Suleyman HANILCI, Mustafa AKMAN) said in their statements that they were working on behalf of Omer Lutfi TOPAL.

The difficulty and problems of finding couriers led TOPAL to a more sophisticated solution and he made the highest bid for the 60% shares of the privatised HAVAS.

However, there are claims that the General Directorate of Security obtained a document from Interpol indicating TOPAL as a drug smuggler and by doing so obstructed TOPAL. As a result claims were also made that HAVAS was sold to YAZEKS in the form of Park Holding but part of the required money was provided by TOPAL. (The correspondence and applications belonging to USA authorities are included in the files of the privatisation administration.)

The General Director of HAVAS at the stage of privatisation was Ahmet KUTLU. He was a close and trusted administrator of TOPAL's.

TOPAL's gambling clubs are especially at the forefront. The number of gambling clubs, including one in Baku, one in Cyprus and one in Turkmenistan (8) are in total 17. However, during our study the fact surfaced that the number of gambling clubs in Turkmenistan are increasing rapidly. In addition there are Emperland Leisure Centres in Izmir, Eskisehir and Adana.

There is a lot of information that may be given that is relevant to Omer Lutfi TOPAL. Here, only the matters that will shed light upon the subject will be dealt with.

TOPAL's becoming the king of gambling clubs was after 1991. The first gambling club was during the Tourism Ministry of Ilhan AKUZUM.

The below list can give an idea on the progress of TOPAL's kingdom. (9)

The number of group companies is 23. Amongst these companies, only the Emperyal Tourism Trade Limited Liability [Group] Company consists of 24 firms. Of the three separate securities/personal assets companies, each have branches in various locations.

FORTUNE GAMES ARCADES OPERATED BY EMPERYAL HOTELIER TOURISM AND TRADING LIMITED LIABILITY COMPANY

NAME OF THE ENTERPRISE	DATE OF LICENCE
Adana Seyhan Hotel	6 March 1991
Antalya Saray Regency Hotel	19 November 1991
Antalya Ofo Hotel	22 October 1992
Istanbul Akgun Hotel	02 October 1992
Aydin Kusadasi Onura Hotel	02 October 1992
Antalya Grand Kaptan Hotel	22 April 1993
Istanbul Polat Ronesance Hotel	01 July 1993
Antalya Seven Seas Hotel	17 June 1994- 28 January 1997
Istanbul Hyatt Regency Hotel	08 July 1994
Mersin Hilton Hotel	09 March 1994

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FORTUNE GAMES ARCADES OPERATED BY REGAL TOURISM AND TRADING LIMITED LIABILITY COMPANY

Mugla Bodrum Park Resort Hotel	29 August 1995
Istanbul Eresin Topkapi Hotel	14 February 1996
Ersin Hilton Hotel	09 March 1994

FORTUNE GAMES ARCADES OPERATED BY LEISURE INVESTMENTS TOURISM LIMITED LIABILITY COMPANY

Istanbul Ceylan Intercontinental Hotel	17 November 1996

DATE	MINISTER	UNDERSECRETARY	DPTY UNDERSEC.	GENERAL DIRECTOR	DPTY. GEN. DIR.
06 March 1991	Ilhan AKUZUM	S.KUCE	A.YILMAZ	N.SONMEZ	M.CAN
19 Nov 1991	Bulent AKARCALI	K.YUCEORAL	N.OZTURK	M.CAN Dpty.	--------
22 Oct 1992	Abdulkadir ATES	K.GOYMEN	A.DEMIRER	M.CAN	M.TELLI
02 Oct 1992	Abdulkadir ATES	K.GOYMEN	A.DEMIRER	M.CAN	M.TELLI
02 Oct 1992	Abdulkadir ATES	K.GOYMEN	A.DEMIRER	M.CAN	M.TELLI
22 Apr 1993	Abdulkadir ATES	K.GOYMEN	A.DEMIRER	M.CAN	M.TELLI
01 July 1993	Abdulkadir ATES	K.GOYMEN	A.DEMIRER	M.CAN	M.TELLI
09 March 1994	Abdulkadir ATES	N.OZTURK Dpty	A.DEMIRER	M.CAN	M.TELLI
17 June 1994	Abdulkadir ATES	N.OZTURK Dpty	A.DEMIRER	M.CAN	M.TELLI
08 July 1994	Abdulkadir ATES	N.OZTURK Dpty	A.DEMIRER	M.CAN	M.TELLI
29 Aug 1995	Irfan GURPINAR	N.EKZEN Dpty	N.EKZEN	A.RENDAN Dpty	M.TELLI
14 Feb 1996	Irfan GURPINAR	N.EKZEN	N.EKZEN	M.CAN	M.TELLI
17 Nov 1996	Bahattin YUCEL	N.OZTURK	A.DEMIRER	S.ORCUN	N.ACAR

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Another important development relevant to gambling clubs is the activities abroad.

TOPAL's Israeli partner Ruven and his assistant Mr. Eli secures it that payments by those Israeli and other investors, which come to gambling clubs, can be made abroad. It has been learned that in a certain and not lengthy period Ruven has accumulated $17 million and deposited them in an account abroad.

Consultant accountants established in their studies that "Large sums of cash monies observed not to be below US $ 50.000.- were withdrawn from bank accounts on numerous occasions on instructions by those whom we guessed to be paymasters and in addition transfers

were made abroad under different names and under the transactions item as cash transfers which could not be related to bank accounts".

The bank statements that document the account movements of TOPAL are interesting to examine. The cash movements in one of the Akbank branches for a period of 7 months (Only belonging to Emperyal Company) is TL 1.3 trillion.

The personal account of Ahmet KARA, one of the authorities of the company, in 7 months is TL 855 billion. His account in another branch is TL 840 billion.

There are numerous accounts opened on one person and numerous individuals with accounts opened on their names.

For example the bank statements belonging to Ahmet KARA account only at Akbank reaches several trillions TL. It is necessary to examine the TL, Dollar and Mark accounts of many individuals and their numerous credit card accounts are to be surveyed in TL, Dollar and Mark terms.

It is interesting that a comprehensive examination of tax and other proceedings were not made for years.

In order to reduce the earnings of the gambling clubs initially expenses were not declared, bed, food and other offerings were met with credit cards who were paymasters [trustworthy] individuals of TOPAL. Taxes etc. were minimised and account records were put to work in the interest of the system [umbrella] company. Inspections carried out by the Ministry of Tourism indicated that some gambling machines and equipment were documented to have been obtained by illegal methods, however no proceedings were taken.

The Emperyal Company was effective in Cyprus and Azerbaycan.

Upon financial difficulties in the construction of the guest house in Baku a decision was made to complete the construction as a hotel and a gambling club being built attached to the hotel, Emperyal took over the operational duties and TOPAL spent $8 million on this project.

This project was carried out by Ilhan ALIYEV, the son of the president. Claims have been made that he owed $500.000 gambling debts to TOPAL and was a secret/ covert/ hidden partner of the hotel.

It has also been expressed that TOPAL extended the gambling club in Cyprus and made large scale investments to meet the future demand.

Turkmenistan is however as if invaded by Emperyal.

Emperyal took over the operation of two 5 star hotels, one large-scale business centre and polyclinic activities in Turkmenistan. The 5 star Grand Turkmen Hotel in the centre of Askaabat was leased for 15 years in return for $15 million and the first gambling club was opened.

Although the gambling club adjacent to Akaltin Hotel was built by Sudi OZKAN, the biggest rival of TOPAL, OZKAN was excluded despite the existing contract and the gambling

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club was sold to Emperyal in 1996 for $22 million.

Emperyal owned numerous business and operations in Turkmenistan in a short period of time and according to deputy Prime Minister Gurban MURODOV became "The executor of the social programme of Turkmenistan".

The interesting matter is that; the Grand Turkmen Hotel was financed with the credit and through the channel of Turk Eximbank, in addition a payment of $10.6 million was made towards the material of Ak Altin Hotel out of the credit $75 million for Turkmenistan, and by doing so became the subject of a practice which would develop the business and affairs of Emperyal Company.

Due to Emperyal not paying its debt to Turkmenistan the credit for Turkmenistan was postponed, as a result Eximbank openly financed Emperyal- in a manner that could only have surfaced if investigated.

The highest authorities of Turkmenistan were hosted in Istanbul, personal relationships were established, gifts were given and Emperyal clearly and completely settled in Turkmenistan.

The Premiership Inspector who examined the Eximbank files concerning hotel credits which were operated in Turkmenistan by TOPAL, could not establish any breach of regulations from the procedural point of view. However, the Premiership Inspector made other interesting findings.

"Another striking matter is the way the credit debts were postponed. In the first postponement there is no written request from Turkmenistan. On the contrary a message is present that the bank requested a meeting for this purpose.

In the second postponement however, there is a correspondence that Turkmenistan made a request concerning the $75 million part and the bank executive board added the sum of credit of $16 million onto the requested $75 million and exercised it as $91 million.

On the other hand, it is stated that Ak-Altin Hotel was opened on the tenth month of 1994 and Grand Turkmen Hotel on the sixth month of 1995, and the operation of both were understood to have been given to Emperyal Tourism and Hotelier Limited Liability Company at a later stage.... In addition, an article concerning the assistance provided in the operation contract by the owner to the operator on the matter of cash transfers outside Turkmenistan have attracted attention. A Clause concerning the administration an operation of Ak Altin Hotel stating that breach of secrecy by parties establishes a cause to forfeit the contract is just as striking.

Apart from all these matters; It has been found interesting that some surnames belonging to the founders of BAYSA Company, which Guven SAZAK and Abdullah CATLI are partners of are also members of the executive of MENSEL JV (Partnership of METIS, NUROL and YUKSEL) which carried of the renovation of Grand Turkmen Hotel. (In the report drawn up by the Parliamentary Susurluk Inquiry Commission, according to the decision dated 24 September

1992 and numbered E: 1992/3924, K: 1992/ 3674, made by Istanbul Trade Court No:1 which was published in T. Trade Registration Gazette dated 2 October 1992 and numbered 3127, the founders of BAYSA Company seem to be Ant Guven SAZAK, Ahmet BAYDAR, Silva SAZAK, Mine BAYDAR and Alper BAYDAR).

The AY- SEL company, which Yuksel Limited Liability Company is the partner of is understood from the lists obtained from Eximbank to have invested in the other Turkic States."

In the relevant section the issue that CATLI went to Guven SAZAK's, will be dealt with. There is an another interesting matter here; at the postponement of credits used in the construction or the renovation of the hoteis, Emperyal Company came into contact and addressed Eximbank.

A claim cannot be made that it is wrong for a Turkish company, which operates abroad, to be involved with procedures before the Turkish authorities concerning a matter relevant to the country [of operation]. However, the expressions in the postponement applications made by the Turkmen party in 1997, which was refused, proves that the true debtor is Emperyal. (Ek:3)

The second page of Ek: (3) indicates that the Grand Turkmen Hotel Project was "Constructed by the Hotelier and Tourism and Trade Limited Liability Company". Therefore the relationship between Emperyal and MENSEL JV it is deemed worth investigating.

The Premiership Inspector brings up the possibility that as a result of postponements, -due to letters of guarantee- payments were made to Garanti Bank, and Eximbank face losses.

One of the civil engineers of Ucgen Public Limited Liability Company which built the Ak Altin Hotel carries a familiar surname: Emrah TINAR.

A conclusion has been reached that there is a need for a comprehensive inquiry into the established matters and relationships from the date on which the Eximbank was instructed by Ekrem CEYHUN, Ministry of State, concerning credit.

An important matter is this; Emperyal reached a position to intervene in the Turkmenistan natural gas and petrol projects and became influential via the Turkmen authorities.

The murder of Omer Lutfi TOPAL echoed widely and gained greater importance especially after the Susurluk accident.

Due to this matter being the subject of a trial it has not been examined during our studies. However, there are certain established matters of interest concerning TOPAL. And it has been concluded that they should find a place in this report.

The nicknamed Findikzadeli Omer [Omer of Findikzade District] TOPAL is an interesting personality who started from tombola and drug smuggling and succeeded in accumulating incredible power and wealth.

TOPAL is an individual who despite a more than $3 million daily income and numerous people he had murdered or harmed, did not have bodyguards, whose house was not protected by

his men in any way, who did not have private chauffeurs, whose car was driven by himself or his wife, and who refused to get into an armored vehicle. Although he lived in a triplex miniature palace- house, and had communication with the rest of the world, he had one telephone line only in his house. It is also known that he never used his wife's mobile telephone. He had a 7 year long relationship with his young wife Ms.Hilal whom he was married to in a religious ceremony [not recognised by the Turkish Law-tn]. His social life consists of the Sunday dinners he was driven to by his wife. He never allowed his wife into his business life and, whilst being cruel in his business affairs at home he turned into a tame human being who joked with his wife and children. There was not even a weapon in the house. Shortly before his death he obtained a pistol that he hid on the wardrobe in his bedroom and a bullet proof jacket, nevertheless he did not use or carry either of them.

He always had his meals in his house. (10) Despite his expected return being around midnight, on the night he was murdered he gave instructions that the table was to be set ready, that his mother-in-law should not wait up and should go to bed, and that he would consume the food at home prepared by his chief cook. The dinner preparations however were organised by his wife Ms.Hilal from the hospital room she was lying in at the time, by means of continuing communication with him. The interesting point is this; the distressed state of Omer Lutfi TOPAL, which he was in since May, was worsened in July and on the 27 July he almost forced his wife into hospital for her approaching birth.

There may have been numerous reason for TOPAL to be murdered. But none of the reasons created the opportunity for anybody to approach him to carry out murder.

After the murder a police authority in Ankara said "I am as sure as my own name that it is their work" and indicated CATLI and a group of Special Operations [Personnel]. One of the detained police officers from the Istanbul Directorate of Security made a reference in his conversation stating "They showed us a target in the interest of the country. Then they proposed toasts in the same halls with our targets. First time we did something on our own and we created a complete mess". It surfaces that Istanbul Directorate of Security received a one page note from MIT, and when a technical study concerning telephone communications was examined in conjunction with this, it became conceivable that a partial revelation could be brought to the TOPAL incident. However, none of these constitute evidence for prosecution. Although CATLI's fingerprint was found on the cartridge clip that was taped with a package band [masking tape] his death creates a mystery over the incident. The tableau used by the Sariyer Chief P.Prosecutor is a summary of a comprehensive study indicating the locations of the perpetrators at the hours of TOPAL's death. (Details are in Ek: 4)

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PERSONS	A.CATLI	A.F.BIR	H.KIRCI	O.YORULMAZ	E.ERSOY	A.CARKIN
A.CATLI (Mobile between Beylerbeyi, Levent, Okmeydani Laleli)	-------	Once		Once		
A.F.BIR (Taksim)		--------				
H.KIRCI (Following O.L.TOPAL Yesilyurt, Kasimpasa, Taksim, Besiktas Celiktepe, Sariyer Incident location Yenikoy)	Twice		---------	Ten times		
O.YORULMAZ (Incident location Yenikoy)	Three times	Twice	-----------	Once	Twice	
E.ERSOY (Incident location Yenikoy)	Once			Three times	-----------	
A.CARKIN (Incident location Yenikoy)						------------

The attitude of Kemal YAZICIOGLU, Director of Istanbul Security on this matter was criticised in clear terms in the summit meeting, which was held with leaders and presided over by the President of the Republic in Cankaya. For this reason he was not referred to within the framework of this study.

An explanation was brought on the matter of police officers being withdrawn to Ankara by the General Directorate and it has been said: " Policemen were not taken to Ankara. Our superiors got scared and we got rid of them by making an excuse that Ankara wanted them. In reality Kemal YAZICIOGLU's calculations later changed, and upon him informing Ankara, the Ministry and the General Directorate requested the police officers [be brought to Ankara-tn] and Istanbul Security was saved from trouble. Because after the policemen "were taken" the Security Director did not come to his office, and no questioning was carried out until 22:00 hours, and

assistant directors did not leave their office rooms. After 22:00 hours at night the security was evacuated and authorities went to rest. YAZICIOGLU may know if there was a questioning after that hour.

There are numerous allegations on the TOPAL murder. There is no doubt that Murat and Elif, his children from his first spouse, would have the greatest benefit from the death of their father. However, the general opinion is that TOPAL could easily handle such a threat.

A claim has also been made that a list of the businessman who helped the PKK was drawn up and he paid extortion money in order to be dropped from the list, and that as a result of the disagreement on the money he was murdered.

It is well-known that TOPAL is a praying and fasting individual with a decent family life, and that he has not collaborated with Kurdish separatists and terrorists. Although these claims were brought up it is known that the true intention is to squeeze large amounts of money out of TOPAL. In addition, the murder of TOPAL, who pays big sums in extortion, would mean slaughtering the [egg-laying; meaning fertile/fruitful -tn] hen, and obviously there is no need for that.

Another claim is relevant to the casino in Cyprus. CATLI, A,Fevzi BIR and S. HOSTAN became informal partners of Emperyal. However they failed to raise the necessary finance for the Cypriot gambling club, and when TOPAL refused to give them shares these partners carried out the action along with policemen from the Special Team. However, this claim is also inconsistent due to the parties not benefiting from the death. The empire has been received by Murat and Elif TOPAL and Ms.Hilal. Other claims were also made. Murat and Elif TOPAL paid CATLI $535.000.- and a Garanti Bank cheque numbered 012157 belonging to Emperyal Casino's account was written, and a cash payment was made to one of the relatives of CATLI, one day before the cheque was due.

This payment cannot be evidence that the murder was committed as a result of a material disagreement. It cannot be the contract fee to murder TOPAL. As to the payment was made 2 months after the death there must have been another reason.

The press referred [to claims] that after TOPAL's death his spouse was shown a debt of $105 million (Ek:5)

It is known that he truly owed money even to brokers and at times had enormous shortages of readily available cash, and that this shortage increased from 1995 onwards; and it is known that he borrowed money from banks and that Necati KURMEL became his guarantor. At a later stage and in 1996 it has been said that on some days the cash shortage was so acute that TOPAL was unable to leave a TL 50 million to his house. (Statement taken by the Account consultant confirm this claim.) Of course a daily income in excess of $3 million is not enough for new investments, purchase of real estate, smuggling large sums abroad.

A chain of bribery starting from the officials of the Ministry of Tourism and extended to Aliyev and Niyazov abroad covers a very large circle.(11)

He also spent a lot of money to develop his political connections. These connections even reached the point of taking a stand against a political party and its leader. A candidate for the parliament who took TOPAL to Sipahi Ocagi [A gentlemens' club attended by civic leaders-tn] to prove his close terms with judges and prosecutors became the subject of strong financial support by TOPAL in order to be strong enough to eliminate Mesut YILMAZ in Rize.

A study was carried out concerning the telephone numbers TOPAL has used which resulted in a thick book. A summary diagram, which indicates interesting results, are in (Ek: 6).

In 1996, TOPAL knew and used telephone numbers 4192363 and 4178749 which belonged to DYP [True Path Party] General Head Quarters. He has also known and used the DYP Istanbul Provincial Party telephone numbers 2132827 and for some reason the Rize Provincial Chairmanship telephone number 4642132827.

One of the individuals TOPAL often was called Sami HOSTAN, Judge Akman AKYUREK is also connected to HOSTAN on the same number.

Sami HOSTAN had conversation with Colonel Veli KUCUK 34 times, Abdullah CATLI 13 times and Korkut EKEN 6 times within the space of 7 months in 1996, from one telephone number only.

In May 1996, and during Mehmet AGAR's term as the Minister for Justice, a sudden news dropped like a bombshell. According to the claims Mehmet AGAR started a file against TOPAL for alleged pro Kurdish activities and gave relevant orders. Just as Orhan TASANLAR said on the TV "I came here to snap heads" after being appointed to the post of Director of Istanbul Security, so around the same date some shady businessmen were taken to the security and subjected to rough treatment. Upon this TOPAL contacted Sedat DEMIR and established contacts with the new team at the police and searched for higher level of protectors. The bill was also very high. (The rumour that TOPAL sent Orhan TASANLAR gifts to the sum of TL 250 billion but was refused stirred up panic around his circles).

It is understood that TOPAL reached political individuals in order to protect himself and had his file checked. He was made to believe that there was nothing he should be afraid of. In addition claims were made that he contacted some members of the Special Team and received a positive reaction from that direction.

His anxiety that started in May 1996 also ended in the same month, and he said in his circles that "He had his name removed from the list". It has been expressed that all these connections caused very important donations and payments.

However, anxiety arrived in June and TOPAL's tension reached its peak in July.

In the meantime a demand of $17 million was made from Ankara and TOPAL requested

some time to collect this money. The individual who narrated the incident, said; "As if the other party gave goods; why shouldn't they have given some time. The time was allowed and the money was paid however, THE MONEY DID NOT REACH ITS DESTINATION, THE PAYMASTERS OF THIS PAYMENT DECIDED TO MURDER TOPAL FOR $17 MILLION". Stating thus he said that this incident was seen this way in their sector.

There is one very important issue which needs to be expressed about Omer Lutfi TOPAL. Security and MIT officials agree on the subject that in our country an American type mafia organisation does not exist, and that some tough guys gather 10-20-40-50 people around them and form gangs, and by paying bribes and using force carry out numerous affairs within the knowledge of the relevant State institutions. It is also agreed that they may be forced to leave a region by a determined government or a brave dynamic and honest local administrator's initiatives. The most important element is that due to information being available on them, these gangs can be eliminated with ease at any given time.

However, there is no body that is integrated with the State and all of its institutions, and connects the Governor, the Security Director, sufficient numbers of Parliamentarians in the Assembly and the Government, and is even in a position to give orders to them. The only individual who covered a long distance in this direction in the history of the Republic was Omer Lutfi TOPAL.

If he was not murdered he was going to be able to penetrate to any authority or office, would have had the most influential connections and would become truly immune in within a few years. All the authorities and consultants are all agreed on this matter.

Despite his dirty background TOPAL showed the ability to reach a strategic decision to eliminate his gambling clubs and become a respected businessman, and selected Turkmenistan as a reserve country and obtained a diplomatic passport. By doing so he prepared himself for the future in many respects. However, the large volume of the money he earned, the senior State figures he hosted in Cyprus and Antalya and his generosity could not prevent the fate he brought about upon himself.

Although he hated bribery not only senior figures but also their connections, bodyguards, and the connections of their connections, became partners of TOPAL's monies. Gratefully developments prevented TOPAL from reaching the point he aimed for however, this situation did not prevent some sad conclusion on the matter where the State was in contact with gangs.

Nevertheless, this complicated state of affairs was caused by a lack of prudence, carelessness and laxity with which the State institutions were doomed. The reason for this point where right and wrong, civilian and uniformed, left wing and right wing elements met, is the appearance of fertile grounds where dirty activities took place in a state of chaos.

At this point officials did not prevent incidents but to the contrary they encouraged them.

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All the incidents generated within the country were kept undercover from the public gaze until the Susurluk accident took place, and in the meantime developments started heading abroad.

MEHMET ALI YAPRAK AND HIS KIDNAP INCIDENT

Attempts are made to bring various comments into the TOPAL murder claiming covert and dirty affairs of the Park Holding such as the HAVAS bid, sources of Turgay CINER's wealth, TOPAL's secret partnership in the Park Holding concerning the HAVAS bid.

However, there is a relationship between TOPAL's murder and the chain of incidents triggered by the kidnap incident of Mehmet Ali YAPRAK in Gaziantep.

Mehmet Ali YAPRAK is a businessman. He owns companies, [a] radio station and [a] TV station. In actual fact however, he is an extremely powerful gang leader.

Information concerning YAPRAK's holdings is enclosed within.

It is understood however, that Captagon [drug] distribution is done by Hidayet Turizm.

The kidnap incident of a leader as powerful as Mehmet Ali YAPRAK is not the kind of affair in which any ordinary gang can succeed.

In the meeting dated 30 November 1997 references were made to the relationship between MIT and the YAPRAK group, and prior to that conversations between EYMUR and Haluk KORAL were mentioned. MIT's submission concerning the Mehmet Ali YAPRAK incident is as follows;

"Prior to 24 December 1995 elections Mehmet Ali YAPRAK donated TL 500 billion to Mehmet AGAR and indirectly to DYP for the election campaign and Ibrahim SAHIN, the President of the Special Operations, Bureau took a sum of TL 100 billion bribe from this individual. Mehmet Ali YAPRAK is the owner of YAPRAK TV and Hidayet Turizm in Gaziantep. The main source of his income comes from the drug trade connected with Syria and Saudi Arabia.

Abdullah CATLI, who was aware of the monies being paid prior to the elections to Mehmet AGAR and Ibrahim SAHIN by Mehmet Ali YAPRAK, had Mehmet Ali YAPRAK kidnapped by a team including police officers Ercan (ERSOY) and Ayhan in order to get [ransom] money from the referred to individual. 6-7 individuals took part in the incident under the police disguise. Upon instructions, intelligence information concerning Mehmet Ali YAPRAK's house and business premises was gathered by a named individual Yahya who held Ulkucu [Idealist: Extreme Right wing nationalist] political views, who ran an astro turf sports ground in Gaziantep and who had problems with Mehmet Ali YAPRAK originating from the past; further plans were made to video tape the future/intended negotiation with the referred to individual. Those individuals who carried out the kidnap incident in the early hours of the morning took Mehmet Ali YAPRAK to Siverek. Following the incident being reported to the

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police the brother of Yahya (EFE) who carried out the intelligence gathering was detained by the police in Gaziantep.

Along with this Mehmet EYMUR [stated] in relation to this incident; "Following the kidnap incident of Mehmet Ali YAPRAK of Gaziantep an acquaintance by the name of Haluk KORAL, who was residing in Gaziantep, called him [EYMUR] and indicated that he is the close acquaintance of a kidnapped wealthy businessman of Gaziantep and he [KORAL] asked for help,

That the referred to individual (H.KORAL) was told that "Direct help could not be given, favourable terms were not used to refer to the kidnapped individual, however intelligence information reports were received that M.Ali YAPRAK was kidnapped by Abdullah CATLI and was brought to Siverek therefore it would be useful to contact BUCAK's".

Sometime later H.KORAL called him (M.EYMUR) and reported that M.A.YAPRAK was released, and that the rumours were confirmed.

Sometime after the incident an official from the Operations Presidency arrived and reported that "The name of Mufit SEMENT, one of our former personnel, was involved with the incident; this Mufit went to Gaziantep on the date of the incident in order to bring us information, he did not take an active role in the incident and it was Abdullah CATLI who asked him (M.SEMENT) to take his video camera with him to Gaziantep; he learnt on his arrival at Gaziantep that the kidnap incident occurred prior to his journey, and for this reason he returned to Istanbul on the same day"

Upon this information, a contact was established with H.KORAL and he was told that the information was received from M.SEMENT and that it would be useful not to involve this assisting individual in the incident, and H. KORAL accepted this [suggestion].

On 15 February 1997, with the additional fresh information gathered by our personnel, another announcement was made: "That M.SEMENT was involved with the incident more than he had narrated, that he went to Siverek and video recorded the M.A.YAPRAK interrogation and in addition M.A.YAPRAK was kidnapped twice, that the first kidnap involved the participation of Ibrahim SAHIN's team, Cengiz COMERT (whose knowledge was put to good use in the past) and Hasan AYDOSTLU (who was involved with the Nafiz BOSTANCI affair in Britain and his knowledge was put into good use in Mugla); that Cengiz COMERT told the kidnappers that M.EYMUR was also in on this affair and he took money from the M.A.YAPRAK ransom on his [EYMUR's] behalf; and that this incident was known amongst the Police Force as thus".

The above matters were claimed. There are various mistakes and expressions that divert the incident into different venues in this narrative. YAPRAK is not the owner of Hidayet Turizm, and it is known that the YAPRAK kidnap incident was organised by senior figures of Hidayet Turizm, that the aim was to learn the production location of the Captagon and forcefully obtain the formula of the drug known as the Haci'nin mali [Pilgrim's property] which is famous in the

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Arabic World and which is added into the original Captagon .

Claims were made that CATLI organised the kidnap incident with a group of police officers, and a ransom money of 1-2 million DM was received from YAPRAK in return for his release, that Hidayet Turizm originally paid 10 million DM but the kidnappers were not aware of this sum and did not receive their share and when the sum of the original payment became known the relationship between CATLI and his group with Ankara went bad and even broke down.

As a result of this situation, CATLI and police officers kidnapped YAPRAK for the second time and had him talk, and this was video recorded A copy of this recording was given to BUCAK's and another copy was delivered to EYMUR (Via Mufit SEMENT) and the original tape was destroyed in Ankara as a result of a negotiation.

It is also not true that Haluk KORAL called EYMUR and asked for help. EYMUR became involved in order to save Mufit SEMENT, and as a result of an identification parade and a fingerprint being found on the vehicle he [EYMUR] made an effort to cover up the incident.

A a result of the second kidnap incident being carried out without the knowledge and confirmation of Ankara and causing the police's strong reaction, EYMUR contacted Haluk KORAL, one of the influential names of YAPRAK group, in order to prevent SEMENT's name from surfacing.

Finally the Prosecutor's decision for an "identity parade" was not carried out and the incident was covered up with the wish that the incident would not get out of hand, and the parties would deal with their own affairs in due course.

Although the Premiership informed the Ministry of Justice on the incomplete nature of the Gaziantep Prosecutor's proceedings in January 1997, the Ministry did not act on the subject despite the former Minister Sevket KAZAN's instructions and until our repetition correspondence dated September 1997.

This brief introduction is an interesting example that how the authorities and relevant personnel of the State handled the affair involving drugs, smuggling, and illicit money at the cost of damage to the State.

In the meantime, it needs indicating that this is a bitter example of how former members of the highly regarded MIT (Mufit SEMENT, Hasan AYDOSTLU) came to be in such relationships and how the security organisation, which is respected institution, became subservient to the drug traders instead of stopping the drug production.

The ability for those kidnapping groups to slip away from their affairs on each occasion could only be possible with these kind of relationships.

Selecting the safety zone that is under control of BUCAKS' in each kidnap incident is a matter that needs concentration upon.

Although the title of Beylerbeyi [Mediaeval Governorship] of the Ottoman Era is not in

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use it is obvious that tribal chiefdoms continue and that the Siverek region is abandoned outside beyond the State's control.

Having taken this opportunity, it was felt necessary that the family trees of YAPRAK and HIDAYET should be submitted to the esteemed Prime Minister in order to portray the grave seriousness of the situation.

Although technically this information should have been submitted as an appendix, a desire is expressed to indicate how the underground world feeds off this black, dirty and bloody money in order to legalise themselves.

YAPRAK FAMILY

FAMILY MEMBERS	REAL ESTATES AND BUSINESS	
1- Ahmet YAPRAK		
2- M.Ali YAPRAK	-YAPRAK TV	(G.Antep)
	-YAPRAK AJANS	(G.Antep)
	-OBEN CONSTRUCTION	(G.Antep)
	-AHU COMPUTERS	(G.Antep)
	-YAPRAK AUTOMOTIVE	(G.Antep)
3- Sadettin YAPRAK	-PRESTIJ CONSTRUCTION	(Istanbul)
4- Osman YAPRAK	-GLOBAL AIR (3 CARGO PLANE Istanbul)	
	-GLOBAL CONSTRUCTION	(Istanbul)
	-GLOBAL ESTATES (VILLAS)	(Istanbul)
5- Omer YAPRAK	-SIVAS TUR COACH FIRM	
	-1 HOTEL IN BODRUM	
6- Mustafa YAPRAK	-ISTANBUL- Taksim- Advocacy Office	
	(Legal Representative of the Family)	
	-1 Yacht in Atakoy Marina	

SHARED REAL ESTATES
200-300 Apartment flats in Tercuman Mahallesi
Sunrise Holiday Village in MANAVGAT
A Holiday Village in MARMARIS (Under construction)

UNDER THE MANAGEMENT OF M.ALI YAPRAK
LABORATORY
(Captagon production)
1- G.Antep region
2- Mobile in Istanbul Province

DISTRIBUTION
1- Akif BAYTAZ
2- Sait BAYTAZ
HIDAYET FAMILY has been granted distribution as a result of a tender in the years of 1990- 1991

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UNDERGROUND ACTIVITIES
INTERNATIONAL DRUGS SMUGGLING
CAPTAGON (Production)
______From Turkey to Syria and S. Arabia
HEROINE and ACID ANHYDRITIDE
Being brought from where Captagon was sent
POLITICAL AND IDEOLOGICAL ACTIVITIES
1- Financial support to the PKK
2- Contact with organisations abroad
(Syria El Muhabarat)
3- Activities against Turkey
4- Activities to enter the TGNA
5- Attempts to seize economic power and have influence in the country

HIDAYET FAMILY

FAMILY MEMBERS	SHARED REAL ESTATES AND BUSINESS	
1- Horik HIDAYET	- HIDAYET Turizm	
2- Habip HIDAYET	-YESEMEK Hotel	(G.Antep)
3- Cemil HIDAYET	- OTEL	(Istanbul- Laleli)
4- Abdulkadir HIDAYET	- CESME TURBAN (Abdo HIDAYET)	
5- Ayhan HIDAYET	-CEMIL A.S. GARAGE	(Kilis)
6- Mehmet HIDAYET	- NAS Company	(kilis)
7- Nuri HIDAYET		
8- Abdo HIDAYET		

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UNDERGROUND ACTIVITIES
INTERNATIONAL DRUG SMUGGLING
CAPTAGON
Distribution
From Turkey to
Syria and S. Arabia

HEROINE and ACID ANHYDRITIDE
Being brought from where Captagon was sent
POLITICAL AND IDEOLOGICAL ACTIVITIES
1- Financial support to the PKK
2- Contact with organisations abroad
(Syria El Muhabarat)

3- Activities against Turkey

INDIVIDUALS IN CONNECTIONS WITH THE FAMILY

1- Abdulkadir ZOR	(Kilis)
2- Rifat CAN	(Kilis)
3- Mehmet CAN	(Kilis)
4- O.Faruk NIZAMOGLU	(Kilis)

HORIK HIDAYET

In his organisation

ISTANBUL	COURIER	DEPOT	CONTACTS ABROAD
Contact			1- Syria Muhabarat
1- Kemal	1- Abdurrezzak ZOR	1- Kilis	2- PKK Organisation
2- Habib	2- Yusuf CELIK	(Habib's house)	
		2- Syria/ Aleppo	
DELIVERY POINT		3- A garage named	
1- Front of Siraz Mobilya		Hidayet Lorry Park between	
Florya		Erzin- Payan after Dortyol, Hatay	
2- Garage next to		4- (Reportedly) a lorry garage on the	
ISMAR SUPERMARKET, AVCILAR		Komurler- Islahiye- Hatay route	

The clear explanation of the diagram is submitted in (Ek: 7). The enclosed within information will indicate a system which secures a drugs income worth millions of dollars.

Despite the information obtained by the MIT and Security the system continues running. In the face of the truth that smugglers cannot be stronger than the State, the fact that the State's hands were tied up is to be investigated and examined. (*)

A claim that Mehmet Ali YAPRAK incident became a turning point [milestone] in the worsening relationship between Ankara and Istanbul was mentioned earlier. This disagreement caused groups to distance themselves away from each other as new developments destroyed the grounds of the former coordinated efforts between these groups. The year '96 is the period when the protective cover open CATLI has thinned out, efforts were spent to bring about control upon the unrestrained situation in the OHAL region, and Omer Lutfi TOPAL's anxiety had increased.

Mehmet AGAR becoming a Member of Parliament, the matter being known months prior to this and no matter how influential they are caused damage to the co-ordination on affairs carried out in the name of the country and the nation. [sic]

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The period of TOPAL's murder coincided with this eventuality.
[This part of the Report has not been released]

BEHCET CANTURK

The intelligence information concerning the past of Behcet CANTURK, of Armenian origin, is as follows.

The above referred to person who is the son of Resit- Hatun, dob. 1950, place of birth Lice/ Diyarbakir, was:

- A pro-Kurdish, attempting to cause riot by claiming that on the 20 November 1975, when the earthquake struck, the State did not provide sufficient aid to Lice region.

- That since 1981 he had close contact with ASALA, which was based in Syria.

- That he was one of the organisers of an Armenian terrorist action carried out in Istanbul Kapalicarsi [Grand Bazaar] on 16 June 1983.

- That the individual, who was interrogated in 1984, admitted that he carried out the drugs operation on behalf of the DDKD (A fringe organisation attached to Turkish Kurdistan Democratic Party) [Devrimci Dogu Kultur Dernekleri- Eastern Revolutionary Cultural Association- tn] which he admittedly that he was a member of.

That at the end of 1984 he was arrested for drug smuggling charges and was acquitted in 1985.

That in 1990, along with other Kurdish Intellectuals, he jointly formed a unity entitled "National Platform" and subsequently they formed a company by the name of Mezopotamya A.S. and an attempt was made to publish a newspaper entitled Mezopotamya.

That by the year 1992 he played an intermediary role to collect money from drug smugglers for handing over to the PKK.

That in April 1992 he had 6 metric tons base morphine and 5 [metric] tons heroine brought from PAKISTAN to TURKEY, and these drugs were bought by Savas BULDAN, Hursit HAN, Adnan YILDIRIM, Cahit KOCAKAYA, Eyup KOCAKAYA, Ferda SEVEN; and at different dates B.CANTURK collected monies from these individuals in order to hand them over to the PKK.

That by 1992 he became one of the financiers of the Ozgur Gundem Daily.

This brief information sheds sufficient light upon the referred to individual. Although his identity and deals were very clear, the State was unable to deal with CANTURK. Legal avenues were insufficient and as a result: "Ozgur Gundem newspaper was blown up with plastic explosives, and whilst CANTURK was expected to obey the State, upon the above referred to attempting to start a new installation, a decision was made by the Turkish Security Organisation to murder him and the decision was carried out."

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By doing so one individual was dropped from "the list of businessman financing the PKK" as the Prime Minister of the time referred to it, and it is established that they were around 100 individuals.

A discussion has not been entered into as to whether murder of Behcet CANTURK was right or wrong or whether it was necessary. However, inevitable questions should be asked. Who ordered the murder of CANTURK? Who can exercise such authority? Under which circumstances could this authority be exercised? Who is responsible to whom? How should the system should work and the responsibility be shared.

The objection that "these questions could not be asked in a legal [Constitutional] State" is in our opinion invalid and unrealistic. This practice will take place as it has done in all the other countries of the world. However, (although the sentence may be adverse to the Prime Minister) such a decision will be taken within the rules of the constitutional state and be practiced with the prudence of a state.

Otherwise, there result practices such as YESIL and the like spreading rumours that they interrogated and murdered an Officer of the Turkish Army (Cem ERSEVER incident), the ugly attitudes of Tarik UMIT, who is in fact a smuggler, saying that "We took, interrogated and murdered so and so", which is common and takes himself too seriously, and the likes of Abdullah CATLI who operates for the State, runs smuggling operations, terrorises people and, by taking advantage of this, collects extortion/ransom money and provides shares to others. A situation which allows 'Alla Turca' [meaning oriental and old fashioned- tn], primitive operations far from any seriousness, is not the kind of structure deserved by our country.

The mentality that allowed such behavior caused a group of human beings - civil and public servants - going beyond the line that divides the country and the nation from personal gains in a very short period of time.

All the relevant institutions of the State are aware of these affairs and actions. Disorder spread wide and matters that should have been State secrets became major topics in newspaper columns as a result of the Susurluk accident spilling the beans. The ease in which everything surfaced and became heard is the most important indicator of the lack of prudence in exercising affairs on behalf of the State. For example, one of the common points of the murders taking place in the Izmit – Adapazari - Bolu axis is the concentrated activities of police, Gendarme and the members of the confessor organisations in this region. The executors did not need to change this axis and the terror they caused became the evidence of their strength.

Upon considering the characteristics of the individuals murdered in such actions, the difference between the PRO-KURDISH individuals murdered in the OHAL region and the others appears in the financial strength they provide from the economic point of view. [sic] We can say that the above indicated matters are also valid in similar matters such as the murder of Savas

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BULDAN, the referred to individual being exposed as a smuggler and executor of the pro PKK separatist actions. The same matters are also valid for Medet Serhat YOS, Metin CAN, Vedat AYDIN. The executors of actions against the unity and sovereignty deserve a heavy punishment. The only opposition between us and these actions are the form and the results of their practice. Consequently it is established that- even those who affirmed all the incidents- regretted the murder of Musa ANTER.

Musa ANTER was not in the armed activities and was more involved with the philosophy of the business. The effect that his murder created surpassed his own influence, and the decision to murder him is said to have been a wrong one. (The information on the referred to individuals in Ek:9)

There are other murdered journalists.

[This part of the Report has not been released]

... trusted and I went to Diyarbakir. In the meantime, an illegal formation was carried out under the umbrella of JITEM. We had the authority to execute almost anybody whom we suspected of having a relationship with the PKK. We assumed the method of apprehending these individuals, establishing their offences, and instead of handing them over to the 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. There were the named former confessors Ali OZANSOY, Huseyin TILKI, Abdul Kadir AYGAN, Hayrettin TOKA, Recep TIRIZ, Adil TIMURTAS and Fatih, the former member of TIKKO [Turkiye Isci Koylu Kurtulus Ordusu-Workers and Peasants Liberation Army of Turkey] in this group. The named individual (Selahattin GORGULU), code name Numan, who was murdered by the organisation in Antalya was the intelligence provider of our organisation. We executed all those in different times and periods that he brought or indicated to us as being related to the organisation. We executed petrol distributor Talat in Bismil, another citizen at the Diyarbakir Bismil road junction for the same reasons. In Batman we took two individuals, one from his house and another one from the front of his house and we executed them between Batman and Silvan. These activities went on for 5 months. Around that period, and in line with the intelligence information furnished by Selahattin GORGULU, Major Aytekin OZEL, code name Celil, and Abdulkadir AYGAN went together and executed an individual"(Ek: 10). (12)

[This part of the Report has not been released]

This cruelty is a matter that needs further attention. "It was perfectly possible to give a

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new profile, a new identity to CATLI, and therefore an opportunity to live above the ground- if deserved- and if not deserved he would have been delivered to the prosecution."

None of these were done. CATLI was capable of being in the company of former or present Ministers and Members of Parliament when going to Ankara and was having tea or meals in the lobbies of the Parliament, but when in a state of merriment he fired two shots in the air in Erdek two policemen arrived from the police station, completed legal proceedings against him, took his fingerprints and put him in custody. Although the telephones worked and he was released, it is not difficult to understand his psychology. Apart from the prosecutors and judges of the State any police officer or station that did not know him was a potential threat to him. What could or would this individual, who was connected with the peaks of the State, have done in this mishmash of contradictions.

When going to Guven SAZAK's farm he was in the company of Ahmet BAYDAR, Drej Ali and Osman Ali, the treasurer Undersecretary. He was meeting politicians in the office of Sedat BUCAK but he was forced to discuss his financial difficulty when he intended to bid for the cleaning operation of BOTAS pipeline. (14)

Abdullah CATLI appears in many visions of the Susurluk incident, however the background of CATLI's focused picture is best completed with the silhouette of Ankara.

CATLI's fingerprint was revealed in the TOPAL murder, however, having considered that CATLI left only DM 2 million to his family the fate of millions of dollars extracted from TOPAL is to be questioned. (This guess should not be left to our Presidency but belongs to those who sympathise with CATLI.) The CATLI file needs to be reopened. All of his contacts and connections are known. An investigation should be carried out to establish how he returned to Turkey from Switzerland, all the information on his appointments should be gathered. Details of how the MIT obtained the information that TOPAL was murdered by CATLI and the police officers, of how [the MIT] informed the Director of Security with a one page note, of why they reached that conclusion, and of the true relationship of drugs connecting Mehmet OZBAY-CATLI, whose identity is still covered with mist, are yet to be revealed.

In addition, there is a necessity to reveal how Abdullah CATLI obtained and used 12 separate identities, passports, and possibly driving licences. The facts as to which businesses, under whose orders and on which days CATLI was involved needs establishing.

Therefore in order to secure the public opinion reaching an objective conclusion about CATLI, and for the State institutions to be washed clean along with their rights and wrongs- without any deterrent [sic]

The recommendations on this matter will be submitted in the conclusion section.

Whilst referring to CATLI, establishments concerning the matter which did not attract public opinion are submitted to the esteemed Prime Minister in (Ek:11).

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The subject referred to Ek: 11 occurred as a result of the legal structure that created a considerable difference between right wing and left-wing terrorists, activists and groups.

It will be hoped that the note that was prepared with the help of a criminal law Professor and Senior judge, is to be evaluated by the Ministry of Justice.

SEDAT BUCAK AND BUCAK TRIBE

The information concerning the BUCAK Tribe is submitted as follows. However, the fact should be borne in mind that the public officials who prepared this information in a report applied a very careful and meticulous style.

BUCAK's, who were originally from Diyarbakir, arrived in Siverek approximately 200 years ago. In the aftermath of the formation of the Republic and during the Seyh Sait rebellion they sided with the Republic and fought against the rebels.

BUCAK's were not spared from three exiles (During ATATURK Era, I.INONU Era and after 27 May). However, since the Seyh Sait rebellion they sided with the State. Although after 27 May Celal BUCAK, the chief of the tribe and Hakki BUCAK, the father of Sedat BUCAK were under arrest in Yassiada they conserved their power in Siverek.

The inter-tribal clashes prior to 1980 in S.Urfa/ Siverek District is known of. Therefore Siverek is an area where pro-Kurdish organisations such as the PKK and the KUK attempt to escalate incidents by means of winning tribes to their side.

BUCAK tribe is "Zaza" and has always been represented at the Parliament since the Demokrat Party Era.

Following the death of his uncle, Mehmet Celal BUCAK, Sedat BUCAK became the chief of the BUCAK tribe.

"BUCAK TRIBE", of which Sedat Edip BUCAK, Member of Parliament for S.Urfa, is the leader of, is dominant in Siverek and Silvan Districts to a great extent and there is no opposition/ sectarianism within the tribe worth mentioning.

It is a known fact that in parallel with the PKK's attention to, and attempts to seek dominance in, S.Urfa/ Siverek the BUCAK tribe armed approximately 350-400 members since September 1993.

The tribe, which took part on the side of the State from September 1993 onwards in the struggle against the PKK, have 1000 protectors in Siverek and Hilvan and 350 of those have the status of "Provisional Village Protectors" who receive a salary from the State.

However, the rest of them that form the majority are being classified as "Voluntary Village Protectors" who carry weapons with the State's permission and perform duties. In addition the tribe have armed members who were named as Private Security. The Private Security and Voluntary Protectors do not receive a salary from the State. (15)

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It is an established fact that from September 1993 Sedat BUCAK visited all the villages of Siverek individually and warned them not to shelter members of the PKK. In addition, IZOL tribe, the second biggest tribe in the region, adopted the BUCAK decision and armed themselves.

The above referred to preparations launched under the leadership of BUCAK tribe caused anxiety amongst some of the local people that the members of the tribe may act beyond the control of the Security Forces. Claims that former criminals and unemployed had penetrated into the BUCAK group, and occasional unnecessary firing in some locations, stirred fear and panic amongst the people.

S.BUCAK armed his tribe with the close collaboration of the security Forces and arranged meetings with the authorities in his Siverek house at various dates.

In December 1993 a meeting was held in Siverek house of S.BUCAK who expressed to Korkut EKEN and their request for missile launchers and similar powerful weapons from the State. In addition S. BUCAK requested "Authority to take illegal men" [may be interpreted as citizen's arrest or to employ illegal people-tn] from Provincial Gend. Brig. Com. Col. Seral SARAL. The referred to individual [S. BUCAK] also indicated that the PKK activities were concentrated in DIYARBAKIR/ Cermik, that they intended to intervene in Cermik, that however, Cermik Gend. Div. Com. created difficulty for BUCAKs and similar adverse situations were experienced with Viransehir Gend. Div. Com. Upon this Col. S.SARAL and K. EKEN assured that they would initiate action rapidly to dissolve this adversity.

Following the referred to period serious blows were scored against the PKK in Siverek and its environs. However, the local Security Forces' tendency to transfer all the operations to BUCAK tribe, and the planning and execution of the operations being completed by the senior figures of the tribe, indicated that the State control in the region was weakening.

Consequently the indicators that the development of BUCAK tribe was getting out of control were: random firing by members of the tribe in the District centre; some individuals' being taken from their homes and interrogated without the knowledge of the security officials; BUCAK's random firing upon some business premises in Siverek on the 29 November 1993; the death of the named militia Hatun TASKAYA who was taken to indicated locations after being apprehended in an incident dated 07 December 1993 near Siverek where two terrorists died and who died in a traffic accident involving three members of the tribe and a BUCAK vehicle; attempts of BUCAK tribe to dominate the local tribes such as KIRVAR, KARAKECILI.

The tribe's success against the PKK in the region brought about some privileges. Those involved with smuggling were treated with tolerance, demands for weapons were met on a large scale and even their shows of strength by firing their weapons into the air were tolerated.

In addition the BUCAK- State relationship was not limited to local senior contacts but very familiar connections were made with Mehmet AGAR, General Director of Security and

Unal ERKAN, Governor of OHAL. (The political connections of the chief of the tribe was not mentioned for unknown reason).

On the other hand the large numbers of those members of the tribe who were involved with drugs and arms smuggling attracts attention.

During this period it has been learned that Adil AKPIRINC, one of the head protectors of the BUCAK tribe, was apprehended with a large quantity of Heroine by the Narcotics Branch of S.Urfa Directorate of Security (Radikal, 17 November 1997).

However, upon each apprehension the subject is distanced from the tribe and advertised as engaging in an individual activity. However on the basis of principle it is not possible to abandon the view that this behaviour was a consequence of the tribal structure.

It should be indicated that the animosity between the tribe and the PKK which resulted in clashes was not based on ideology, but was caused by the type of propaganda carried out by the PKK which attempted to upset the tribal structure, and the fact that large sums of money were demanded under the title of "tax".

Protectors of BUCAK tribe started participating in the ambush activities of the Police and the Gendarme from the end of 1993. In addition, members of the tribe set up a wireless system, based in the house of Sedat Edip BUCAK, in order to secure communication between themselves.

Intelligence information was received that "Bedir YIGITBAY, the head protector of BUCAK tribe, said in his speeches to the people around him from January 1997: "BUCAKs are the State. The State is unable to do anything to them. Two individuals who are under the protection in the tribe are in Caylarbasi- Susik (Bukec 09-72) Village, Siverek. The State's investigation cannot do anything".

In addition Ahmet KIRAN, the chief of KEJAN tribe of Siverek, announced that Haluk KIRCI, whose name was mixed up in the TOPAL murder and Bahcelievler massacre, was in hiding in Sedat BUCAK's house and a new identity document was being prepared for him. (21 October 1997, Radikal). Upon this announcement the DYP Siverek council demolished part of his house. (01 November 1997, Milliyet).

(It has been considered that KEJAN tribe is KIRVAR tribe and Ahmet KIRAN is Ahmet KIRVAR.)

This situation would have been stated as an indicator that the members of the tribe see themselves as in a privileged position.

On the other hand we do not have any facts showing that senior figures of the BUCAK tribe receive lump sums or monthly salaries from the State. The voluntary protectors certainly do not declare that they received money from the tribe.

However, it is a fact that the tribe's income is being used in the employment of special

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and voluntary protectors. In other words, the tribe have successfully marketed their armed struggle with the PKK, which was intended to protect its presence and structure, to the State and by doing so has disguised its own illegal behaviour.

It has been observed that the BUCAK community credentials with regard to state institutions were shaken after the Susurluk incident, and that the local relationships are being administered with greater precaution.

Coincidentally as a result of the introduction of the Southeastern Anatolian Project (GAP) those tribes and their chiefs who wanted to abandon their roles as feudal landlords, entered into a race to build industrial installations.

GAP started changing the social roles of the local tribes, and tribes and their chiefs took part in the race not according to the number of the villages or the dimensions of their land, but according to the number of industrial installations they had constructed.

Murat BUCAK, the brother of S. Edip BUCAK, DYP Member of Parliament for Sanliurfa and the chief of BUCAK tribe, turned to industry by purchasing the privatised tin factory.

This situation caused the tribal chiefs to end their "feudal land lordship" by abandoning their villages and settling down to [city/district] centres as a result of their investments, as opposed to the former centuries old role of land ownership measured by dozens of thousands of dekar [1/4 acre] and numerous villages in the region.

In conclusion, in a period of initiating rehabilitation, in order to rapidly depart from the tribe's, and their armed members'; "State within the State" appearance even at the regional level, avoiding radical practices, such as abolishing the voluntary protectors or disarming them in a short period of time, is deemed useful. Such radical practices would bring the tribe closer to the PKK.

The above statements, such as: "350- 400 Provisional Village Protectors, who receive salaries from the State; Voluntary Village Protectors, who carry weapons with permission from the State; and the additional armed members of the tribe, who were entitled private protectors; the sentence referring to how "Sedat BUCAK requested "Authority to take illegal individuals" from Colonel Seral SARAL, the Commander of Provincial Gendarme Brigade in the Gendarme region; the regional Security Forces' tendency to transfer all the operations to BUCAK tribe; the operations being planned and executed by the senior members of the tribe; the BUCAK tribe's attempt to dominate the regional tribes such as KIRVAR and KARAKECILI; the tolerant treatment of those mixed up with smuggling; demands for weapons being met to a large extent; a large number of the members of the tribe having been involved with drugs and arms smuggling; the head protector Adil AKPIRINC's apprehension with a large quantity of heroine"; these reflects the situation of the BUCAK tribe.

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The following evaluation is especially submitted to the esteemed Prime Minister's attention: "The animosity between the tribe and the PKK, which, resulted in clashes, were not based on ideology but caused by the type of propaganda carried out by the PKK which attempted to upset the tribal structure, and the fact that large sums of money was demanded under the title of "tax".

Especially, the following comment is worth attention: "The tribe has successfully marketed to the State its armed struggle with the PKK, which was intended to protect its presence and structure, and by doing so disguised its own illegal behaviour."

In conclusion the appearance of the tribe and its armed members as a "State within the State" is to be abandoned rapidly, however, it is obvious that radical practices, which may result in bringing the tribe closer to the PKK, are to be avoided.

It is deemed necessary that the tribe's and its leaders' relationship with the State is to be reviewed and all the illegal affairs and procedures are to be established in a special study.

GANGS

Various gangs, which came to the public attention, were formed. Amongst those Kocaeli gang (Hadi OZCAN), Soylemezler gang and Yuksekova gang attracted the most attention.

The formation of each of these gangs was referred to the prosecution. However, incidents did not stop. The arrest of Hadi OZCAN and claims broadcasted that he was the gang leader made known his importance. Even being in prison did not stop him from sending [threatening-/] messages, collecting extortion money [as a result] via the men of his gang and increasing his power like Alaattin CAKICI. It is interesting that a strange individual with mental illness came to hold such a position. The Security, the EYMUR group within MIT and the Gendarme have contacts and relationships with the referred to individual. The examination of the Cemal SENCAN file of the Deputy Director of Kocaeli Security will reveal that in order to cover up incidents Cemal SENCAN was selected as a victim.

The appearance of gangs in Kocaeli, the crossroad of the drugs traffic on their journey to Europe after being brought to the country from Afghanistan and Iran and after being processed in the triangle bordered by Adapazari – Bolu - Istanbul; in addition the involvement of the names Veli KUCUK, Gendarme Brigade Commander, Nihat CAMADAN, Director of Security and Affan KECECI with various incidents, drew comments and speculations and caused the region to be dubbed "Satan's Triangle".

The absence of in depth evaluations concerning this region, and the absence of satisfactory explanations of and investigations into officials, whose names were involved with the various claims were regarded as the greatest evidence of the presence and continuation of the gang.

The situation of Asgar SMITKO and Lazem ESMAEILI, who were working in Turkey with permission from the Foreign Investment Bureau as they held foreign passports and who became victims of murders involving unknown perpetrators, raised questions.

Both of them left the gambling club and got into a Mercedes registration number 34 RZU 47 at 3:40 hours. [The vehicle] was stopped by a police vehicle with the top warning light flashing and a check was carried out in Atakoy. The vehicle was found empty under the Yesilyurt railway bridge.

According to the information we obtained from the Security files, the referred to individuals had run a drugs trade since 1989, were apprehended for forging passports, and the Security attempted to deport them on numerous occasions. Each time their residential permit was extended due to MIT initiatives, and the acceptance into citizenship of Ahmad ESMAEILI, another member of the same family who was "one of the senior figures who ran drug smuggling operations", was objectionable. The fact should be remembered that after their disappearance and before their murder their family paid ransom to YESIL.

According to the Security intelligence correspondence and establishments, along with his many illegal activities, Asgar SMITKO received large a cache of weapons from the Iranian HUMEYNI REGIME in return for a very large sum, relative to the conditions of those days, and had those opponents of the regime who were residing in Istanbul murdered by informing the Iranian Secret Service. Upon this information the Security attempted to deport the referred to individual forthwith, and although the order was faxed to all the Provincial Governments, the MIT Undersecretariat obstructed this initiative with a 5-6 year long continuing correspondence using the excuse that he was being useful to them. However, nobody prevented, or was capable of preventing, his kidnap and murder in January 1995.

These established facts are clear enough in order to be submitted to the esteemed Prime Minister without any comment.

Developments concerning the Soylemezler gang are more interesting. Soylemezler and M. Sena SOYLEMEZ were apprehended as a result of an armed clash they entered into with the teams of Istanbul and Adana Directorate of Security in Adana- Pozanti region on the 11 June 1996 whilst travelling to Mersin accompanied by trigger man Fevzi SAHIN and First Lieutenant Can KOKSAL, whose appointment was with Siirt Provincial Gendarme Command. Their intention was to murder Osman BUCAK, one of the senior figures in the BUCAK tribe.

During the investigation concerning the SOYLEMEZ's, 20 more individuals, inclusive of 3 from the Security and 7 from the TSK [Turkish Armed Forces], were apprehended.

In conclusion, it was established that the SOYLEMEZ brothers formed a big organised criminal network; that in return for material gains they employed members of the security and the TSK in order to obtain intelligence, arms and protection within the organisation; that in order to

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launder their illegal earnings they purchased real estate. These various cases were unified and referred to the Istanbul State Security Court.

Weapons, ammunition and the list of activities carried out by the gang that were seized in operations are submitted in Ek: (12). An examination of the list will clearly indicate the dimensions of protection, collaboration, organisation, and communication, and that these incidents could not have occurred “covertly”. And there is no reasonable cause to believe that such a group could be organised without the knowledge and attention of all the relevant units. If the process of organisation of the gang escaped the eyes of the Security units that would mean that the State needs to revise the complete internal Security system. If this process was condoned the need for revision should be different but of a greater scale.

The YUKSEKOVA gang became the most concrete example of what was occurring in the Southeast. The chronology of developments are as stated below.

The process of escalation of the incidents centred in HAKKARI/ YUKSEKOVA started with Kahraman BILGIC, code name HAVAR, member of the PKK having surrendered to the Security Forces in the first months of 1994, and this was followed by his participation in the operations against the PKK with the Border Battalion Command and Yuksekova Mountain Commando Battalion Command in the capacity of a confessor.

In his statement taken by the Diyarbakir SSC, the referred to individual stated: “Kanber OGUR, the Commander of Yuksekova Border Battalion proposed to form a team and collect monies on behalf of the PKK but he [K. BILGIC] did not accept it. This was followed by his participation in operations against the PKK along with the Mountain and Commando Command after his arrival at Yuksekova. Similar offers were made by the GKK’s [Provisional Village Protectors] whom he met during the operations.”

In addition, the following were indicated in the same statements: “Activities of collecting money on behalf of the PKK were carried out in the region; that illegal practices were carried out in return for personal gain in operations against drug smuggling; that members of prominent families were kidnapped for ransom in the region; that [sheep/goat like] cattle of unknown origin were smuggled from NORTHERN IRAQ to TURKEY; and that these activities were carried out with the knowledge of Colonel Hamdi POYRAZ, the former Chief of Staff of Yuksekova Regiment Command, Lieutenant Colonel Kamber OGUR, the Commander of Yuksekova Border Battalion and M, Emin YURDAKUL, the former Commander of Mountain Commando Battalion”.

The disappearance of Abdullah CANAN, the nephew of Esat CANAN, former CHP Member of Parliament from Hakkari on the 17 January 1996 during his journey from Yuksekova to Hakkari, his body being found nearby in Yuksekova on the 21 February 1996, led to the CANAN family and the people of the region holding Major M. Emin YURDAKUL responsible

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for the murder of Abdullah CANAN and these incidents started surfacing before public opinion.

During the referred to period a named individual Tahir BASKIN, who was related to NCO Serg. Major Huseyin OGUZ, arrived at the Yuksekova Border Battalion Command in September 1996 and relayed information concerning the "Yuksekova gang". Along with this the statements of Huseyin OGUZ before the TGNA [Turkish Grand National Assembly] Susurluk Commission and statements of Kahraman BILGIC, code name HAVAR, confessor member of the PKK, who was questioned by the Diyarbakir SSC gave an official quality to the incidents and they were referred to the prosecution.

In accordance with the statements made by Kahraman BILGIC, code name Havar, the Narcotics Branch of DIYARBAKIR Directorate of Security carried out an operation in HAKKARI/ Yuksekova on the 02 March 1997 and as a result the named individuals Ismet OLMEZ, Kemal OLMEZ, Hasan OZTUNC and Abdullah OLMEZ were apprehended along with various long and short barrelled weapons of different make and calibre.

Consequently, those who are related to the above referred to individuals, namely Ali Ihsan ZEYDAN, the Leader of Yuksekova Council and the nephew of Mustafa ZEYDAN, DYP Member of Parliament for Hakkari; Tahir AKARSU, Leader of Esendere Council; and Fahrettin AKARSU, Director of the Meat and Fish Institution were detained on 3 March 1997. Major M.Emin YURDAKUL was detained on 15 March 1997 and Colonel Hamdi POYRAZ was detained on the 18 March 1997.

It is established that Ali Ihsan ZEYDAN, one of these individuals, was working for the EBK [Meat and Fish Institution] until 1993 and his financial situation was not well, however following his election as the council leader his circumstances improved rapidly as he had vehicles, belonging to the Council, Village Services [Directorate], Agricultural Directorate and the PTT, used to transport drugs.

The list of weapons and equipment seized as a result of the operation relevant to this gang is a striking example of what they were capable of doing before the eyes of the Security Forces.

WEAPONS AND EQUIPMENTS SEIZED IN THE OPERATION

In the Residence of Ismet OLMEZ:

- 4 Licensed Kalashnikov infantry rifles
- 1 Kubi make licensed weapon
- 1 Cylinder Cartridge clip
- 1460 Kalashnikov bullets
- 3 Pistols of various make and calibre, 5 cartridge clips and 41 rounds of bullets
- 2 Precision telescopes belonging to long barrelled weapons

- 2 Portable wireless, the type the PKK uses
- 2 Russian make shrapnel hand grenades
- 1 Ericsson mobile telephone

In the Residence of Kemal OLMEZ:

- 3 Kalashnikov infantry rifles (1 without licence, along with 15 Cartridge clips and 1040 Rounds of bullets)
- 4 Pistols of various make and calibre, 7 cartridge clips and 11 rounds of bullets
- 2 MKE make shrapnel hand grenades
- 1 Ericsson mobile telephone

In the Residence of Abdullah OLMEZ:

- 1 Kalashnikov infantry rifle 4 Cartridge clips and 120 rounds of bullets)

In the Residence of Cemal OLMEZ:

- 4 Kalashnikov infantry rifles (2 without licence, along with 18 Cartridge clips and 500 Rounds of bullets)
- 1 Law weapon [armour piercing anti-tank weapon]

In the Residence of Hasan OZTUNC:

- 5 Licensed Kalashnikov infantry rifles (4 without licence, 18 Cartridge clips and 1672 rounds of bullets)
- 1 Kubi make weapon
- 2 Pistols various makes and calibres, 2 Cartridge clips and 25 Rounds of bullets
- 1 Portable wireless
- 1 Wireless charge box
- 1 Mobile telephone
- 3 grams of opium gum

In the Residence of Ali Ihsan ZEYDAN:

- 12 Kalashnikov infantry rifles, 8 cartridge clips and 1660 rounds of bullets
- 1 G3 make infantry rifle, 2 cartridge clips and 33 rounds of bullets
- 3 Missile launchers
- 12 Missile launcher missiles
- 1 Grenada launcher
- 1 Star make pistol
- 1 Uzi make automatic pistol and 6 cartridge clips
- 1 Hunting rifle
- 2 Pistols various makes and calibres, 5 Cartridge clips and 21 Rounds of bullets
- 2 Thomson make weapons and 50 rounds of bullets
- 320 Rounds of BCS bullets

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- 1 Binoculars
- 1 Dagger
- 1 collapsible stock

In the Residence of Omer AGIRBAS, the bodyguard of A. I. ZEYDAN:

- 1 Kalashnikov rifle

In the Residence of Oguz BAYGUNES, the chauffeur of A. I. ZEYDAN:

- 1 Pistol- 14 rounder
- 14 Rounds of bullet

were seized.

It is not possible to express that this is an individual development.

In previous sections a matter was raised concerning some telephone numbers, and establishments were made within the framework of detailed information. Although these establishments are not evidence for the prosecution there is enough light in them to take precautions for a determined administration to disband such gangs.

The second individual Omer Lutfi TOPAL has called is his partner Ali Fevzi BIR. In turn A.F.BIR is in contact with Abdullah CATLI and Police Officers Oguz YORULMAZ and Mustafa ALTINOK.

The individual who followed up TOPAL's official affairs was in contact with every level, starting from the Finance Minister's private number downwards.

It seems that whenever Susurluk is referred to everybody is in contact with Saray Hali-KURMEL group.

Mehmet EYMUR calls Meral AKSENER, DYP General Headquarters, journalist Nurcan AKAD, Tolga Sakir ATIK, Ozer CILLER, Mehmet AGAR and Adil ONGEN from his telephone.

Sedat PEKER calls numbers registered to the Gendarme intelligence from the telephone no 532 243 6111 (Registered to Memis TAVUKCU). Ali YILDIZ calls Sedat PEKER from the telephone numbers 532 264 2701 and 262 8314 which are registered on his name.

Sedat PEKER calls Veli KUCUK numerous times. It will be observed that the total sum of the detailed telephone bills is in excess of this individuals legal income.

Whilst YESIL calls the Gendarme intelligence in Ankara and JITEM Commander Nurettin ATA, he also calls those who attacked Mr YILMAZ in Hungary.

Further examination reveals that numerous telephones belonging to Sedat PEKER, Sami HOSTAN, Abdullah CATLI, the genuine Mehmet OZBAY, casino telephones belonging to TOPAL and Hadi OZCAN all called the telephone no 542 214 5021 belonging to YESIL.

Another matter is that of the police identities given to numerous people. There is also a claim that driving licences and passports issued by Ankara Security need examining within the

framework of the investigation. An important claim is that Cemil SERHATLI had all these collected. It is also a witness' narrative that the Green Passports which were given to Tarik UMIT were distributed to their owners by the referred to individual.

A computer diskette relevant to the concentrated telephone traffic and to the telephone connected with the attack on the esteemed Prime Minister in Hungary is at our Presidency. It is considered that a future examination will reveal surprising connections.

If all these gang activities are not seen as the Susurluk incident and wholesale rehabilitation projects are not taken on board, the suggestion, that a time of rebellion against the State by neighbourhood gangs' and tough guys' is not far off will not be soothsaying.

Whilst discussing the gangs, reference to a type of grouping is inevitable, even though they cannot be called gangs and relationships to Susurluk were not established.

It would be a grave mistake to acknowledge the incidents, individuals and activities which were referred to from the beginning, as being individual or independent affairs.

There may be a dissimilarity of the type and variety of a weed growing in one corner of the field from another weed growing in the other corner. Instead of the farmer being surprised about the reasons why these weeds appeared in his field, he should accept the fact that he neglected his field. The incidents that occurred in the country have obviously been affected by the conditions of the Southeast and fed by the preferences of those in charge of public administration.

An identified example of these preferences can be seen in public banks. A group of bureaucrats sprang up from Sekerbank and worked as bank executives in public banks in 1992 and afterwards. This group has been moved from one bank to another in a way which could only be seen in family holdings.

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SEKERBANK

1- Aydin AYAYDIN
2- Cihan PACACI
3- Nurettin SENOZLU
4- Cihan SAKARYA
5- Levent CAKIR
6- Metin TUNCSU
7- Akif (Retired)
8- Mehmet SAVAS
9- Ersan GOKMAN
10- Birsen AKER

ETIBANK

2- Cihan PACACI (Gn. Dir.)

VAKIFBANK

1- Aydin AYAYDIN (Gen. Dir.)
3- Nurettin SENOZLU (Dpty. Gn. Dir.)
4- Cihan SAKARYA (Dpty. Gn. Dir.)
5- Levent CAKIR (Dpty. Gn. Dir.)
10- Birsen AKER (Dpty. Gn. Dir.)

HALK BANK

2- Cihan PACACI (Gn. Dir.)
6- Metin TUNCSU (Dpty. Gn. Dir.)
8- Mehmet SAVAS (Dpty. Gn. Dir.)

EMLAK BANK

1- Aydin AYAYDIN (Gen. Dir.)
3- Nurettin SENOZLU (Dpty. Gn. Dir.)
4- Cihan SAKARYA (Dpty. Gn. Dir.)
10- Birsen AKER (Dpty. Gn. Dir.)
9- Ersan GOKMAN (Dpty. Gn. Dir.)

ZIRAAT BANK

2- Cihan PACACI (Gn. Dir.)
6- Metin TUNCSU (Dpty. Gn. Dir.)
7- Akif (Gen.Dir.)
8- Mehmet SAVAS (Dpty. Gn. Dir.)

PREMIERSHIP SUPREME
INSPECTION COMMISSION

3- Nurettin SENOZLU (Member)
Haluk INCITMEZ (Head Inspector)

COMPETITION COMMISSION

1- Aydin AYAYDIN (President)
3- Nurettin SENOZLU (Dpty. President)
Haluk INCITMEZ (Office Director)

This tableau is interesting at first sight. And it does not allow much opportunity to make any comment. However, it is found interesting that despite the legal impossibility of appointing Nurettin SENOZLU to the Supreme Inspection Commission as a member and later as the President, attempts were still made. Halk Bank, Ziraat Bank, Vakif Bank and Emlak Bank are being inspected by the Supreme Inspection Commission. By doing so proceedings and inspections were going to be left in the hands of the same team. If serious problems had not happened in bank procedures in the last five years it would not have been appropriate to evaluate these bureaucratic exercises with dismay. In reality however, serious developments had taken place in public banks in recent years. Public banks granted much bigger sums to certain groups, holdings and companies than they are capable of paying, and when limits were forced offshore banks continued credits. Leasing proceedings were carried out for numerous companies and, as if this is not sufficient, credits were granted from foreign banking partners.

Some banks seemed as though they were the banks of certain companies, and investments were concentrated on few companies, therefore increasing banking risks.

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Stretching the bank limits brought about another procedure. Credit letters belonging to Turkish banks were issued and as a result foreign credits were sought and credits reaching dozens of millions of dollars were used. When due the majority of these credit letters will be paid by these banks.

There are numerous examples on company bases. For example Vakiflar Bank dedicated a large section of its investments to a small number of companies.

Despite making losses, and its inability to market its costly residential properties, Emlak Bank continued the construction of residential estates. Companies' profits continued despite the bank's losses. Instead of small and medium scale companies Halk Bank concentrated on selected companies and by doing so they carried out innumerable transactions that could not be found agreeable with banking.

The public's losses from the banks have not even been established. The credits which were withdrawn from the banks in foreign currency were deposited in the same banks in Turkish Lira with a higher interest than the market, and by doing so, whilst the bank suffered losses in both ways, the company is deliberately advantaged.

A group that receives credit from Vakif Bank on Libor+2 sells foreign currency in their bank on Libor+7.

[This part of the Report has not been released]

EVALUATION (16)

The general evaluation of the Susurluk incident offers a distressing view. On the one hand, incidents, groupings, tough guys, illegal earnings and illegal affairs, complaints, and on the other hand public institutions. Moreover amongst the public institutions there is the Armed Forces to which the Turkish People and Public Administration is always very sensitive and careful not to turn it into the subject of a casual debate. It is deemed appropriate to clarify this matter.

How does the relationship between the Susurluk incident and the Armed Forces arise? Susurluk was caused as a result of the preferences made in Ankara, developed in OHAL region, and was transferred to the metropoles of the country and widened as a result of absorbing suitable incidents, individuals and groups in such metropoles. As a result it became a multi-dimensional mishmash of relationships in which state institutions and administrators were involved knowingly or otherwise. Without any relevance to the State institutions and administrators this incident would have become only an important policing matter, and after a 3-5 day press attention it would not have had this kind of a sensational impact.

References to the Armed Forces, and the high sequence of references made to the

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Gendarme, increase the attention and public' indecision. Along with the Gendarme, the Special Warfare Bureau and, -although not known so much by the public, the Special Forces Command became subjects of debate. It has been decided that this matter is to be briefly included in the evaluation.

SPECIAL WARFARE

The chain of command and the tight military hierarchy have never been broken in the military intelligence. Consequently military intelligence has not suffered from weaknesses caused by actions or activities out of control, in contrast to the Gendarme, Police, and even from time to time as observed at MIT.

In due time the Special Warfare Bureau developed into the Special Forces Command, and as a result of ranked officers having been the bases of this force the provisional recruits have always been small in numbers. At present already the nucleus of a professional army has been formed in several brigades.

Due to a decision that support from civilian sources should not be used, the military discipline was not weakened at any stage and therefore interference did not occur.

In the past the Gendarme Intelligence was very small and powerless, even at the level of public order intelligence in the provinces. During General Hulusi SAYIN's Chief of Staff, JITEM was developed. It was supported with individuals capable of speaking the local language and slowly strengthened. However, it had never reached the level of MIT or Military Intelligence. It was not deemed necessary. The armed struggle atmosphere that was created by the PKK in the 80's became the source of the Gendarme intelligence. Therefore JITEM followed a line of progress closely related to the south-eastern problem as this was the reason for its existence.

However, when the confessors and local elements which were employed by JITEM in time became loose and free they created the source of this big problem on their own.

Not only the local elements but even those intelligence staff were left outside the military hierarchy. In an environment where much higher ranking officers were present Major Cem ERSEVER still managed to move independently.

Groups formed by local elements and confessors have always been used by the Gendarme. Although "Holding the fire with a pair of tongs" would be an appropriate and justified behaviour in the atmosphere that had been created, the confessor groups became free and loose. Alaattin KANAT is a well-known confessor from this group. The most famous one is however Mahmut YILDIRIM- YESIL who is known for his cruelty and the large number of people he murdered. YESIL is a Safii Kurd. This group regards Alaouite Kurds as their greatest enemies. In this air which he was breathing since his childhood YESIL was driven to extremes not only by concerns of self-interest, extortion etc. but also under the influence of religious

motives.

After returning from the Southeast those personnel, Officers and Non- Commission Officers who worked in the Gendarme intelligence regrouped with former members in the Western regions to which they were appointed, and developed the habit of maintaining contact after their retirement. (17)

A matter of attention is that these elements who fought in the Southeast, and carried out intelligence activities there used what they had learned in the later years of their lives. (18) The harshness of the tools applied and the cruelty of the methods that the PKK applied caused those who fought the struggle to use similar methods.

[This paryt of the Report has not been released]

... those aiming such … have succeeded and caused more harm to the PKK than hot clashes. However, whatever has been done to ordinary individuals and those who are called only pro-Kurdish but do not have any direct relationship [to the PKK] created damage to all the work.

Especially for those officials and confessors who participated in this kind of work in the Southeast, moving towards the big metropoles was related to their degeneration and concentration on their self-interest.

The developments briefly referred to above, the section that summarises the 1993 period and its aftermath, portrays the preferences of the higher echelons of the state as much as it reflects the problems.

In actual fact the drawn up framework and the lines [references] referring to collaboration of the public institutions are not much in harmony with the truth. [sic]

It is obvious that success was scored with terrorism, that the PKK started a retreat, and that difficult times are coming about for the PKK. There is no doubt that this result was produced by a wholesale struggle. However, when the previously referred to incidents and developments were put together it is known that serious differences occurred, and certain attitudes and [opposite] camps were formed.

The basic question is this; the studies of the Police, Gendarme and even MIT concerning covert operations have exposed these institutions led by the security to public opinion, even in a situation where they could not function.

The driving and leading force amongst the security institutions is the Armed Forces. Special Warfare Forces carried out effective cover activities with Special Operations Teams. But the military was not involved with affairs based on self-interest (with the exception of Nafiz KARACAN in the Senar ER incident). Those who were involved were eliminated. The difference must have been in the administration, the administrator and their mentality.

Although, it could be imagined that the subject could be better explained as a matter of discipline, in that case an explanation would be necessary as to why the Gendarme is closer to the police rather than to the military units.

Whilst referring to the sources of illegal activities, their reasons, developments and results, the expressed basic conclusion is that the illegal activities progressed within the context of the struggle with the PKK. In order to bring the PKK threat under control primarily those tribes which were known to be supporters of the state were taken advantage of, and within the framework of the Regret Act the confessors and Provisional Village Protectors system became fighting elements against the PKK.

With the participation of those public officials with criminal tendencies, and as a result of the harmony between central preferences and self-interests, degenerated relationships that at present are called "gangs" came about.

Elements such as the presence of the feudal structure in the East and Southeast, contradictions amongst tribes, the essence of the GKK [Provisional Village Guards] system having been based on the feudal structure, extensions of the tribes being in Iran and Iraq, the formation of the regional economy being based on smuggling which is predominantly based on drugs, all became influential factors in creating sources for illegal activities.

Confessors and individuals who carried out illegal activities moved towards metropoles for the following reasons; Upon being exposed in the OHAL region; upon the Security Forces decision no to use them any longer; or those authorities who gave them tasks being appointed to Western Provinces. In a short period new and illegal entities were added to the existing ones.

There are numerous files and information at the judiciary and the security on this matter.

The task has taken shape at this point. To prevent the existing and continuing illegal activities and formations and, in order to do that, a courageous and a decisive action on these subjects. However, coordination is to be established or reestablished. Specialists primarily indicate a lack of coordination in the intelligence field. The problems in this field are classified and examined under 1. Sources, 2. Subjects necessitating joint work, 3. Subjects concerning technical studies. However these problems are also experienced as a chaos of execution amongst Police- Gendarme and MIT therefore the higher priority target is coordination where borders of authority and responsibility are in focus.

DRUG SMUGGLING

Whilst referring to gangs there is a certain need to mention drugs smuggling. There are incredible profit margins in this sector. Smugglers covered a long distance to launder their incomes and become respected citizens in society.

A brief quote was taken from a document prepared by specialists on this matter.

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As a result of evaluating the existing information concerning drug smuggling in our country, a fact was noticed that those apprehended are close relatives with partnership relationships amongst them and have been registered in the same place. It is concluded that these individuals are in organised activities, and that by establishing relationships with international individuals and groups they turn into organisations without boundaries, and by doing so they turn into family organisations which form the financial source for terrorist organisations.

The majority of the organisations operating in our country are originally from the Southeast and East Anatolian regions. These groups, which started their business with small scale opium smuggling in the past, moved their organised smuggling activities towards heroine as a result of the high profits and increased demand since the 1980's.

Upon generally examining the drug (smuggling) organisations;

a) The organisations operate within each other and are related to other criminal organisations. These organisations arrange marriages and therefore either form or strengthen relationships in order to increase joint forces, or reaffirm trust amongst the each other. In addition another element which establishes contacts between organisations are certain key figures These individuals play an important role between organisations in order to maintain communication and start activities.

b) The organisations showed a tendency for a division of labour and by doing so reduced the proportion of risks in their activities, and continued drug smuggling in greater security.

It has been observed that organisations formed different sectors such as; acid suppliers (suppliers of acid anhydrate) transporters (individuals who transport drugs within the country and abroad) couriers (individuals who look for markets for the finished drug products and maintain contact between the buyer and suppliers), suppliers (those individuals who supply raw material for drug production) and money launderers; and through this division of labour they collaborate in their activities.

Whilst previously the drug smuggling was carried out by these organisations within the country, at later stages they started obtaining base morphine from abroad (Iran, Iraq, Afghanistan, Syria), turned it into heroine and in turn smuggled it to European markets in order to increase their profit margins. They handled the marketing, production, transportation and distribution themselves.

It is known that terrorist organisations in the world have used drug smuggling operations as one of the most important sources of income. The PKK terrorist organisation especially is observed since their armed activities started in 1984 to have moved towards the drug trade, which is organised along the line stretching from the Middle east to Turkey and Europe, in order to meet requirements of their militant cadres such as weapons and logistic needs. Upon examining the drug smuggling incidents which organisations such as BAYBASIN, BAYRAM,

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KASAR, AY and SITOCI run, it is established that they were in a relationship with the PKK terrorist organisation and provided financial support for this organisation.

In order to stabilise their power within their region and to supervise their illegal activities on the state level with an official capacity, the organisations select certain individuals from their families who are capable of influence at the political level. They have the monies which they have earned from their activities laundered by various methods and have their relatives appear as businessman from which they gain respect, in order to create a ballot potential and place them in the higher echelons of the state. In addition they have the idea of recruiting individuals of authority within the state, administration and political platforms [parties-?] from outside their organisation and used them for their own purposes".

Whilst the smuggling organisations develop and catch up with national and international developments, our country started getting behind due to the struggle having been run on a provincial basis. A public official who reached the framework of our report and narrated his experience and stated his point of view as follows: "The main work load is being handled by the Provincial Directorates of Security. Is it possible for us to discover or prevent [something] if the evidence was stained. How possible it is to measure the extent of the diversion in our struggle when the pressure is applied upon by the locals and politicians? How effective the province [Provincial Security] is? As an individual who was a Provincial Director of Security, let me tell you openly that when an officer, chief or provincial director takes an uncompromised stand he is removed from his duty, and even if the replacement is not closer to them the new arrival becomes ineffective in the face of their power. In my opinion the state starts affecting the struggle at this point. The prosecutor insists that he will carry out the investigation and the details/ connections of the incident become limited, or the drug turns into flour / henna. In prolonged cases the evidence arrives before the judge stained, and the whole offence is reduced to the courier. The politicians remove the official from duty and the formation of a fighting cadre is being obstructed. The administration remains a passive viewer to all this.

The judicial system creates opportunities for the administration to perform as they wish and carry out their work with an ability to defend themselves. For example isn't Susurluk a traffic accident within the Gendarme jurisdiction? This investigation was carried out and the task was completed. (Ek: 13)

In addition to the legal structure which is free from the political power, and having considered that the legal structure is affected by preferences we see that the struggle with illegal incidents gets more difficult. For example; the distance between Anamur and Bozyazi is 10 km. Anamur is an undefended border port. However another border port was opened in Bozyazi District. Tasucu [to] Seka Port is 5 km. Tasucu is a [an idiom meaning uncontrolled, wide open-tn] border port but Seka Port intended to turn into a border port even though the port is known

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for being a shanty town dwelling, thus new weak locations are being opened for illegal activities. Isn't this a protection to, and a creation of opportunity for, some illegal activities?.... This situation is one of the reasons for an officer to degenerate. Wouldn't the administration know this?

It should be indicated as the state's fault that the tribes whose hegemony was damaged in the past become partners of the administration either as politicians or state supporting protectors. Having considered the quantity of weapons in the Southeast and failure of the struggle in Van and especially Hakkari, which are the places known for being entry points for drugs, would it be the personal weakness of the local administrators which makes the struggle ineffective or would it be turning a blind eye on the state's behalf? In my opinion this is an important matter for investigation.

I think the failures and breakdown of the system developed from the mentality of individual struggle. The bureaucrat, the state and nation in his mind starts applying his own methods, whether he finds a personal interest or not. For this reason I think the military, MIT and the Security have their own separate methods and the conflict is caused by this. But in due course whatever is being done for the state changes character, and then things are being done for personal and political interest".

The opinions of this high ranking civil servant concerning the existing system, his bitter complaints, partial loss of hope and even his errors of evaluation are considered important enough to be submitted to the esteemed Prime Minister due to its perspective.

[This part of the Report has not been released]

RECOMMENDATIONS

The matters and details prepared and submitted in the previous section are not based on personal opinion or knowledge but to a large extent on the narratives of authorities, archive information and official records received in writing from various institutions.

Due to not preparing an investigation report, and our basic task not being to develop documents for submission to the prosecution, and rather our intention being correct conclusions and correct information and proposing recommendations for submission to the esteemed Prime Minister, we did not even insist on a technical matter such as identifying the source or sections stated by public institutions in inverted commas.

As stated in the introduction section, public institutions were not wishful of or keen on, furnishing information. This resistance was only overcome after long hours of friendly confidence raising conversation with individuals and authorities. The fact of the matter was told to everybody, that the true intention was establishing the facts and incidents and not to

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incriminate them and their friends.

The matters concerning the public's reaction, the fact that institutions such as MIT and the Security could only be successful if they had credibility, and the fact that in order for their credibility to be restored they would have to be accepted by public opinion, were talked over, discussed and stated.

This approach met a response and some distance was covered. The entire report was drawn up with this framework of understanding, and the recommendations were developed in the light of this secure framework.

Recommendation 1

The first recommendation to be submitted to the esteemed Prime Minister is that the General Directorate of Security is to be dispatched to a general struggle against the formation of gangs. A definitive decision is to be taken and developments are to be checked periodically by the Premiership. The needs of the organisation which are urgent, daily and which can be met immediately, are to be met.

For this purpose a group of senior administrators at the General Directorate of Security are to be appointed and empowered to use the authority of the General Director or even the Minister in order to establish co-ordination. Those Directorates of Provincial Public Order, Intelligence, and Prevention of Terrorism Branches who are unable to adapt themselves to the work should be removed from their posts promptly and be employed in Ankara for three months, and their replacements should be made by the group selecting those young and unstained individuals.

The deadline for success given to the General Directorate of Security senior administration should be limited to three months. The public is to be reassured in the most suitable terms that in the event that a serious and satisfactory development is not secured the General Directorate senior administration would be changed to a large extent. The Police organisation should complete the investigation concerning Emperyal company, which was instigated by a correspondence belonging to our presidency but not concluded.

Recommendation 2

In order to secure the success of the works centred around the General Directorate of Security, and in order for the MIT to support them with all their facilities, a coordination channel is to be provided which is supervised and controlled by the Premiership. In order to do this, a coordination committee in which the Premiership is also represented will solve any problem or breakdown promptly in meetings and without records being made. An absolute determination must exist that any breakdown of communication would bring responsibility to both institutions. The flow of information must be maintained from the Chief of Staff Intelligence Presidency.

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Recommendation 3

The Police work will drive gangs and groups into silence. However, the already created and known financial resources are to be destroyed and brought to account. The police work is to be supported by financial investigations.

The examination study concerning Omer Lutfi TOPAL and his companies, which was launched as a result of an instruction from the Premiership, are to be widened and concluded. Such work has to be reapplied to other mafia and godfathers.

For this purpose the requests of the central coordinating group are to be handled with priority by all the Inspectorate units starting from the Finance Ministry, Customs Undersecretariat and Ministry of Trade and Industry. The cabinet has to decide upon these 3 matters and the decision is to be announced by the Ministers.

Recommendation 4

A limited Confession Act centred around Susurluk and relevant to gangs and illegal earnings is to be issued.

However; the experiences obtained from the Confession Act which created problems in the Southeast, are to be borne in mind.

Recommendation 5

In the relevant section the work of the Special Operations Bureau was submitted and references were made. For this reason Special Operations Bureau should be narrowed down to the borders of the OHAL region. The Special operations personnel should only bear the title within OHAL region and all the other Special Operations Units are to be abolished and integrated into the police organisation. Initial exercises are to be carried out with administrative decisions, and if necessary relevant changes in the law are to be carried out. The first exercises are to be carried out in Antalya.

Recommendation 6

A Premiership circular is to be issued as an order that, with the exception of Interpol, General Directorate of Security's relations with organisations and services abroad could only be established via the Foreign Ministry and the MIT channels, that apart from these channels, external intelligence operations are forfeited and halted.

Primarily; the realisation of the above referred to recommendation is to be secured with a circular drawn up along the lines of Chief of Staff, MIT and General Directorate of Security and if necessary legal arrangements be made if deemed necessary.

Recommendation 7

The "Public Order Institution" bill that was prepared by the National Security Council General Secretariat several years ago is to be examined and to be submitted for the Government's consideration. The Public Order Institution Presidency is to be considered as an organisation

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without provincial organisations, with a limited number of cadre and empowered with operational authority, capable of establishing relationships with all the units of the State dealing with any kind of gangs, underground or over ground, which would have an adverse affect on the public order, social structure and general morale.

At this stage, the nucleus of this organisation cold be structured within MIT as an administrative decision. With a rapid examination, and in the light of the preparations carried out by the MGK [National Security Council], a legal framework can be established and a final decision be made.

Recommendation 8

The struggle against drug smuggling should not be considered one of the routine activities of the General Directorate of Security, but be considered as a top priority and urgent matter. Whilst this work is ongoing the struggle should be enlarged from the provincial to national level and a legal and administrative framework is to be established.

For this reason, the personnel that was employed for various reasons at Provincial Branch Directorates, the Smuggling and Organised Crime Bureau of the General Directorate of Security are to be promptly and rapidly reappointed elsewhere if deemed necessary and new cadres, who are selected carefully and meticulously, are to be appointed in their stead. Following this, the bureau's work is to be continued within the framework of the first 3 recommendations.

Recommendation 9

The subject of drug smuggling is to be selected as a matter of struggle with certain specialities and a special study aimed at individuals and families, and including financial investigations, should be launched with priority.

There is sufficient information in the archives. This information should be assembled with coordinated study and an operation plan is to be prepared to enable rapid action.

Recommendation 10

The State archives contain information and even diagrams concerning various smuggling and illegal activities. The continuation of these illegal activities is a problem on its own. Relevant institutions of the State (Finance, MIT, Security, Customs, Incitement, Treasury) must develop a collaboration amongst themselves. The principle of this collaboration is to be drawn up.

Recommendation 11

Gendarme General Command, MIT and Security records and information are to be evaluated with coordination, and the personnel belonging to all these organisations who were involved with illegal relationships and formations in the Western regions are to be eliminated in a short period of time.

The Confession Act will speed up the process. There is sufficient information on this matter. Collection and exchange of this information is sufficient to solve the problem.

The General Directorate of Security and MIT's priority to carry out this exercise within their own organisations will both elevate the credibility and speed up the solution to the problem.

Recommendation 12

The use of confessors should be limited rapidly. The use of confessors ought to be allowed on certain subjects and limited in numbers. Detailed reports should be requested from provincial and OHAL regional Governors on the present situation, precautions and practices, and this matter is to be decided upon in certain terms within 15 days. The fact should be borne in mind that a confessor is a former criminal and when out of control they would show and have shown initiative in their self-interest. For this reason confessors should not be included in the kind of work which may cause speculation.

Recommendation 13

Existing cadres of PVP's are to be frozen in their numbers, the vacant and vacated cadres ought to be abolished. Those PVPs, willing to and suitable, are to be employed as Special Security Officers.

In the application of Article 22 of the Provisional Village Protectors Rule book dated October 1986, sensitivity must be maintained in practices concerning release from duty and the age limit ought to be reduced from 65 to 45. And in accordance with Article 24 those above 45 years of age are to be released from duty within two months by double compensation payments. Those suitable for public institutions ought to be encouraged to take up employment as labourers.

The dismantling process of the tribe structure, which strengthens the existing semi- feudal nature of the region, of the region have stopped as a result of the PVG system which is based on tribes and in fact became even more effective. Lords of the tribes and leader of families grew stronger on the basis of this income and different types of criminal and terrorist organisations appeared. There is a necessity to break down the effectiveness of the family and tribe system, which is well established in the region.

It is recommended that this practice be introduced starting at the Urfa region.

Recommendation 14

The procedures of the Ministry of Tourism concerning fortune game halls must be a subject for inquiry. What were the procedural basis for the Ministry to issue licences to gambling clubs? The identities of those granted licenses are embarrassing to the public. Offences involved physical blows, obstruction of freedoms, forced signatures to debt bonds, deception and illegal seizures, and all these gambling clubs reached prosecution stage. The Ministry's involvement and its reasons, in those gambling clubs where life security is non-existent is to be revealed.

Recommendation 15

Tax and accountancy records of these gambling club operators must be investigated.

TOPAL declared his assets/means of income to the Istanbul SSC No: 2 in a file numbered

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1991/412 in 1989. Such information is also present for the others. The trillions that accrued up to the present day can be explained in this fashion.

Recommendation 16

The conclusions of the TGNA Susurluk Inquiry Commission that established the offence and the investigation ought to be forwarded by the Premiership to the relevant authorities and relevant proceedings ought to be undertaken.

There are numerous conclusions and recommendations in the Susurluk Commission Report the results of which were inconclusive. In accordance with their importance they should be undertaken.

Recommendation 17

In order to enlighten the existing complicated mass of information at the Custom Undersecretariat and General Directorate a comprehensive examination/evaluation is to be carried out on the matter concerning weapons donated to the General Directorate of Security. Even if the transfers made from the discretionary fund were kept exempt, transfers from various funds reached sums of hundreds of billions of TL. There is a need to establish where these payments were made, even if not the methods by which these sums were spent. There is a need to prevent speculative exploitation of the subject of purchased-donated weapons. In addition, concerning the incidents and individuals referred to in the various pages of this report;

Recommendation 18

The position and situation of Abdullah CATLI is to be comprehensively investigated in an inquiry. CATLI's relationship prior to and after 80, if any, is to be investigated.

Recommendation 19

The coup d'etat attempt in Azerbaycan and the Turkish party's position is to be subject of a separate inquiry.

Recommendation 20

Protectors, payments and the recipients of these payments, tribes and families ought to be detailed and mistakes/ shortfalls are to be evaluated in a comprehensive study, if deemed necessary a local university is to be put into use.

Recommendation 21

A coordinated study into the income- tax affairs of those operators of fortune game halls is to be launched, money laundering operations are to be followed up with the support of the financial police [fraud squad].

Recommendation 22

The Mehmet Ali YAPRAK kidnap incident is to be re- investigated along with a financial investigation. Captagon production and trade is to be handled by a special police team.

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Recommendation 23

Nesim MALKI and Yener KAYA murder incidents are to be re- investigated along with a financial investigation. Those individuals and companies owing money to the above referred to credit brokers are to be investigated from the financial point of view.

Recommendation 24

Within the framework of the sufficient information established in the investigation and revealed by confessor Ibrahim BABAT's statements, the claims concerning the Bodrum Sun Club incidents, the $40.000 extortion money and its division between parties and the Hikmet BABATAS murder are to be re- investigated.

Recommendation 25

As referred to in the relevant sections, relationships between Eximbank-Turkmenistan and Emperyal Company are to be subjected to a detailed investigation and inquiry, if necessary.

Recommendation 26

The reasons for a $105 million debt which surfaced after the death of Omer Lutfi TOPAL, and which companies' balance sheets this debt was originated in, ought to be investigated independently and statements from the executives of Emperyal are to be secured.

Recommendation 27

A decision for a legal regulation of the conclusions of the investigation relevant to the banks is to be made.

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Footnotes

(1) Some names, which were often appointed to numerous important operations and as a result rewarded, attract the attention. Ayhan AKCA, Ayhan CARKIN, Oguz YORULMAZ, Ziya BANDIRMALIOGLU, Ercan ERSOY. These names were also recognised by public opinion as a result of the Susurluk incident. In most cases Ibrahim SAHIN, Ayhan AKCA and Celal ERTAS gave references for those appointed to Special Operations.

(2) In the documents concerning appointments for the operations of Special Operations Teams, the expression "Fulfilment of Task" is used and no other explanatory note is put, and records were limited to the expression "returned to the base".

(3) As a result of the correspondence dated 16 August 1993, which was personally signed by the Prime Minister, Nuri GUNDES was appointed to the post of "Intelligence Senior Advisor" to the MIT, and having been employed at the Premiership his appointment at the MIT undersecretariat and his duty at the Premiership was put into effect immediately, with the response bearing the same date. The speed of these appointments and the language used in the correspondence prove the "very special" nature of this matter. At a later stage the Premiership Office questioned the position of Nuri GUNDES on 19 February 1997 and the

response dispatched in a rapid but routine manner on 24 February 1997 and this correspondence was recorded in the Premiership Personnel register on 28 February 1997.

(4) The President of the Premiership Inspectorate Commission of the time had the same contact point with the Prime Minister and the confirmations that are to be submitted to the Prime Minister were referred to the spouse of the Prime Minister. Moreover, the [Premiership] official residents telephone numbers at the Inspectorate are known to have belonged to the Prime Minister's spouse and the Secretary.

(5) The matter concerning the Foreign Investment Bureau's practice of furnishing work permits to unknown individuals of Arabic descent from the South Eastern Provinces who are dealing with heroin trafficking was the subject of our criticism in one of our reports dated 1989.

(6) Mehmet EYMUR, in his letter dated 12 February 1997 to the Interior Minister Meral AKSENER, made a complaint about Hanefi AVCI and narrated that Orhan TASANLAR, Ankara Director of Security, called him at 03:00 hours in the morning to say that they should come and take YESIL and as a response he said that Ankara region and himself did not have anything to do with [YESIL-?].

(7) In those provinces TOPAL opened gambling clubs, he formed relationships with individuals and families with influence and connections. He provided opportunities for social activities, spent money and made smart gestures at birthdays and wedding anniversaries and by doing so formed partnerships. Upon collecting his credits he ended his relationships. With the excuse of increasing attendance/ capacity of his gambling clubs he had chips given liberally to individuals, and in the end, in order to liquidate partnerships he had other parties shown as debtors. In Antalya he had houses built and them sold to his employees on dollar prices via a company he obtained in that fashion. He provided places to General Omer SARLAK and Security Director Mete ALTAN. He used civil servants when transferring the company shares.

(8) In Turkmesitan Ak Altin gambling club was followed by Grand Turkmenistan Hotel's gambling club and later by others.

(9) Opening of fortune games arcades their regimes, control have often being subject to changes and as if their launch was encouraged, despite the earnings reaching millions of dollars neither true inspection nor tax examinations exist. The Ministerial Fund that reaches a few billion TL is found striking and being argued over. Gambling clubs and their administrators neutralise all the mechanisms of the State.

(10) Only on the night when Hikmet BABATAS was murdered in Bodrum did he sit consume food and alcohol amongst everybody in Antalya.

(11) In return for the credits he received, TOPAL gave the real estate mortgage guarantees for the following sums to the relevant branches. TL 1 trillion to Yurt Bank Central Branch, TL 270 billion Sekerbank Istanbul Branch, TL 100 billion to Toprakbank Central Branch, TL 145 billion to Demirbank Zeytinburnu Branch. TOPAL was suffering from poverty amidst his wealth.

(12) Contrary of the promises that he would be imprisoned for seven years, when sentenced to 17 years confessor Ibrahim BABAT applied to Istanbul SSC Chief Prosecutor and Premiership Inspectorate Commission in order to make a statement. Prior to his interview with the inspectors (19 December 1997)

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Kirklareli Intelligence Branch Director and Gendarme Brigade Commander visited I. BABAT and "wished him well and asked as to his well being". Whilst saying this they felt the urge to remind him that "he should be careful and not damage the State as the case was at the Supreme Consultative Stage".

(14) The dimensions of an organisation, which intended to extract the 20.000 metric tons petrol residue which is the sediment in the pipeline was to be bought for $10 per ton and be sold to Iskenderun Iron and Steel Factories for $250 per ton, needs consideration.

(15) A lawyer who worked in the region for many years indicated that the number of protectors under the command of BUCAKs are 20.000 and if (TL) 10 million was paid per head a necessity would arise to ask what the source would be.

(16) As a result of individuals and incidents being submitted with established facts and comments in the developments section and in order to avoid repetition- the section dedicated to evaluation was limited to a few important but brief subjects.

(17) The disagreement between Vasfi Ahmet KOSEOGLU and his friend Ahmet Nedim BASMISIRLI, the owner of Sun Club Hotel in Bodrum, Gumbet was resolved between mafia and confessors on the one side and Gendarme Officers and non-commissioned officers on the other. The cheques were cashed. In the disagreement that took place, confessor Ibrahim BABAT shot his friends. To the contrary of the promises that he would be imprisoned for seven years, when sentenced to 17 years Ibrahim BABAT applied to the Premiership Inspectorate Commission telling them he decided to talk. Prior to his interview with the inspectors Security Provincial Intelligence Branch Director and Gendarme Brigade Commander visited and advised him that " Not to make a mistake in a state of excitement and not to talk unnecessarily."(!)

(18) In his statement to the police (26 August 1994) Atilla KANAT said: "I thought to extract money from the named individuals of Southeastern origin Abdulkadir AKBIYIK and Senar ER by frightening them, as I know that they are involved with heroine smuggling and I have known them from my past. I got into action by thinking that I can frighten them by giving the names of (murdered) Behcet CANTURK, Savas BULDAN who were famous and known to be involved with heroine smuggling. The reason for my using a different name and introducing myself as the counter guerrilla when I called the complainant on the telephone was solely for the purpose of frightening them".

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APPENDIX B

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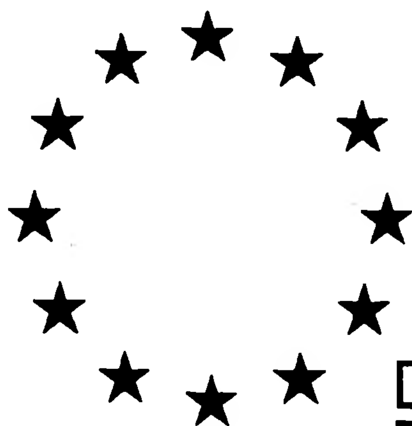

COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

Or. English

EUROPEAN COMMISSION OF HUMAN RIGHTS

Institut kurde de Paris

Application No. 22496/93

Salih TEKIN

against

Turkey

Report of the Commission

(Adopted on 17 April 1997)

Strasbourg

Institut kurde de Paris

EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 22496/93

Salih TEKİN

against

Turkey

Institut kurde de Paris

REPORT OF THE COMMISSION

(adopted on 17 April 1997)

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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, born in 1964 and resident in Diyarbakır. He was represented before the Commission by Mr K. Boyle and Ms F. Hampson, both teachers at the University of Essex, England.

3. The application is directed against Turkey. The respondent Government were represented by their Agent, Mr A. Gündüz.

4. The applicant alleges that he was ill-treated while he was being held in detention in Gendarme stations in Derinsu and Derik from 15 to 19 February 1993 and that this event was not adequately investigated by the State authorities. He invokes Articles 2, 3, 5 para. 1, 6 para. 1, 10, 13, 14 and 18 of the Convention.

B. The proceedings

5. The application was introduced on 14 July 1993 and registered on 16 July 1993.

6. On 11 October 1993 the Commission decided, pursuant to Rule 48 para. 2 (b) of its Rules of Procedure, to give notice of the application to the respondent Government and to invite the parties to submit written observations on its admissibility and merits.

7. The Government's observations were submitted on 22 April 1994 after two extensions of the time-limit fixed for this purpose. The applicant replied on 12 July 1994 after one extension of the time-limit.

8. On 20 February 1995 the Commission declared the application admissible.

9. The text of the Commission's decision on admissibility was sent to the parties on 8 March 1995. The parties were invited to submit such further information or observations on the merits as they wished. They were also invited to indicate the oral evidence they might wish to put before delegates.

10. On 18 May 1995 the Government submitted further observations after an extension of the time-limit fixed for this purpose.

11. On 1 July 1995 the Commission decided to take oral evidence in respect of the applicant's allegations. It appointed three Delegates for this purpose: Mr H. Danelius, Mr B. Conforti and Mr J. Mucha. It notified the parties by letter of 19 July 1995, proposing certain witnesses and requesting the Government to identify the public prosecutor at Derik to whom the applicant had complained on 19 February 1993, the public prosecutor who had conducted the investigation and the officers who had been involved in the interrogation of the applicant. The Government were also requested to provide the contents of the

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investigation file which should include, in particular, the notice dated 19 February 1993, signed by Musa Çitil, with three reports, and a copy of the decision not to prosecute. The applicant was requested to provide details of his medical history to which reference was made in the application. It was subsequently decided that oral evidence would be taken by the Delegates at a hearing on 8 November 1995.

12. By letter dated 13 September 1995 the Government provided the names of two gendarme officers and of three public prosecutors who had been involved in the investigation of the alleged ill-treatment.

13. On 15 September 1995 the applicant replied to the Government's further observations and submitted a copy of a judgment of the Diyarbakır State Security Court of 2 August 1993 in which he was acquitted of the offence for which he had been arrested in February 1993. He also requested that his father be heard as a witness. His representatives, moreover, stated that it had not yet been possible to obtain details concerning the applicant's medical history. By letter dated 9 October 1995 the applicant submitted further information.

14. On 9 October 1995 the Commission reminded the Government of the outstanding requests for a number of documents. Furthermore, the Government were requested to indicate to which of the three public prosecutors identified by them the applicant had complained.

15. By letter of 24 October 1995 the Commission urgently requested the Government to provide copies of the still outstanding documents and to name the public prosecutor to whom the applicant had complained.

16. On 25 October 1995 the Government requested that the hearing be postponed in view of the fact that following a misunderstanding as to which cases would be heard they had not had sufficient time to prepare themselves for the hearing.

17. On 27 October 1995 the Commission granted the applicant legal aid for the representation of his case.

18. The Commission notified the Government on 30 October 1995 that the hearing of evidence in the present case would be maintained but that any witness unable to attend might be heard at a later date.

19. On 30 October 1995 the Government submitted a number of documents, including the decision not to prosecute.

20. By letter dated 1 November 1995 the applicant's representatives informed the Commission that they were still not in possession of the applicant's medical history.

21. Evidence was heard by the Delegates of the Commission in Diyarbakır on 8 November 1995 from the applicant and his father, Hacı Mehmet Tekin. One of the Delegates, Mr Mucha, was not able to attend the hearing. Before the Delegates the Government were represented by Mr A. Gündüz, Agent, assisted by Mr T. Özkarol, Mr A. Şolen, Mr A. Kaya, Mr A. Kurudal, Ms N. Erdim and Mr A. Kaya. The applicant was represented by Mr K. Boyle, counsel, assisted by Ms A. Reidy, Mr M.

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Şakar, Mr O. Baydemir and Ms D. Deniz (interpreter). Further documentary material was submitted by the applicant and the Government during the hearing, including a document containing information of the applicant's medical condition.

22. On 2 December 1995 the Commission considered that the evidence heard was not conclusive and decided that a further hearing of oral evidence would take place in Strasbourg on 7 March 1996.

23. On 23 January 1996 the Government submitted documents concerning the piece of cloth which, according to the applicant, had been used to blindfold him.

24. By letter of 25 January 1996 the Commission requested the Government to submit a document which had been referred to as an arrest report by the Agent of the Government during the hearing on 8 November 1995.

25. On 26 January 1996 the Government informed the Commission that one of the witnesses summoned to appear at the hearing on 7 March 1996 would not attend. They also proposed that a further three witnesses be heard.

26. On 13 February 1996 the Government provided the document requested by the Commission on 25 January 1996.

27. Further evidence was heard by the Delegates of the Commission in Strasbourg on 7 March 1996 from Harun Altın, Musa Çitil, Sinan Dinç, Mehmet Dinç and Halit Tutmaz. One of the Delegates, Mr Conforti, was not able to attend and in his place Mr N. Bratza participated in the hearing. Before the Delegates the Government were represented by Mr A. Gündüz, Agent, assisted by Ms A. Emüler, Mr A. Şolen, Mr A. Kaya and Mr A. Kurudal. The applicant was represented by Mr K. Boyle, counsel, assisted by Ms A. Reidy.

28. On 13 April 1996 the Commission decided to invite the parties to present their written conclusions on the merits of the case. By letter dated 26 April 1996 the Commission also reminded the Government of their undertaking, expressed by the Agent at the hearing on 7 March 1996, to submit a copy of the statement taken by the Turkish authorities from Mr Musa Çitil, as well as copies of the custody records of Derinsu Gendarme Station for 1993.

29. On 2 May 1996 the Government submitted the documents which had been requested by the Commission on 26 April 1996.

30. The applicant submitted his final observations on the merits on 9 June 1996.

31. By letter dated 2 July 1996 the Commission informed the Government that the time-limit fixed for the purpose of submitting final observations had expired without any such observations having been received from the Government or an extension of the time-limit having been sought.

32. On 10 July 1996 the Government informed the Commission that they would be able to submit their final observations before the Commission's October session. In reply, the Commission drew the

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Government's attention to the fact that in the circumstances of the present case it would be for the Commission to decide whether or not any final observations submitted by the Government would be taken into consideration.

33. The final observations of the Government were submitted on 26 July 1996.

34. On 8 April 1997 the Commission decided that the Government's final observations should be taken into consideration.

35. 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

36. 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:

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

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37. The text of this Report was adopted on 17 April 1997 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.

38. 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.

39. The Commission's decision on the admissibility of the application is annexed hereto.

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

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II. ESTABLISHMENT OF THE FACTS

41. The facts of the case, in particular those which relate to the events between 15 and 19 February 1993, are in dispute between 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 examined written material, as well as oral testimony, presented before the Delegates. The Commission first presents a brief outline of the events, as submitted by the parties, and then a summary of the evidence adduced in this case.

A. The particular circumstances of the case

1. Concerning the events between 15 and 19 February 1993

a. Facts as presented by the applicant

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

43. On the morning of 15 February 1993 the applicant was arrested at his father's house in the hamlet of Yassıtepe by gendarmes under the command of Harun Altın and taken to Derinsu Gendarme Station. The applicant was a journalist employed by the Özgür Gündem newspaper in Diyarbakır. That newspaper had been closed down by the authorities at the time. The applicant had travelled home to visit his family probably on 12 February 1993.

44. The applicant was interrogated, assaulted and threatened with death at the Derinsu Gendarme Station where he was detained until the morning of 19 February 1993. He was kept in a cell without any lighting, bed or blankets and in freezing conditions throughout this time. He was not given any regular meals but only bread and water after the first day. When he protested about his detention he was assaulted in his cell by gendarmes including Harun Altın. He was prevented from freezing to death by the fact that on the night of 18 February 1993 he was joined in the cell by his three brothers who wrapped him in extra clothing they had.

45. On the morning of 19 February 1993 the applicant was brought to the District Gendarmerie Headquarters at Derik. There he was stripped naked and subjected to torture with the purpose of having him sign a prepared statement of admission. He was brought before the District Gendarmerie Commander Musa Çitil who threatened him with death if he returned to the area.

46. Late in the afternoon the applicant was brought before the public prosecutor Hasan Altun to whom he complained of his treatment and to whom he handed a wet blindfold that had been left around his neck. He was released on 19 February 1993 and having received attention and medication from his family he returned to Diyarbakır on the morning of 20 February 1993. The applicant did not go to see a doctor after his release.

47. The applicant has subsequently been the victim of torture at the hands of other gendarmes on several occasions.

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b. *Facts as presented by the Government*

48. In their final observations on the merits of the application the Government submit that the applicant, who had served a term of imprisonment prior to the events at issue for having indulged in illegal and separatist activities and who had continued these activities as a journalist working for Özgür Gündem, was arrested in Yassıtepe village on 17 February 1993 and taken to Derinsu Gendarme Station. He was detained because intelligence information available suggested that he had threatened village guards in order to make them lay down their arms. His father and brothers were not arrested, but they followed the applicant to the Gendarme Station voluntarily. His brothers were not allowed to enter the security room where the applicant was kept.

49. The security room at Derinsu Gendarme Station is situated in the centre of the building, is surrounded by other units and has no exterior walls, while the outer walls of the building are 50 cm. thick. Other rooms within the building being heated by coal-burning stoves, the temperatures in the security room cannot drop below zero. Moreover, the applicant had not been deprived of food, water or sleep. The applicant was not questioned while in Derinsu Gendarme Station, nor was he blindfolded and slapped in the face by Harun Altın.

50. On 19 February 1993 the applicant was taken to Derik District Gendarmerie Headquarters. He was not exposed to torture or ill-treatment there.

51. The applicant complained that he had been tortured and ill-treated at both Derinsu Gendarme Station and Derik District Gendarmerie Headquarters to the public prosecutor before whom he was brought on 19 February 1993. Although this public prosecutor recorded the applicant's allegations, he did not act upon them and for this reason the Supreme Council of Judges and Prosecutors has started an investigation which will probably lead to disciplinary proceedings against the public prosecutor.

2. <u>Criminal proceedings against the applicant</u>

52. Finding that the offences of which the applicant was accused fell within the competence of the State Security Courts, a public prosecutor at Derik issued a decision of non-jurisdiction and referred the case to the prosecutor at the Diyarbakır State Security Court.

53. The applicant was subsequently summoned to appear before the Diyarbakır State Security Court to answer charges under Articles 188-191 of the Criminal Code (issuing threats). A hearing took place on 13 May 1993 at which the applicant protested his innocence. He was acquitted on 2 August 1993. According to the Government's final observations, the three villagers who gave evidence before the Delegates (Sinan Dinç, Mehmet Dinç and Halit Tutmaz) had been among the witnesses who testified in the criminal proceedings that the applicant had not threatened the village guards.

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3. Proceedings before the domestic authorities

54. Following the communication of this application by the Commission to the respondent Government on 11 October 1993, the Ministry of Justice (International Law and External Relations General Directorate) contacted the public prosecutor's office in Derik on 18 December 1993, informing them of the complaints made by the applicant. A preliminary investigation was opened.

55. On 20 April 1994 Harun Altın, the commanding officer of Derinsu Gendarme Station at the time of the alleged incident, was questioned by a public prosecutor in Daday district at the request of the Derik public prosecutor Bekir Özenir.

56. A decision of non-prosecution in respect of Harun Altın and Musa Çitil, the Derik District Gendarmerie Commander at the relevant time, was issued by the public prosecutor Bekir Özenir on 4 May 1994. It stated that there was no concrete evidence other than the applicant's abstract allegations that the defendants Altın and Çitil had committed the alleged offences of maltreatment and threat.

57. Hereupon, the Ministry of Justice (International Law and External Relations General Directorate) informed the office of the Mardin public prosecutor in an undated letter that as the decision of non-prosecution had not yet been notified to the applicant, the proceedings remained incomplete, the applicant still having the opportunity to file an appeal against the decision. Having regard, furthermore, to the identities of the defendants and the nature of the crime the Ministry of Justice submitted that the alleged offence might fall within the scope of the law on the prosecution of civil servants and suggested that an investigation be carried out to see whether a decision of non-jurisdiction would be appropriate. This letter was transmitted to the public prosecutor's office at Derik on 26 April 1995.

58. A decision of non-jurisdiction was issued on 4 May 1995 by the Derik public prosecutor Hüsnü Hakan Yağiz. The investigation was referred to the Derik District Administrative Council.

59. On 14 July 1995 a statement was taken from Musa Çitil by a Gendarme Lieutenant Colonel.

60. The Derik District Administrative Council submitted its summary investigation report dated 5 September 1995 to the office of the Mardin Provincial Governor from where, on 12 September 1995, it was referred to the Mardin Provincial Administrative Board. On 13 September 1995 the Mardin Provincial Administrative Board decided that due to lack of evidence Altın and Çitil were exempt from public prosecution.

B. The evidence before the Commission

1. Documentary evidence

61. The parties submitted various documents and newspaper articles to the Commission. These included reports about Turkey, documents relating to, *inter alia*, the applicant's detention in Derinsu and Derik Gendarme Stations and to the investigation on the domestic level into the applicant's allegations, and a floor plan of Derinsu Gendarme Station.

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

a. *Official documents*

i. Urological examination report of 15 January 1991

63. The report states that the applicant's right kidney had been surgically removed in 1986.

ii. Custody note dated 17 February 1993

64. This is a handwritten note, signed by the applicant, a gendarme officer with number 1989/1007 and a gendarme private by the name of Abdurrahman Keben. It states that the applicant was taken into custody on 17 February 1993 around 16.00 hours following information to the effect that he had threatened and incited the village guards of Derinsu- Yassıtepe hamlet to adhere to the PKK and fight against the State.

iii. 1993 security room ledger from the Derinsu Gendarme Station

65. The ledger contains an entry to the effect that the applicant was brought to Derinsu Gendarme Station on 17 February 1993 at 16.30 h. According to the ledger, the applicant was arrested on suspicion of making propaganda for the PKK. His arrest had been ordered by the Derik District Gendarmerie Headquarters. He was transferred to Derik District Gendarmerie Headquarters on 19 February 1993 at 09.00 h.

66. It appears from the ledger that six people had been detained in the Derinsu Gendarme Station in 1993; the applicant had been the second, the first having been arrested on 15 January 1993, the third on 18 April 1993 and the last person on 5 September 1993. The applicant was the only detainee to have been held on suspicion of a PKK-related offence.

iv. Notice of referral of a suspect, dated 19 February 1993, from Musa Çitil to the public prosecutor's office at Derik

67. In the notice the applicant is referred to as "the suspect". It states that he is charged with inspiring the village guards of the Yassıtepe hamlet to lay down their weapons, join the PKK and fight against the State. He is referred to the authority of the public prosecutor's office. The letter contains the mention that, *inter alia*, three witness statements are enclosed. These statements have not been made available to the Commission (paras. 11, 14, 15).

v. Judgment of the Diyarbakır State Security Court of 2 August 1993

68. The judgment states that the applicant was charged with having threatened temporary village guards whilst the latter were on duty. The applicant had denied the charges and the public prosecutor at the State Security Court had asked for the acquittal of the applicant. The Court held that it had not been possible to obtain sufficient credible evidence to the effect that the applicant had committed the alleged offence and it acquitted the applicant. The applicant was not present when the judgment was pronounced but he was represented by a lawyer, Mr Baki Demirhan.

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vi. Decision of non-prosecution of 4 May 1994

69. This decision, issued by the Derik public prosecutor Bekir Özenir, lists as defendants of the offences of maltreatment and threat Harun Altın and Musa Çitil, and the applicant as the complainant. The date of the alleged offences is given as "15.2.1993 - 19.2.1993". It states that the applicant claimed that he had been maltreated whilst he was being held in detention in Derinsu Gendarme Station on 17 February 1993 on suspicion of aiding and offering shelter to the PKK terrorist organisation and that his life had been threatened by the Derik District Gendarmerie Commander, Musa Çitil. As there was no concrete evidence other than the applicant's abstract allegations that the defendants had committed the alleged offences, they were freed from prosecution.

vii. Decision of non-jurisdiction of 4 May 1995

70. This decision was made by the Derik public prosecutor Hüsnü Hakan Yağiz. It also lists Harun Altın and Musa Çitil as defendants in respect of the offences of maltreatment and threat, allegedly committed on "15.2.1993 - 19.2.1993". It goes on to say that the applicant had been taken into custody on 17 February 1993 for aiding and sheltering members of the PKK terrorist organisation. The applicant had claimed that he had been maltreated and that on the same day a threat to his life had been made by Musa Çitil. In view of the fact that the defendants were members of the security forces, it was decided that the investigation was to be referred to the Derik District Administrative Board pursuant to Decree No. 285.

viii. Decision of non-prosecution of 13 September 1995

71. This decision, issued by the Mardin Provincial Administrative Board, was taken following the referral of the investigation by the Derik District prefect to the office of the Mardin Provincial Governor. Again, it lists Altın and Çitil as defendants of the alleged offences of maltreatment and threats. The date and place of the offences are given as 17 February 1993, Derinsu Gendarme Station and Derik District Gendarmerie Headquarters. It says that the applicant, who is referred to as the complainant, was detained for having sympathy with the PKK terrorist organisation, for being a reporter on a like-minded organ of the press and for having a hostile attitude towards the State and its soldiers. Although the applicant had alleged to have been subjected to maltreatment and threats at Derinsu Gendarme Station and Derik District Gendarmerie Headquarters, he had failed to produce sufficient evidence to substantiate his allegations. For that reason the Administrative Board decided unanimously that the defendants Altın and Çitil were to be exempt from public prosecution.

ix. Expert's examination report of 30 November 1995

72. The report concerns an examination by a tailor, Abdullah Kaya, of the piece of fabric which the applicant alleges had been used to blindfold him and which he had given to the Derik public prosecutor on 19 February 1993. It appears from the document that the examination was requested by the Ministry of Justice (International Law and External Relations General Directorate) on 23 November 1995.

73. According to the report, the piece of fabric was what is commonly called a "*kefiye*", cut in half. A *kefiye* is used by men in the South East of Turkey as a head cover and scarf. The piece of fabric had not been produced in any special way; it had not been turned into a blindfold nor had it been produced to serve as a blindfold.

b. *Statements made by the applicant during his detention*

i. Statement dated 19 February 1993

74. Although the document does not indicate where the statement was taken, it appears to have been drawn up in Derik District Gendarmerie Headquarters. It is signed by the questioning officer, who is only identified as "89/1007", a gendarme private called Abdurrahman Keben, and the applicant.

75. The applicant was asked to respond to the accusation against him, i.e. that he had threatened the life of the village guards in the district of Derik if they did not lay down their arms. The applicant stated that he was a reporter with the Özgür Gündem newspaper. He had travelled to Yassıtepe hamlet three or four days earlier to visit his family. The applicant denied the charges, saying that he had not threatened anybody in order to make them lay down their weapons and that he had not acted on behalf of the PKK.

iii. Statement dated 19 February 1993 taken by the Derik public prosecutor Hasan Altun

76. The applicant, referred to as the suspect, was informed of the charges against him and was asked to make a statement. He repeated what he had told the gendarmes on the same day (para. 75). A number of unknown people had alleged that he had visited various villages in the District of Derik where he had incited people to join the PKK and had threatened the village guards to lay down their arms. The applicant denied these allegations. He had come to the area to visit his family in Yassıtepe hamlet. He had been taken into custody as a result of the fact that the gendarmes were prejudiced against him since he worked for Özgür Gündem. He had been kept in custody in Derinsu and Derik Gendarme Stations for four days. During his detention he had been forced to sleep in the cold, he had been submitted to cold water torture and had been beaten with truncheons. He had been forced to make up statements. During his interrogation he had been blindfolded. He was told that he would be shot if he returned to the area.

77. The applicant told the public prosecutor that he wanted to file a complaint with him against the officers in charge of the Derinsu and Derik Gendarme Stations for having tortured him whilst he was in their custody. He also handed the public prosecutor a wet blindfold.

78. Underneath the signatures of the public prosecutor, the clerk who wrote down the statement and the applicant, the document features a short second statement signed by the same persons. In this, the applicant stated that the fabric which he had shown to the public prosecutor belonged to Derik District Gendarmerie Headquarters and that it had been used to blindfold him. It had been forgotten and left around the applicant's neck at Derik District Gendarmerie Headquarters.

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c. *Statements made by the applicant in support of his application*

i. Statement, undated, handwritten by the applicant

79. On 15 February 1993 the applicant was taken into custody together with his father and his brothers in the hamlet of Yassıtepe by non-commissioned officers from Derinsu and Dumluca Gendarme Stations. Throughout the four days of his detention at Derinsu Gendarme Station he was in a cell where the temperature was -20°C. During this period his request for a blanket was refused and in order not to freeze, he had to keep walking and could not go to sleep. He was only given water and was subjected to abuse. His father and brothers were kept in a different place; they were not subject to the same procedures.

80. On 19 February 1993 the applicant was taken to Derik District Gendarmerie Headquarters, his eyes covered as he was taken inside the building. During the interrogation which took place there he was stripped naked, sprayed with cold water and beaten with truncheons. This treatment caused him to faint. When he came to, he was taken up to see Musa Çitil whom he assumed was the Station Commander. Çitil told him that he would be killed if he visited the area again.

81. The applicant was released on 19 February 1993 by a Derik Public Prosecutor before whom he had been brought.

ii. Supplementary statement, undated, taken by Sedat Aslantaş of the Diyarbakır branch of the Human Rights Association

82. On 12 February 1993 the applicant went to Yassıtepe hamlet to visit his family. Although he was on holiday he did carry his press card in view of the incidents taking place in the area. On his third day there, i.e. 15 February 1993, his father's house was raided by the commanders and soldiers of Derinsu and Dumluca Gendarme Stations. The applicant, his father and three brothers were taken to Derinsu Gendarme Station. The applicant was detained in the security room and his father and brothers were put in the canteen.

83. Around midnight, the Station Commander, of whom the applicant only knew his first name Harun, took them in turn to the interrogation room. The applicant was asked whether they had threatened village guards in neighbouring villages in order to make them lay down their weapons. Throughout the interrogation the applicant suffered verbal abuse and was beaten. The applicant's father and brothers were released at about 01.00 hours on the condition that they stay in a house in the village.

84. The applicant was returned to the security room. In order not to freeze he was forced to pass two days and two nights without sleep as he was held for four days in temperatures of -30°C. He was left hungry and thirsty, and was not given a blanket or any kind of heating despite the fact that he informed the soldiers that he only had one kidney.

85. On 19 February 1993 the applicant was taken to Derik District Gendarmerie Headquarters. In the interrogation room pressure was put on the applicant to admit that he had threatened village guards and had carried out propaganda for the PKK. He was taken to a different room where there were three gendarmes who told him to strip naked. They then

proceeded to squirt the applicant with pressurised cold water from a hose pipe and to beat him on the shoulders and buttocks with a truncheon. Again, they wanted the applicant to admit to having threatened village guards and having made propaganda for the PKK as well as having written newspaper articles directed against them. However, the applicant did not admit to anything. At some point he lost consciousness. When he came to, the soldiers were dressing him. He was taken up to Çitil's room where Çitil told him that he would be killed if he came to the area again. Having been brought back down again, the applicant was forced to sign a statement which had been prepared by the gendarmes before he was taken to a public prosecutor. He told the prosecutor that the accusations against him were false and, as evidence of the torture to which he had been submitted, he handed the prosecutor a wet blindfold that had been left around his neck. The prosecutor included this in his report and also recorded that the applicant wished to complain about Musa Çitil.

iii. Supplementary statement dated 27 July 1995, handwritten by the applicant

86. The applicant had started working as a reporter for Özgür Gündem when this newspaper first started publishing. He subsequently became the Özgür Gündem representative in their Cizre and Diyarbakır offices. The interest of the authorities in the applicant increased as he started working for the newspaper.

87. The applicant went to visit his family in Derik District on 15 February 1995. When the security officers found out that he worked for Özgür Gündem, the applicant, along with his father and three brothers, was taken into custody by Derinsu Gendarme Station. His father and brothers were released after one day and the applicant was taken to Derik District Gendarmerie Headquarters. There he experienced five days of torture: electric shocks, falaka, cold water treatment and crude beatings.

88. Although he was acquitted of the charges brought against him, he has subsequently been exposed on numerous other occasions to torture during detention, as have other reporters of Özgür Gündem.

d. *Statements made by other persons*

Harun Altın

Statement dated 20 April 1994 taken by public prosecutor at Daday

89. This statement was taken upon the request of the Derik public prosecutor Bekir Özenir (para. 55).

90. It says that Altın was informed of the allegations and that he declared that on 15 February 1993 he had been Commander of the Derinsu Gendarme Station which fell within the jurisdiction of Derik District Gendarmerie Command. He had held this post for two years. During that time numerous judicial procedures had been processed and some people had been kept in custody. It was impossible for him to remember every person by name and although the applicant may have been detained in Derinsu, he did not remember him. However, during his term of office no maltreatment, beating, torture, coercion or any other form of illegal treatment had taken place in his Station.

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Musa Çitil

Statement dated 14 July 1995 taken by a Gendarme Lieutenant Colonel

91. It appears that this statement was taken within the framework of the investigation carried out by the Derik Administrative Board (para. 59).

92. Çitil was informed of the allegations raised by the applicant in his application to the Commission. In reply, he said that the applicant had been taken into custody as he was suspected of having exerted pressure on village guards and of having run a propaganda campaign amongst them. The applicant had also been charged with aiding and abetting the PKK terrorist organisation. The applicant had been duly investigated and referred to the office of the public prosecutor and the court. The applicant had not been subjected to ill-treatment or threats, either by Çitil or by others. Had the allegations been true, the applicant would have informed the legal authority before which he was brought.

2. Oral evidence

93. Amongst the witnesses summoned to appear before the Commission's Delegates on 8 November 1995 in Diyarbakır and subsequently on 7 March 1996 in Strasbourg were Hasan Altun (the public prosecutor at Derik before whom the applicant appeared on 19 February 1993 and to whom he complained about having been ill-treated in custody), Bekir Özenir (the Derik public prosecutor who issued a decision of non-prosecution in respect of Altın and Çitil on 4 May 1994) and Osman Yetkin (public prosecutor at the Diyarbakır State Security Court). None of these prosecutors appeared as the Government stated that they had not had enough time to prepare themselves for the hearing (para. 16).

94. Prior to the hearing in Strasbourg the Government informed the Commission that as Osman Yetkin, in his capacity of public prosecutor, had only been involved with the proceedings against the applicant which led to the judgment of the Diyarbakır State Security Court of 2 August 1993 (paras. 53, 68), and since all documents relating to these proceedings had been submitted, Mr Yetkin felt he would be unable to add anything of interest and failed to see the necessity of his attendance at the hearing. The Commission was further informed that Hasan Altun was in an analogous situation.

95. At the hearing on 7 March 1996 the Government informed the Delegates that Bekir Özenir had sent word that he would not attend the hearing. Mr Özenir had not given reasons for his absence.

96. The evidence of seven witnesses heard by the Delegates may be summarised as follows:

i. Salih Tekin

97. Salih Tekin stated that he was born in 1964. Prior to becoming a journalist he had worked in the Revenue Directorate of the Diyarbakır municipality. However, in 1986 he had been convicted of membership of

the illegal Communist Labour Party and he had served a four and a half years sentence. After his release he had been unable to return to his post and he had applied for a job with the Özgür Gündem newspaper after its launch.

98. He could not remember the exact date when he had gone to the Yassıtepe hamlet to visit his family but it had been in the week prior to his arrest. At that time Özgür Gündem had temporarily stopped publishing and only archive work was being carried out. If a story had developed in the area while he had been there, he would have made a report about it which he would have sent to the paper for the archives.

99. While he had been with his family, other relatives and friends had come to see him and he had gone to other villages to visit people. Some of his relatives and friends were village guards.

100. In the morning of Monday 15 February 1993, when he had had his breakfast, the Commanders of the Derinsu and Dumluca Gendarme Stations and a number of their soldiers had arrived in the middle of the village and had called out for him. He had gone to them and had been told to get into the taxi with the two Commanders. His father and three brothers had followed them together with the soldiers. In the taxi the officers had asked him why he had come to the area, why he was working for Özgür Gündem, a banned newspaper, and why people had been reluctant to give a statement about him. He had also been told that he had threatened the temporary village guards.

101. Having been shown the custody note which states that he had been arrested on 17 February 1993 (para. 64), he emphasised that his arrest had taken place on 15 February. He denied ever having read or seen the note before and said that there was something wrong with the signature.

102. He had been taken to Derinsu Gendarme Station where, upon arrival, he had been informed that he had been arrested because he was suspected of having come to the region in order to persuade the temporary village guards to lay down their arms. He had not seen whether his detention had been recorded in a register. At the Gendarme Station, he had been separated from his father and brothers and put in a cell on his own. The cell was square, with concrete walls and floor, about 1,80 metre high, and it would have held fifteen people standing up. It had no window or light and the door was made of iron and had a grid which could be opened from the outside. There was no chair, no bed and no blankets. Furthermore, the temperature in the cell was extremely cold and there was no heating.

103. At around 23.00 hours he had been blindfolded by two soldiers and taken to the room of the Station Commander whom he had known only as "Harun". He had been interrogated for about forty-five minutes to one hour. Harun had asked him why he worked for a banned newspaper and had told him that he had threatened village guards and that he was an enemy of the State. He had denied the accusations. At the end of the interrogation Harun had slapped him three times in the face, saying that he was a liar and that he should be killed. He had then been taken back to the cell.

104. When he was asked why he had said in one statement that it had been -20°C (para. 79) in the cell and in another statement had mentioned -30°C (para. 84), he explained that it had been impossible for him to measure the exact temperature.

105. In order to stave off the cold he had been forced to keep moving in the cell. Following an operation in 1986 he had only one kidney. Even though he had informed the Station Commander of this fact when he had been interrogated and had said that for this reason he needed to drink water and to keep inside a warm environment, he had been refused both a blanket and food. When he had not been walking, he had been leaning with one shoulder against the wall or had sat on his feet. Sometimes he would sleep for twenty minutes like that. Around noon the following day he had protested against this treatment by yelling loudly "Stop this arbitrary treatment!". The Station Commander and five or six privates had come into the cell and, at the order of the Officer, the latter had struck him with fists and kicked him. He had been told that they would give him things when they felt like it.

106. That day, around 15.00 hours, he had been given a glass of cold water. He could not remember exactly but he thought that it had been on the second or the third day of his detention that he had been given half a loaf of bread to eat. Once a day the Station Commander would come to the cell accompanied by a number of privates. They threatened him and said that he would freeze to death in the cell.

107. On the third night of his detention, around 02.00 or 03.00 hours, his three brothers had been brought to his cell. He had tried to keep awake but at that time he had not been able to stand it any longer and he had collapsed. His brothers had put a coat underneath him and had also put some of their clothes on him. Although he did not remember whether his brothers had been wearing the head scarfs typical of the region he knew that if they had given him such a scarf he would have put it around his head rather than neck. Then his brothers had sat on him to warm him up. He did not know why his brothers had been allowed to join him in the cell. They had told him that they had been made to wait in the snow and had occasionally been allowed to wait in the sentry box. At some stage they had quarrelled with the soldiers and had told them that if they would not be released they should be put in the same cell as their brother. His brothers had been taken away from him the next day, 19 February 1993.

108. That morning, i.e. 19 February 1993, he had been blindfolded, put into a military vehicle and taken to Derik District Gendarmerie Headquarters. Confronted with his supplementary statement to the Human Rights Association, where it says that he spent two days and two nights without sleeping in Derinsu, he said that when he had looked through the document before signing it he had probably missed the discrepancy in the number of days.

109. Upon arrival at Derik District Gendarmerie Headquarters a second blindfold had been put on him. After having been made to sit and wait with his head on a table for ten minutes he had been taken towards a corridor to the right of where he had been sitting. He had been made to enter a room which he assumed must have been a washroom. Despite the two blindfolds he had been able to see a little of the floor from underneath the blindfolds. In this manner, he had seen three pairs of military boots of the type soldiers wear. He had been ordered to strip

naked. One of the soldiers had yelled at him that the interrogation had begun; the second soldier had then started spraying him with cold water from a hosepipe while the third soldier had beaten him with a truncheon. At some stage they had also subjected him to electric shocks and falaka. They had continued this treatment despite his telling them that he was ill and showing them his surgical scars.

110. All the time one of the soldiers had put questions to him about why he worked for Özgür Gündem and why he had come to the region. He had been told that they had obtained information to the effect that he had threatened the temporary village guards in his village. He had denied all allegations and had told the soldiers that the people in the village were his relatives and acquaintances, including the village guards. After approximately three hours he had fainted. He did not know how long he had been unconscious.

111. When he had come to, he had found that he was being dressed by the soldiers. He had been asked to sign a statement which the soldiers had prepared but he had refused and had said that he would read it first. He had then been taken upstairs to a room where he had heard someone introduce himself as the District Gendarmerie Commander, Musa Çitil. One of the soldiers accompanying him had told Çitil that a statement had been prepared and that he had not signed it. Çitil had repeated the questions that had already been put to him and had then said to him that he was writing news about the region in a banned newspaper and that he had threatened the village guards. Finally, Çitil had told him that he was going to be sent to the public prosecutor but that if he ever came back to the area two holes would be put in his head. Çitil had then ordered the soldiers to write in a statement what he, Tekin, had told them.

112. He had been taken downstairs again and shortly afterwards had been given a statement to read. His blindfold had not been removed but while one of the soldiers had held his head over a table, the blindfold had been slightly raised to enable him to read and sign the statement. He confirmed that this was the statement of 19 February 1993 (paras. 74-75) and that its contents were correct.

113. He had subsequently been taken to the office of the public prosecutor which was located in a nearby building. His blindfold had been removed somewhere near the exit of the Derik District Gendarmerie Headquarters; however, the second blindfold had slipped down around his neck and it had been left there. This blindfold had been made from the head scarf material used in the area.

114. The public prosecutor's office was situated in a building close to the Gendarme Headquarters and as he had been brought before the public prosecutor he had told the prosecutor that it must be possible to hear the screams of the people being tortured in the Gendarme Headquarters. He had said that during his interrogation he had been sprayed with cold water and beaten with truncheons. He had removed the wet blindfold from around his neck and had wrung it out over the prosecutor's desk. He had denied the accusations which had been levelled against him and had said that he wanted to file a complaint against the people who had maltreated him. In reply, the public prosecutor had said that he was a man of the law, that he had received complaints of torture before, that he had warned the military on this matter but that there was nothing he could do about it. However, the

statement which had subsequently been drawn up did include his allegations of torture, and a separate statement at the bottom of the second page indicated that he had submitted a piece of fabric which he claimed had been used as a blindfold.

115. He had further told the public prosecutor that he ought to be sent to a hospital. However, the prosecutor had told him that he would be released and that he would be informed of further developments in his case.

116. Upon his release, he had stayed the night at his father's house. His mother and his wife had looked at his back and had said that it was bruised. They had also washed his feet with warm water but he had been unable to feel anything. The next day he had returned to his house in Diyarbakır. He had not seen a doctor. Incidents of detention and torture having become commonplace, he had only seen cause for happiness at his release and had not thought about going to a doctor or obtaining a medical certificate which would substantiate his allegations of having been maltreated. Besides, he had been in a shock. From a pharmacy in Diyarbakır he had purchased a medicine which cleanses the kidney, some antibiotics and an ointment for his feet and shoulders. He had then stayed at home for a week, after which he had gone to the Diyarbakır branch of the Human Rights Association of which he was a member. There he had been told that officials working in the region where a state of emergency had been declared were not subjected to prosecution and that for that reason he would have to complain to the Commission.

117. Subsequently he had been summoned to appear before the Diyarbakır State Security Court on charges of having threatened village guards. He had told the Court that these charges were fabrications. During the hearing he had also said that he had been ill-treated during his detention and he thought that this had been recorded in the minutes of the hearing. He had not been present when witnesses had been heard by the Court. He had been acquitted of the charges.

118. About one month before appearing before the Delegates he had received a decision issued by the Mardin Provincial Administrative Board from which it appeared that no action would be taken against the officers Harun and Çitil.

119. Having taken the threats made against him seriously, he had not been back to Derik since February 1993.

ii. Hacı Mehmet Tekin

120. Hacı Mehmet Tekin said that he was born in 1923 and that he was the applicant's father. He said that the applicant had come to visit him on Monday 15 February 1993 and had been arrested the next day, but also that the applicant had stayed at the family home for one night before being arrested on 15 February 1993. His house had been surrounded by soldiers from two Gendarme Stations and he and his four sons, including the applicant, had been arrested and taken to Derinsu Gendarme Station. Upon arrival, the applicant had been separated from him and his other sons.

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121. Asked whether he had been informed of the reason for his arrest, he said that he had been told that the applicant had been arrested because he worked for Özgür Gündem. He had also been told to dissuade the applicant from that kind of thing or else he would not see his son again.

122. He had been forced to wait outside the Gendarme Station in the freezing cold with his three sons. They had been made to lie down in the snow. Once they had been allowed to sit in the canteen for about three hours but they had not been given anything to eat or drink. Although he had not been locked up inside a building he maintained that he had been detained and that there had been a large number of guards and soldiers. Around 03.00 hours he had been able to leave. He was unable to explain exactly how his release had come about. He said that by 03.00 hours they had been so cold that they could stand no more. He had then given his identity card to the Station Commander Harun and had escaped, together with his sons, without informing anybody. However, he also stated that in view of his age a soldier had told him that he could go but that his sons had stayed behind. He had instructed his sons to watch over their brother.

123. He had not rested until the applicant had been released, knowing that if he did nothing his son would be made to disappear. He had submitted petitions to the office of the public prosecutor, to the Provincial Governor in Mardin and to the chief public prosecutor in Mardin. When he had eventually returned to Derinsu, a neighbour had given him extra clothing for the applicant. He had given the clothes to his sons and they had taken them to the applicant on the third day of the latter's detention. They had also tried to give the applicant a blanket but this had been refused. He was not very clear about how his sons had obtained permission to enter the cell where the applicant was held. He thought that his sons had pushed the Station Commander Harun until the latter said, "You'll die too. Die with Salih."

124. When his sons had entered the applicant's cell, they had found their brother lying on the floor in a coma. They had given him the clothes and warmed him up; they had saved the applicant's life.

125. When the applicant had been taken to Derik District Gendarmerie Headquarters on 19 February 1993 he had followed the armoured vehicle in a taxi. He had gone there with a large number of relatives and they had all waited outside. A village guard had told them that the applicant was being tortured inside the Gendarme Headquarters. Upon the applicant's release, they had immediately taken him away to a relative's house in Derik.

126. He had been told that, while in detention, cold water or ice had been poured over the applicant's naked body. This had occurred at Derinsu Gendarme Station as well as at Derik District Gendarmerie Headquarters. There had been bruising caused by beatings with truncheons on the applicant's body and there had been blood on his neck and shoulders. The family had treated the applicant's wounds by applying ointments and bandages.

127. Although he first said that they had been afraid to stay in Derik and had left after one hour, sending the applicant to Diyarbakır by taxi, he also said that after the applicant's release the latter had come by taxi and had stayed for one night. He had two houses.

128. He thought that the applicant had seen a doctor in Diyarbakır but he did not know when. The applicant had told him that he had gone to a doctor and had got everything.

129. About one month before appearing before the Delegates, soldiers and guards had taken him to Üçtepe Gendarme Station where he had been forced to sign a statement which said that the applicant had put pressure on the village guards to disarm. Out of fear he had signed this statement.

iii. Harun Altın

130. Harun Altın stated that he was born in 1966 and that he was a non-commissioned gendarme officer. From July 1991 until August 1993 he had been Commander of Derinsu Gendarme Station.

131. He had arrested the applicant in February 1993 at the orders of the District Gendarmerie Commander, Musa Çitil. The applicant had been accused of making propaganda against the State. He did not remember the exact date of the arrest but said that this would have been recorded in the custody ledger of the Gendarme Station. When shown the custody note of 17 February 1993 (para. 64), he stated that this indicated that the applicant had been arrested on 17 February 1993.

132. He had gone to Yassıtepe hamlet towards evening in a commercial taxi as the Gendarme Station did not have a vehicle, accompanied by two soldiers. In Yassıtepe he had asked in which house the applicant was staying. The applicant had been the last person to come out of the house he had been directed to. He had invited the applicant to come to the Gendarme Station and the applicant had not resisted. Although he did not exactly remember, he thought it unlikely that he would have spoken to the applicant while they had been travelling to the Gendarme Station. Once there he would have informed the applicant of the reason for his arrest.

133. In Derinsu Gendarme Station the applicant had been put into the security room. This room measured approximately 2,5 by 3,5 metres and was 3 metres high. It had no window, but the grid in the door served as such. The security room contained a bed with a mattress, a pillow, a sheet and, as it was winter, two woollen blankets. Although there was no heating in the room, it was surrounded by rooms which had coal stoves in them. Furthermore, the outer walls of the Station were 50 cm. thick. It was therefore not possible that it had been cold in the security room. The applicant had not complained to him that it was freezing cold in the security room.

134. The applicant had received water and three meals a day inside the security room. Ordinarily a person would have a medical examination before being detained. However, as no doctor was present at Derinsu Gendarme Station and the Station did not have a vehicle and District Gendarmerie Headquarters was far away, the circumstances had not permitted the applicant being seen by a doctor. But the applicant had told him that he did not have any medical problems and had not mentioned the fact that he only had one kidney.

135. He had not arrested the applicant's father or brothers. He had been told that members of the applicant's family had come to the Gendarme Station and had requested permission to see the applicant. However, he had refused permission. He had not seen the family himself but had his refusal conveyed to them by a guard. Furthermore, he had not allowed the applicant's brothers to join the applicant in the security room.

136. The applicant had not been interrogated by anybody whilst at the Station, nor had he been blindfolded. Derinsu Gendarme Station had no interrogation team. If suspects had to be interrogated, he would either inform the District Gendarmerie Commander who would send a team, or he would send the suspect to Derik District Gendarmerie Headquarters from where he would subsequently be sent to Mardin Provincial Gendarme Headquarters.

137. Apart from noting down the name of a detained person in the custody ledger, a custody note like the one dated 17 February 1993 would also be drawn up when a person was placed in detention. The custody ledger would be sent to District Gendarmerie Headquarters at the end of the year, whereas the custody note would be included in the file concerning the detained person. He had not signed the custody note of 17 February 1993 as this was the task of the Station's staff members. The two people who had signed the custody note pertaining to the applicant had in fact been intelligence personnel from Derik District Gendarmerie Headquarters who had been assigned to Derinsu. They had been under the command of Musa Çitil. He did not know why they had come but their work was to gather intelligence. Musa Çitil had told him that he would send a car to collect the applicant and the intelligence personnel. For that reason he had asked these two people to sign the custody note. He regarded this procedure as normal since he had taken the applicant into custody on the orders of the District Gendarmerie Commander and had not himself executed any procedural acts in connection with the applicant. He was not able to identify the second person who had signed the note of whom only the registration number "1989/1007" appeared on the document.

138. The applicant had been kept at Derinsu Gendarme Station for two days as no car had been available from Derik District Gendarmerie Headquarters to collect him before then.

139. When he had been asked to comment on the applicant's allegations by a public prosecutor on 20 April 1994 (paras. 89-90) he had only been given the applicant's name as a reference and that on its own had not meant anything to him. When he had received the summons to appear before the Delegates he had contacted his former colleagues since, out of curiosity, he had wanted to find out the details of the incident. He had been told that the applicant had been the journalist who had been taken into custody. In that context and by association he had remembered the applicant. However, he had not contacted Musa Çitil in this respect.

iv. Musa Çitil

140. Musa Çitil said that he was born in 1962. In February 1993 he had been the Commander of the District Gendarmerie of Derik.

141. He had received complaints that the applicant had been putting pressure on relatives, who were village guards in the villages of the district, to disarm. For this reason he had ordered the Commander of Derinsu Gendarme Station, Harun Altın, to take the applicant into custody. He had also assigned two intelligence officers who had been on duty in the area to accompany Altın. He had not ordered the arrest of the applicant's father or brothers. The applicant was to be kept at Derinsu Gendarme Station until Derik District Gendarmerie Headquarters had a car available to collect him. That day the Gendarmerie Headquarters had only had one car at its disposal which was needed for other purposes. The other cars had been sent to collect the persons who had complained about the applicant so that they could make a statement.

142. The applicant had not been taken into custody to be interrogated but to have his statement taken. Interrogations would usually be conducted by interrogation specialists from the interrogation unit attached to the Provincial Gendarmerie. Since he had had the details of the case he had thought it more advantageous for the applicant's statement to be taken at Derik District Gendarmerie Headquarters rather than Derinsu Gendarme Station. He thought that the applicant had stayed two days at Derinsu Gendarme Station. The arrest records had been prepared at Derinsu by the intelligence officers who had been on duty there.

143. The persons who had complained about the applicant had communicated with him directly; they had been his informants. In cases such as this he would try to confirm the validity of the information with the intelligence staff stationed at the Gendarmerie Headquarters. If the information was correct, a member of his intelligence staff would take a statement from the accused. The applicant's statement had been taken by a gendarme soldier who had been assigned to intelligence duty and by a specialist sergeant. The registration number "89/1007" belonged to this specialist sergeant; his name was Mustafa Yanalak.

144. The applicant had arrived at Derik District Gendarmerie Headquarters in the morning. The intelligence officers had put the accusations to the applicant and had noted down his response. This had taken place in the room of the intelligence officers which was situated on the ground floor, to the right of the entrance of the building. The applicant had not been taken into the security room of the Gendarmerie Headquarters, for this reason his name had not been entered into the custody ledger. He had not taken the applicant into his office to put questions to him. He had not been aware that the applicant was a journalist until his statement had been taken. The applicant's arrest had not been connected to his profession of journalist but only to the allegations that had been brought against him.

145. After having taken the applicant's statement, the specialist sergeant had gone up to his room on the first floor and had told him that the procedures had been completed. He had then gone down to where the applicant was waiting, near the entrance, and had told him that he would be sent to the public prosecutor. He had also asked the applicant, pursuant to customary procedure, whether he had any complaints. If the applicant had then told him that he had been subjected to ill-treatment he would immediately have been sent to a doctor and the time of this referral would be noted. However, as the applicant had not made any complaints, the referral to the public prosecutor had only contained the date (para. 67).

146. The case had attracted a lot of publicity. The Minister of the Interior had telephoned the Governor of the Province who in his turn had verbally requested that the applicant's case be heard in court as soon as possible. As to the further proceedings against the applicant, he only knew that the applicant had not been held in detention during the trial. He was not aware of the outcome of the proceedings.

147. When shown the statement which the applicant had made to the public prosecutor (paras. 76-78) he said that the applicant had not been blindfolded nor ill-treated. The applicant had only been at Derik District Gendarmerie Headquarters for one hour or so. He had not threatened the applicant not to come back to the area.

148. He had been asked to make a statement regarding the applicant's allegations to his commander at his present place of work. This statement had then been sent to the Derik District Governor.

v. Sinan Dinç

149. Sinan Dinç stated that he was born in 1967. He was a farmer and lived in Yassıtepe hamlet. His house was situated twenty metres from the house of the applicant's father. He had very good relations with the applicant's family. He had been a village guard for the past two years.

150. In February 1993 the applicant had come to Yassıtepe. During his stay in Yassıtepe, the applicant had also visited other villages. Five or six days after his arrival the applicant had been taken to Derinsu Gendarme Station. He had not witnessed this arrest as he had taken his animals to graze and upon his return in the evening had been told about it. The applicant's father and brothers had not been arrested; they had gone to the Gendarme Station on their tractor to find out what was happening to the applicant. However, they had told him that they had been unable to find out anything.

151. After three days the applicant had been released and had returned to Yassıtepe. He had gone to welcome the applicant back and had asked him what had happened. The applicant had said that his statement had been taken but that the Station Commander had treated him well. He had not seen any bruising, swelling or wounds on the applicant's face.

vi. Mehmet Dinç

152. Mehmet Dinç said that he was born in 1969. He lived in the hamlet of Yassıtepe along with his brother, Sinan Dinç, and the applicant's family. The brothers' houses were about 100 metres apart, but he was the closest neighbour to the applicant's family. He had become a village guard at the same time as his brother.

153. In February 1993 the applicant had been arrested. He had witnessed the Commander of Derinsu Gendarme Station arrive in the hamlet in a commercial taxi towards evening. The Commander had been accompanied by a specialist sergeant and a soldier. They had gone to one of the two houses belonging to the applicant's father and had called the applicant. When the applicant did not appear, the soldier had gone to the other house and had brought the applicant to the Commander.

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154. The applicant's father, mother and brothers had followed the applicant to the Gendarme Station. None of them had been arrested. Towards evening the parents had returned. The applicant's father had told him that the Station Commander had refused to let the applicant go and that the Commander at Derik District Gendarmerie Headquarters had sent for the applicant.

155. Three days later the applicant had returned. He had seen the applicant arrive. In the evening he had gone to welcome the applicant back. On that occasion the applicant had told him that the Station Commander had even given him a blanket and that he was very pleased with the way he had been treated. The applicant had not looked tired; nor did he have wounds on his face. The applicant had not told him that he had been ill-treated.

vii. Halit Tutmaz

156. Halit Tutmaz stated that he was born in 1963. He was a farmer and lived in Yassıtepe, about 150 metres from the house of the applicant's father. He had been a village guard for the past ten years. He had never been asked questions about this matter before.

157. He remembered that the applicant had been arrested in February 1993 and thought that this had been for political reasons. He had not been in the hamlet when the arrest had taken place. He had returned towards evening and had been informed about it. He had also been told that the applicant's father and his brothers had followed the applicant to Derinsu Gendarme Station. They had returned the same evening. The applicant's father had said to him that there was nothing to worry about and that the applicant would perhaps be released the next day.

158. A few days later the applicant had returned and he had gone to visit the applicant. The applicant had not said much and he had not asked many questions. He remembered that the applicant had given a statement to a public prosecutor but the applicant had not said to him that he had told the public prosecutor that he had been ill-treated in custody.

C. Relevant domestic law and practice

159. The parties have made no separate, detailed submissions with regard to domestic law and practice applicable in this case. The Commission has incorporated relevant extracts derived from, inter alia, its summary of the relevant domestic law and practice as submitted by the parties in the case of Aksoy v. Turkey (Comm. Rep. 23.10.95, paras. 117-133, Eur. Court HR, judgment of 18 December 1996, to be published in Reports 1996).

160. The Government submit that the following provisions are relevant.

Article 125 of the Turkish Constitution provides as follows:

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(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."

161. 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.

162. 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."

163. The Turkish Criminal Code makes it a criminal offence

- to deprive someone unlawfully of his or her liberty (Article 179 generally, Article 181 in respect of civil servants),
- to issue threats (Article 191),
- to subject someone to torture or ill-treatment (Articles 243 and 245)

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.

165. Generally, 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 Executive Committee of the Provincial Assembly). The local council decisions may be appealed to the Council of State; a refusal to prosecute is subject to an automatic appeal of this kind. If the offender is a member of the armed forces, he would fall under the jurisdiction of the military courts and would be tried in accordance with the provisions of Article 152 of the Military Criminal Code.

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166. 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 had caused damage in an unlawful manner whether wilfully, negligently or imprudently. Pecuniary loss may be compensated by the civil courts pursuant to Article 46 and non-pecuniary or moral damages awarded under Article 47.

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

168. The applicant points to certain legal provisions which in themselves weaken the protection of the individual which might otherwise have been afforded by the above general scheme. Decree 285 modifies the application of Law 3713, the Anti-Terror Law (1981), in those areas which are 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.

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III. OPINION OF THE COMMISSION

A. Complaints declared admissible

169. The Commission has declared admissible the applicant's complaints that he was ill-treated while he was being held in detention at the Gendarme stations in Derinsu and Derik from 15 to 19 February 1993 and that this event was not adequately investigated by the State authorities, that his right to receive and impart information has been interfered with, that he has no access to court or no effective remedy in respect of his complaints, that he has been subject to discrimination and that his experiences disclosed restrictions on Convention rights for ulterior purposes.

B. Points at issue

170. 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 3 of the Convention;

- whether there has been a violation of Article 5 para. 1 of the Convention;

- whether there has been a violation of Article 10 of the Convention;

- whether there has been a violation of Article 6 para. 1 of the Convention;

- whether there has been a violation of Article 13 of the Convention;

- whether there has been a violation of Article 14 of the Convention;

- whether there has been a violation of Article 18 of the Convention.

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C. The evaluation of the evidence

171. Before dealing with the applicant's allegations under specific Articles of the Convention, the Commission considers it appropriate to assess the evidence and attempt to establish the facts, pursuant to Article 28 para. 1 (a) of the Convention. The following general considerations are relevant in this context:

i. It is the Commission's task to establish the facts, and in doing so the Commission will be dependent on the co-operation of both parties. Since there have been no findings of fact made by domestic courts as regards the subject-matter of the applicant's complaints, the Commission must to a large extent base its conclusions on statements by witnesses who have direct or indirect knowledge of the situation which is the basis of the application. The Commission has no means to force a person to

come forward to give evidence as a witness, but it is clear that where an important witness fails to appear, this may affect to a considerable extent the possibilities of the Commission to establish the facts beyond reasonable doubt (cf. No. 22729/93, Kaya v. Turkey, Comm. Rep. 24 October 1996, currently pending before the Court). In this respect, the Commission notes that the three public prosecutors who had been summoned to give evidence before the Delegates did not attend the hearings (paras. 93-95). In the case of Bekir Özenir, no reason for his absence was provided. As regards Osman Yetkin and Hasan Altun the Delegates were informed that these prosecutors considered they had nothing to add to what appeared from the documents. However, public prosecutors are civil servants, and pursuant to Article 28 of the Convention it is the Government's duty to contribute to the investigation of an admissible case. Hence, a Government is under an obligation to see to it that its own officials contribute, as far as is required by the Commission, to the investigation. In the present case no convincing reason has been put forward which could have justified the absence of the witnesses concerned. Moreover, the Commission cannot accept that witnesses whom it or its Delegates wish to hear, make their own assessment of whether or not their evidence is relevant or important.

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; in relation to both the written and oral evidence, the Commission has been aware that the cultural context of the applicant and witnesses has rendered inevitable a certain imprecision with regard to dates and other details (in particular, numerical matters) and does not consider that this by itself reflects on the credibility of the testimony.

iii. In the assessment of the evidence as to whether or not the applicant's allegations are well-founded, the standard of proof is that of "beyond reasonable doubt" as adopted by the Court in the Ireland v. the United Kingdom case in relation to Article 3 (Eur. Court HR, judgment of 18 January 1978, Series A no. 25, p. 65, para. 161) and applied by the Commission in a number of cases concerning allegations of Convention violations in South-East Turkey (cf. No. 23178/94, Aydın v. Turkey, Comm. Rep. 7.3.96, pp. 28-29, para. 163 sub iii; No. 22275/93, Gündem v. Turkey, Comm. Rep. 3.9.96, p. 23, para. 152, both cases currently pending before the Court). Such proof may follow from 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.

1. Concerning the applicant's detention

172. The applicant alleges that he was arrested on the morning of 15 February 1993 and that he was detained in Derinsu Gendarme Station until the morning of 19 February 1993. He submits that during his detention he was kept in a cold, dark cell, with no heating, bed or blankets, and that he was denied food and liquids. Furthermore, he was

aggressively interrogated while being blindfolded, assaulted and threatened with death.

173. He further submits that he was taken blindfolded to Derik District Gendarmerie Headquarters on the morning of 19 February 1993. Upon arrival a second blindfold was put on him and he was forced to strip naked. He was then hosed with cold water, beaten with a truncheon and subjected to electric shock treatment. He was asked to sign a statement but he refused to do so without having seen the statement. This treatment continued until he lost consciousness. After having been threatened with death by the Gendarmerie Commander, Musa Çitil, he signed a statement which contained his denial of the allegations brought against him. Towards the end of the working day he was rushed to the office of the public prosecutor.

174. According to the Government, the applicant was arrested towards the evening of 17 February 1993 and kept in the security room of Derinsu Gendarme Station until the morning of 19 February 1993. They deny the allegations as to the conditions of the applicant's detention and the treatment he was given at Derinsu. In particular, the Government submit that it was impossible for the temperature in the security room at Derinsu to be as low as claimed by the applicant. Moreover, they maintain that while in Derinsu Gendarme Station the applicant was not questioned or interrogated.

175. While the Government acknowledge that on the morning of 19 February 1993 the applicant was taken from Derinsu Gendarme Station to Derik District Gendarmerie Headquarters, they maintain that the applicant only stayed at the Gendarmerie Headquarters for about one hour, this being the time needed for the specialist sergeant Mustafa Yanalak and the gendarme soldier Mustafa Keben to take his statement. The applicant was neither blindfolded nor ill-treated.

176. The Commission notes in the first place that it is not in dispute between the parties that the applicant was arrested and detained in Derinsu Gendarme Station until 19 February 1993. However, it has been presented with diverging accounts as to the date on which the applicant was arrested and as to the conditions of his detention.

177. It has not become clear whether the applicant was kept at Derinsu for two or four days. It is true that the Commission has been provided with a custody note (para. 64), purportedly bearing the applicant's signature, and the Derinsu Gendarme Station's custody ledger (paras. 65-66) from which it appears that the applicant was in fact detained from 17 February 1993. Furthermore, in the statement which the applicant made to the Human Rights Association, it is said that he was forced to pass two days and two nights without sleeping as he was held for four days in Derinsu Gendarme Station (para. 84). However, the Commission notes that when confronted with this apparent inconsistency in his account at the hearing before the Delegates, the applicant stated that he had never seen the custody note (para. 101) and that he must have overlooked the matter of the number of days he spent at Derinsu when he read through the statement made to the Human Rights Association before signing it (para. 108). In addition, the Commission observes that the challenged passage from the applicant's statement to the Human Rights Association could also be interpreted as meaning that he had not been able to sleep in Derinsu Gendarme Station until the third day of his detention. This interpretation would in fact tally

with the applicant's testimony that when his brothers joined him in the security room on the third night they had found him unconscious (para. 107).

178. If there is an inconsistency in the applicant's evidence in this respect, the Commission finds that it is of a minor nature in light of the detailed, precise and on the whole consistent accounts presented by him. Having regard, further, to the fact that the evidence given by the applicant's father, which, although at times imprecise and perhaps somewhat exaggerated, basically supports the applicant's accounts, the Commission considers that this element is insufficient to question the applicant's general credibility.

179. In this respect the Commission also attaches relevance to the fact that the applicant's account contains a number of unusual elements which it would not expect to find in a fabricated story. The Commission refers, as an example, to the applicant's statement to the Delegates, which was confirmed by his father, that his three brothers had persuaded the gendarmes to let them see the applicant in the security room in Derinsu and that they warmed him up.

180. It is true that as regards the temperature of the security room, the applicant has said both that it was -20°C (para. 79) and -30°C (para. 84). However, unlike the Government, the Commission cannot find that this is an inconsistency which detracts from the credibility of the applicant's accounts. The Commission accepts that the applicant merely tried to express his feeling that it was very cold in the security room.

181. As to the veracity of this claim, the Commission notes that according to Harun Altın, the Commander of Derinsu Gendarme Station at the relevant time, the outside walls of the Station were 50 cm. thick and that there were coal-burning stoves in rooms surrounding the security room. He further stated that the security room was equipped with a bed and, it being winter, with two woollen blankets. However, the Commission is not convinced that the presence of coal-burning stoves in spaces and offices in Derinsu Gendarme Station would suffice to heat a room described by the applicant as having concrete walls, a concrete floor and an iron door.

182. This leads the Commission to an assessment of the general credibility of the evidence given by Altın. The Commission notes that when Altın was first questioned about the allegations brought against him by the applicant, i.e. by a public prosecutor at Daday on 20 April 1994, he stated that he could not remember the applicant (para. 90). Yet in his testimony to the Delegates, Altın appeared to have detailed recollection of the applicant and the latter's arrest and detention. He explained this by saying that he had contacted his former colleagues at Derinsu Gendarme Station in order to refresh his memory when he had received the summons to appear before the Delegates and that, in his interview with the Daday public prosecutor, he had only been confronted with the applicant's name which in itself did not mean anything to him (para. 139).

183.. This explanation does not seem convincing to the Commission. In this respect the Commission notes in the first place that it appears from Altın's statement to the public prosecutor that he was informed of the allegations made against him by the applicant (para. 90). Next,

the Commission observes that the custody ledger of Derinsu Gendarme Station only contains six entries for the whole of 1993 and that the applicant was the only detainee who was indicated as being charged with carrying out PKK propaganda (para. 66). Furthermore, according to Musa Çitil, the case against the applicant had received a lot of publicity (para. 146). In these circumstances it is not credible that Altın would have forgotten the applicant altogether when he was interviewed by the Daday public prosecutor only about one year after the event, and that he would have remembered so many details about the applicant and his stay in Derinsu at the hearing before the Delegates at a much later stage. Moreover, it is difficult to understand why Altın would not have similarly refreshed his memory before he was heard by the public prosecutor.

184. In the Commission's view, these factors cast a serious doubt on Altın's credibility as a witness. The Commission has similar doubts concerning the evidence presented by the three villagers Sinan Dinç, Mehmet Dinç and Halit Tutmaz (paras. 149-158). It finds that their statements appear less than frank. It notes in particular that according to Sinan Dinç and Mehmet Dinç the applicant told them that he had been treated well by the Station Commander (para. 151), and that he was pleased with the way he had been treated by the Station Commander and had even been given a blanket by him (para. 155). The Commission finds it in itself unlikely that the applicant should have said this. However, it considers it incredible that he should have expressed himself in this way at a time when he had just returned from the office of the Derik public prosecutor to whom he had complained of his treatment in, *inter alia*, Derinsu Gendarme Station.

185. The Commission is furthermore surprised to note that according to the Government's final observations the three villagers were among the witnesses whose testimony helped secure the applicant's acquittal in the criminal proceedings against him before the Diyarbakır State Security Court (para. 53). When specifically asked, Halit Tutmaz denied ever having been asked questions about the applicant prior to his appearance before the Delegates (para. 156). In addition, the Commission has also given weight to the Delegates' assessment of the three villagers' appearance before them in Strasbourg which was that they gave the impression of having been instructed on what to say or, at the very least, of being anxious to express themselves in a manner which was agreeable to the Government. For these reasons, the Commission considers it unsafe to rely on the testimonies of Sinan Dinç, Mehmet Dinç and Halit Tutmaz.

186. As regards the applicant's detention in Derik District Gendarmerie Headquarters, the Commission finds the course of events as described by the applicant not implausible. Information to the effect that he had threatened village guards had been received by the District Gendarmerie and he was questioned about these allegations. The piece of fabric which the applicant said was used to blindfold him and which he gave to the Derik public prosecutor Hasan Altun provides strong support for his claim that he was ill-treated during this questioning, the more so since the applicant's statement to the public prosecutor of 19 February 1993 expressly includes his account in relation to the blindfold (paras. 76-78). The applicant's testimony that he wrung the wet cloth out over the public prosecutor's desk is another element which the Commission would not expect to find in a fabricated story. Moreover, the Commission was informed that Hasan Altun had decided not

to appear before the Delegates since in his opinion all relevant information was contained in the documents submitted. The Commission considers that Altun would have been an important witness, since he was the person who saw the applicant immediately before his release, who heard his complaints of torture and ill-treatment and who received the piece of cloth from him. His reference to the documents as containing all relevant information must be interpreted, in the Commission's opinion, as confirming that the cloth which was handed over to him was indeed wet, as indicated in the recorded statement by the applicant of 19 February 1993.

187. The Commission further notes that in his evidence, the applicant indicated that after he had signed his statement at Derik District Gendarmerie Headquarters he was rushed to the office of the public prosecutor. Although the applicant attributed this haste to the fact that the end of the working day was looming, the Commission attaches relevance in this respect to Musa Çitil's testimony that the applicant's case had received a lot of publicity and Çitil had received instructions that the case should be heard in court as soon as possible.

188. The Commission notes that the applicant did not go to a doctor following his release and that it has thus not been provided with any medical evidence as to the marks allegedly left on the applicant's body. However, it is not inconceivable that the applicant was at that time in such a state of shock that he did not do what would have seemed reasonable in the circumstances. Furthermore, it appears from the applicant's testimony that he was able to treat the wounds which he allegedly sustained by himself and that the medication he needed was available from a pharmacy (para. 116). It may thus be that he was not actually in need of any medical treatment to be administered by a physician and that a visit to a doctor would have served the sole purpose of obtaining a certificate pertaining to the existence and possible cause of the wounds. Such a course of action would have required the applicant to think clearly of any future steps he might wish to take, and the Commission considers it not unreasonable to accept that he was not capable of that at the time. The Commission, moreover, observes that the applicant's father also testified to the existence of wounds on his son's body (para. 126). Although his father said that the applicant had told him that he had gone to a doctor, it may well be that the applicant only told him that he had procured the necessary medication, which is compatible with Hacı Mehmet Tekin's statement that the applicant "got everything" (para. 128), and that his father had assumed that therefore the applicant must have seen a doctor.

189. Accordingly, the Commission does not consider that the applicant's failure to provide it with a medical certificate impinges on his general credibility.

190. In its evaluation of whether there is sufficient evidence to prove the applicant's allegations beyond reasonable doubt, the Commission cannot exclude the possibility that the applicant's account may contain certain exaggerations as regards the conditions in which he was detained and the treatment to which he was exposed. The Commission has found no reason, however, to question his general credibility, and it finds essential elements in his allegations supported by other evidence, in particular the testimony given by his

father and the remarkable fact of the piece of wet cloth that was handed over to the public prosecutor. On the other hand, the Commission has found reason to doubt the credibility of some of the other witnesses heard in the case (Harun Altin, Sinan Dinç, Mehmet Dinç and Halit Tutmaz), and it must also attach weight to the fact that one of the essential witnesses, the public prosecutor Hasan Altun, failed to appear, without any valid excuse, as a witness before the Commission's Delegates. In these circumstances, and while applying a cautious evaluation of the evidence, the Commission is satisfied that the applicant was kept in a cold and dark cell and that he was blindfolded and treated in a way which left wounds and bruises on his body in connection with his interrogation. It would appear probable that the applicant was subjected to this treatment on the basis of a suspicion that he had threatened village guards to lay down their arms and to join the PKK.

2. Inquiries and investigations at the domestic level into the applicant's allegations

191. Noting that the applicant also alleges that the investigations by the domestic authorities into his allegations of ill-treatment were inadequate, the Commission will next assess the evidence relating to these investigations. The Commission has already noted that there have been no findings of fact by domestic courts (para. 171 sub i). However, the Commission will evaluate the investigations actually made insofar as information regarding these investigations have been provided. The Commission observes in this respect that the Government were requested to submit the investigation file. The Commission must assume that the documents which were received constitute the complete material deemed relevant by the Government in relation to the investigation carried out.

192. The Commission notes in the first place that the applicant brought his complaints of maltreatment in Derinsu Gendarme Station and Derik District Gendarmerie Headquarters to the attention of the Derik public prosecutor Hasan Altun. The Government do not dispute that Altun failed to take any action whatsoever to investigate these allegations (para. 51).

193. It appears that a preliminary investigation was not commenced until 18 December 1993, following the communication of the application to the Government and ten months after the alleged events (para. 54). Upon the request of the Derik public prosecutor Bekir Özenir, who was in charge of the preliminary investigation, Harun Altın was heard by a public prosecutor at Daday on 20 April 1994 (para. 55). Altın denied the allegations, saying that he could not remember the applicant (para. 90).

194. Bekir Özenir issued a decision of non-prosecution in respect of the two accused Harun Altın and Musa Çitil on 4 May 1994. Although according to this decision there was no concrete evidence which substantiated the applicant's allegations, this conclusion appears to have been based solely on Altın's testimony to the effect that he did not remember the applicant. There is no indication that any attempt was made either to question the second accused person, Musa Çitil, or to investigate what had happened during the detention at Derinsu Gendarme Station or Derik District Gendarmerie Headquarters, such as an examination of the custody records or the hearing of the applicant, his

father and brothers or any person who had been at Derinsu Gendarme Station or Derik District Gendarmerie Headquarters at the relevant time.

195. At the instigation of the Ministry of Justice (International Law and External Relations General Directorate) (para. 57) a decision of non-jurisdiction was taken on 4 May 1995 and the case was referred to the Derik District Administrative Council (para. 58). The Commission notes with some surprise that according to the decision of non-jurisdiction the applicant had been detained on the suspicion of having assisted and sheltered PKK members since none of the other documents submitted contain an accusation of this nature.

196. Musa Çitil only appears to have been questioned about the applicant's allegations on 14 July 1995 (para. 59), within the framework of the investigation carried out by the Derik District Administrative Council. The Administrative Council apparently did not find it necessary to question Harun Altın again. There is no indication that the Administrative Council undertook any of the investigative measures mentioned in paragraph 194.

197. The investigations at the domestic level ended with the decision of the Mardin Provincial Administrative Board of 13 September 1995, in which it held that due to lack of evidence Altın and Çitil were exempt from prosecution (para. 60).

198. On the basis of the foregoing, the Commission considers that the investigations carried out by the domestic authorities were flawed and perfunctory. Not only were the allegations which the applicant brought to the attention of the Derik public prosecutor Hasan Altun not acted upon immediately, but the investigations eventually undertaken seem superficial and do not appear to reflect a serious wish to find out what had really happened in Derinsu Gendarme Station and Derik District Gendarmerie Headquarters.

199. In order to allow a fuller assessment of the investigatory measures taken by the authorities, the Delegates had requested the hearing of, *inter alia*, Hasan Altun and Bekir Özenir. However, both these public prosecutors failed to appear before the Delegates for reasons which the Commission cannot find convincing. The Commission has already commented on this unsatisfactory state of affairs in para. 171 sub i. In addition, the Commission notes that in their final observations on the merits of the application the Government contend that the reason for Hasan Altun's failure to act upon the applicant's allegations cannot be ascertained since Altun had not appeared before the Delegates. The Commission does not consider, however, that it should be precluded from drawing conclusions from Altun's apparent failure to act for the simple reason that it was not possible to put questions to him. On the contrary, the Commission finds that Altun's failure to give evidence before the Delegates or in any other form must to some extent affect the evaluation of the facts in this case and hence the examination of the complaints brought by the applicant.

200. On the basis of these findings, the Commission will now proceed to examine the applicant's complaints under the various Articles of the Convention.

D. As regards Article 2 of the Convention

201. 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."

202. The applicant submits that the threats made to his life by the agents of the State Harun Altın and Musa Çitil while he was held in custody constitute a violation of the obligation to protect the right to life.

203. In their final observations on the merits of the application, the Government have not commented on this complaint. However, they maintain that there is no evidence to substantiate the applicant's allegations against the staff at Derinsu Gendarme Station and Derik District Gendarmerie Headquarters.

204. The Commission recalls that Article 2 contains two separate though interrelated basic elements. The first sentence of paragraph 1 sets forth the general obligation that the right to life shall be protected by law. The second sentence of this paragraph contains a prohibition against intentional deprivation of life, delimited by the exceptions mentioned in the second sentence itself and in paragraph 2 (cf. No. 17004/90, Dec. 19.5.92, D.R. 73, p. 155). The present complaint centres on the first element.

205. However, the applicant was not deprived of his life. Nor can the Commission find any indication that his right to life was not protected by law.

CONCLUSION

206. The Commission concludes, unanimously, that there has been no violation of Article 2 of the Convention.

E. As regards Article 3 of the Convention

207. Article 3 of the Convention reads as follows:

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

208. The applicant complains that the treatment to which he was subjected by gendarmes while in their custody between 15 and 19 February 1993 amounted to torture. This torture consisted of blindfolding, aggressive interrogation, assault, threats to his life, being stripped naked, being hosed with cold water, being beaten with a truncheon and being subjected to electric shock treatment and falaka. Furthermore, the conditions of his detention in Derinsu Gendarme Station (being held in darkness in sub zero temperatures in a cell with no bed or blankets, being denied food and liquids and the ignoring of his medical condition) also constituted torture.

209. The applicant further alleges that the treatment to which he was subjected whilst in custody is part of a practice of torture in Turkey which calls into question the commitment of the Government in respecting the guarantees of Article 3 and which creates an aggravated violation of this provision. In this respect reference is made to findings by the European Committee for the Prevention of Torture (CPT), the United Nations Committee for the Prevention of Torture, the United Nations Special Rapporteur and various non-governmental organisations such as Amnesty International.

210. The Government deny the applicant's claims and submit that they are illogical, inconsistent and unsubstantiated. In their opinion, the applicant's allegations of torture are part of the separatist campaign in which he participates.

211. The Commission does not consider it appropriate to analyse the individual elements of the applicant's allegations as regards their characterisation under Article 3 of the Convention. It will examine the treatment suffered by the applicant as a whole. Further, while it notes with grave concern the considerable body of documentation relating to allegations of other instances of torture on persons held in custody in Turkey, it will confine itself to an examination of the allegations in the present case (cf. Aydın v. Turkey, Comm. Report 7.3.96, para. 185, currently pending before the Court).

212. The Commission reiterates that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention. The assessment of this minimum is, in the nature of things, relative. It depends on all the circumstances of the case, such as the nature and context of the treatment, its duration and its physical or mental effects (cf. Eur. Court HR, Soering v. the United Kingdom judgment of 7 July 1989, Series A no. 161, p. 39, para. 100). The Commission further notes that "the Convention, with its distinction between 'torture' and 'inhuman or degrading treatment', should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering" (Eur. Court HR, Ireland v. the United Kingdom judgment, op. cit., p. 66, para. 167; Aksoy v. Turkey judgment, op. cit., para. 63).

213. The Commission has also had regard to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted on 10 December 1984 by the General Assembly of the United Nations which provides in Article 1:

> "For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes

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as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity..."

214. The Commission recalls its finding above (para. 190) that, on the basis of the written and oral evidence before the Commission, it has been established beyond reasonable doubt that the applicant was kept in a cold and dark cell, blindfolded and treated in a way which left wounds and bruises on his body in connection with his interrogation. Moreover, it is clear that on 19 February 1993 he complained of torture and ill-treatment before the public prosecutor and that no action was taken in regard to his complaints.

215. The Commission finds that the conditions of detention and the treatment to which the applicant was subjected constituted at least inhuman and degrading treatment within the meaning of Article 3 of the Convention.

CONCLUSION

216. The Commission concludes, by 31 votes to 1, that there has been a violation of Article 3 of the Convention.

F. <u>As regards Article 5 para. 1 of the Convention</u>

217. Article 5 para. 1, insofar as relevant, provides as follows:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

..."

218. The applicant argues that the phrase "security of person" in Article 5 of the Convention should be interpreted as encompassing the protection of the integrity of the individual and the protection from such conditions of detention that violate that integrity. In his opinion, the conditions of detention themselves are part of the requirements of conformity of an arrest with Article 5 para. 1. In view of the conditions of the detention encountered by him, the applicant submits that his detention was contrary to Article 5 para. 1.

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219. The Government maintain that at the time of the applicant's arrest there existed a reasonable suspicion which was supported by a certain amount of evidence that he had threatened village guards to lay down their arms. In their view, it is clear that the applicant was arrested for the purpose of bringing him before a court.

220. The Commission notes that it is not in dispute between the parties that the applicant's arrest served the purpose provided for in Article 5 para. 1(c). The Commission considers that it has already examined the applicant's complaints concerning the conditions of his detention under Article 3 of the Convention.

CONCLUSION

221. The Commission concludes, unanimously, that it is unnecessary to examine the complaint under Article 5 para. 1 of the Convention.

G. As regards Article 10 of the Convention

222. Article 10 of the Convention, insofar as relevant, provides as follows:

> "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 ...
>
> 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."

223. The applicant alleges that his arrest was essentially motivated by the fact that he is a journalist with Özgür Gündem. He submits that his right to receive and impart information was interfered with contrary to Article 10 through treatment at the hands of the security forces intended to silence him.

224. The Government maintain that there is no evidence to substantiate the applicant's allegations against the security forces.

225. The Commission considers that it has not found evidence to corroborate the application's complaint that his arrest and detention were due to the fact that he was a journalist with Özgür Gündem. In these circumstances, the Commission cannot find it established that there has been an interference with the right protected by Article 10 of the Convention in respect of the applicant.

CONCLUSION

226. The Commission concludes, unanimously, that there has been no violation of Article 10 of the Convention.

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H. As regards Article 6 para. 1 of the Convention

227. Article 6 para. 1 of the Convention, insofar as relevant, reads as follows:

> "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. ..."

228. The applicant, while not contending that the ability to seek compensation would offer sufficient redress for torture or inhuman or degrading treatment, complains of a denial of effective access to court to seek compensation contrary to Article 6 para. 1 of the Convention. He submits that the public prosecutor Hasan Altun failed to carry out a proper, objective and independent investigation into the applicant's allegations which could have led him to reach a balanced and informed decision on whether to bring a prosecution. Moreover, without such a prosecution having been instituted, he would have had no prospect of success in civil proceedings.

229. The Government argue that the applicant did have access to court and submit that there is evidence that he would have obtained the results he desired if he had cooperated with the system of remedies available under domestic law instead of turning to the Human Rights Association.

230. The Commission recalls the findings of the Court in the case of Aksoy v. Turkey (op. cit., paras. 92-94) where it was found that, although there is no doubt that Article 6 para. 1 applies to a civil claim for compensation in respect of ill-treatment allegedly committed by agents of the State, the crux of the complaint concerned the prosecutor's failure to mount a criminal investigation. The Court considered that it was more appropriate to examine the complaint in relation to the more general obligations on States under Article 13 to provide an effective remedy in respect of violations of the Convention.

231. The Commission, noting that the nature of the complaint under Article 6 para. 1 in the present case is comparable to the complaint in the Aksoy case cited above, finds that there are no reasons to reach a different conclusion.

CONCLUSION

232. The Commission concludes, unanimously, that it is unnecessary to examine the complaint under Article 6 para. 1 of the Convention.

I. As regards Article 13 of the Convention

233. Article 13 of the Convention reads 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."

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234. The applicant submits that the lack of an independent investigation into his allegations represents a denial of an effective remedy for his complaints contrary to Article 13 of the Convention. In his opinion, this denial is part of an administrative practice of failure to provide and implement effective remedies, characterised by the attitude of public prosecutors and gendarmes and the inadequate medical and forensic procedures practised in Turkey. The applicant refers to other cases brought before the Commission involving similar allegations of ineffective remedies in South-East Turkey, and findings made by the CPT and the United Nations Committee for the Prevention of Torture to the effect that the persistent nature of allegations of human rights abuses reported from Turkey indicates a failure to take effective action to address them.

235. The Government have not specifically addressed this issue beyond stating that the applicant's allegations have not been substantiated.

236. Although the Commission is concerned about the apparent frequency with which it encounters occasions where no action is taken upon allegations of serious offences committed by security force personnel which are brought to the attention of public prosecutors, it considers that it should limit itself to an examination of the allegations in the present case.

237. The Commission notes that according to the Court in the above-mentioned case of Aksoy v. Turkey, "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" (op. cit., para. 95). The Court further held that in view of the fundamental importance of the prohibition of torture Article 13 imposes an obligation on States to carry out a thorough and effective investigation of incidents of torture (op. cit., para. 98).

238. The Commission observes that it is undisputed that the applicant complained to the Derik public prosecutor Hasan Altun of having been tortured during custody in Derinsu Gendarme Station and Derik District Gendarmerie Headquarters. The Commission notes, moreover, that under Turkish law the public prosecutor was under a duty to carry out an investigation (para. 164). However, the Commission has found that no investigation was instigated by the public prosecutor Hasan Altun (para. 192).

239. The Commission further considers that it cannot be said that the investigation subsequently commenced - which was in itself inadequate - made up for the initial inactivity. The major deficiencies in this investigation have been outlined in para. 198.

240. It is possible that if the Commission had been able to examine the public prosecutors Hasan Altun and Bekir Özenir who had been summoned to give evidence before the Delegates, a fuller assessment of the investigatory measures taken by the authorities could have been made, and certain doubts as to the adequacy of the measures might have been dispelled. However, as has been noted above (para. 93-95), these public prosecutors failed to appear before the Delegates. In the

absence of their evidence, and on the basis of the available material, the Commission considers that the investigation into the applicant's allegations of torture was so inadequate as to amount to a denial of an effective remedy.

CONCLUSION

241. The Commission concludes, by 31 votes to 1, that there has been a violation of Article 13 of the Convention.

J. As regards Articles 14 and 18 of the Convention

242. Articles 14 and 18 of the Convention provide as follows:

Article 14

"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."

Article 18

"The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

243. The applicant submits that because of his Kurdish origin the various alleged violations of his Convention rights were discriminatory, in breach of Article 14 of the Convention. He also claims that his experiences represented an authorised practice by the State in breach of Article 18 of the Convention.

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

245. The Commission has examined the applicant's allegations in the light of the evidence submitted to it, but considers them unsubstantiated.

CONCLUSIONS

246. The Commission concludes, unanimously, that there has been no violation of Article 14 of the Convention.

247. The Commission concludes, unanimously, that there has been no violation of Article 18 of the Convention.

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K. Recapitulation

248. The Commission concludes, unanimously, that there has been no violation of Article 2 of the Convention (para. 206).

249. The Commission concludes, by 31 votes to 1, that there has been a violation of Article 3 of the Convention (para. 216).

250. The Commission concludes, unanimously, that it is unnecessary to examine the complaint under Article 5 para. 1 of the Convention (para. 221).

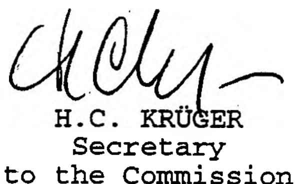
251. The Commission concludes, unanimously, that there has been no violation of Article 10 of the Convention (para. 226).

252. The Commission concludes, unanimously, that it is unnecessary to examine the complaint under Article 6 para. 1 of the Convention (para. 232).

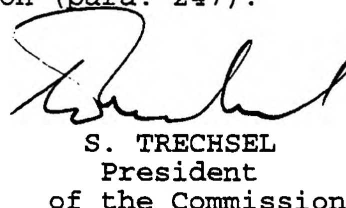
253. The Commission concludes, by 31 votes to 1, that there has been a violation of Article 13 of the Convention (para. 241).

254. The Commission concludes, unanimously, that there has been no violation of Article 14 of the Convention (para. 246).

255. The Commission concludes, unanimously, that there has been no violation of Article 18 of the Convention (para. 247).



H.C. KRÜGER
Secretary
to the Commission



S. TRECHSEL
President
of the Commission

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(Or. French)

OPINION DISSIDENTE DE M. GÖZÜBÜYÜK

Je ne considère pas, contrairement à la majorité, que dans la présente requête la violation de l'article 3 a pu être prouvée au delà de tout doute raisonnable.

Premièrement, aucune preuve médicale n'a été soumise de la part du requérant dont le statut de journaliste permettait de penser qu'il devait être conscient de la valeur de preuve d'un rapport médical.

Cela était d'autant plus important dans son cas qu'il prétendait avoir subis de mauvais traitements le jour même de sa libération le 19 février 1993, donc à un moment où les traces de tels actes pouvaient être facilement décelées.

Deuxièmement, la nature des mauvais traitements que le requérant prétend avoir subis sont de nature à laisser des traces surtout lorsque l'examen médical intervient le jour même ou le lendemain. L'eau froide aurait provoqué une hypothermie locale ou même des engelures étant donné les basses températures, les coups de bâton des ecchymoses, les électrochocs des brûlures.

Je tiens à souligner notamment que lors de l'introduction de la requête devant la Commission, le requérant n'a aucunement fait allusion à des électrochocs. Je me réfère à cet égard à la décision sur la recevabilité (p. 45 et 46).

Or, le requérant a formulé ses griefs portant sur les électrochocs pour la première fois devant les délégués de la Commission à Diyarbakır. Oublier un tel traitement lors de la préparation de la requête, si ce traitement a eu vraiment lieu, n'est pas possible. Se souvenir des électrochocs seulement après la recevabilité, devant les délégués, fait planer à mes yeux un doute plus que sérieux sur la crédibilité du requérant. Il faut ajouter que pareil traitement aurait été le seul dont les traces auraient pu être décelées à la suite d'un examen médical.

Par ailleurs, j'estime que si l'on tente de remplacer l'élément de preuve médical par les dépositions des membres de la famille du requérant, on en prendrait des voies incertaines et dangereuses.

Les conclusions de la Commission ne me paraissent pas convaincantes et pour ces raisons, particulières à cette requête, je ne partage pas non plus la conclusion concernant l'article 13 dans la mesure où l'absence de preuves rend la question du recours effectif illusoire. La Commission dans la requête 10427/83 (vol. 47, p. 85) a estimé que des griefs "totalement dépourvus de substance" n'étaient pas défendables au sens de l'article 13 de la Convention.

Je considère que dans cette requête les conclusions de la majorité de la Commission, au lieu de se fonder sur des preuves matérielles tangibles, sont basées sur des déductions qui ne s'appuient pas sur des éléments de preuves.

APPENDIX

DECISION OF THE COMMISSION

AS TO THE ADMISSIBILITY OF

Application No. 22496/93
by Salih TEKİN
against Turkey

The European Commission of Human Rights sitting in private on 20 February 1995, the following members being present:

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

Mr. H.C. KRÜGER, Secretary to the Commission

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

Having regard to the application introduced on 14 July 1993 by Salih TEKİN against Turkey and registered on 20 August 1993 under file No. 22496/93;

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 22 April 1994 and the observations in reply submitted by the applicant on 12 July 1994;

Having deliberated;

Decides as follows:

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THE FACTS

The applicant, a Turkish citizen of Kurdish origin, was born in 1964 and lives at Diyarbakır. He 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 states that the following occurred:

The applicant is a journalist. Since 30 May 1992 he has worked for the newspaper Özgür Gündem.

On 12 February 1993 he travelled to Yassıtepe hamlet at Derinsu village in the Derik district for a holiday and to visit his family who lives there. He was not there to write or to investigate stories, but he carried his press card with him.

On 15 February 1993 the Gendarme Commanders of Derinsu and Dumluca villages, accompanied by soldiers, raided his father's house where he was staying and arrested him. His father Hacı Mehmet and his three brothers Arif, Fethi and Abdulkadir were also arrested. They were brought to the Derinsu Gendarme Station. The applicant was taken to a detention cell and the others left with the soldiers in a canteen.

At about midnight all were taken in turn, blindfolded to an interrogation room. This was organised by the station commander whose first name was Harun. The applicant was questioned about alleged threats he and the others had made to village protectors locally. The applicant denied all such allegations but was threatened continually during the interrogation including with death. He was also physically assaulted a number of times. The other members of the family were not ill-treated during questioning and were released at 1.00 on 16 February 1993, on condition that they stayed in the village.

The applicant was held for four days in a cell, where the temperature was far below zero. He was not given any blankets, which he requested. Nor was he given any food during these days. He was subject to constant abuse from his interrogators over this period. In order not to freeze to death he had to keep himself awake throughout this time. He informed the police that he had only one functioning kidney but they ignored it. This experience is expressed in the applicant's own words as follows:

<Translation>

> "In order not to freeze I was forced to pass 2 days and 2 nights without sleeping as I was held for 4 days in weather of -30 degrees, starved and left thirsty without being given a blanket or heating equipment of any shape or form. I should also state that although one of my kidneys does not function and I told them this, they gave me nothing at all to warm myself up."

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On 19 February 1993 he was taken from Derinsu Gendarme station to the Derik Gendarme station. He was again blindfolded and he remained blindfolded throughout his interrogation. He told his interrogators that he was a journalist, but was nevertheless subject to a brutal questioning. He was again accused of threatening village protectors and of having written propaganda for the PKK. His interrogators wanted him to admit these accusations. He refused since they were untrue. He was also accused of having written critical reports about the security forces and the protectors in this region for his newspaper.

He was stripped naked and hosed with cold water at sub-zero temperatures. Throughout this procedure he was truncheoned on the back, buttocks and ankles until he passed out. He recalls regaining consciousness and finding soldiers trying to dress him and revive him. He was later taken up two floors, where he was required to stand in the room of the Gendarme Commander, whom he could recognise as Commander Musa Çitil. The Commander said: "you write reports about Derik and Metina near Derik (an area where there are many protectors) and disturb us. And you threaten village protectors. If you come to this area again I shall open two bullet holes in your head."

He recalls that he was brought back again to the lower floor, where despite his denials he was forced to sign a statement that the police had prepared. At some point he was brought before the public prosecutor of Derik. He informed the prosecutor that the accusations were false and that he had been forced to sign the statement. He pointed to the blindfold still around his neck which his interrogators had overlooked to remove which was still wet, as proof of the hosing torture he had been subjected to. The prosecutor wrote down what the applicant said including his allegations of torture and his complaint against the Commander of the police, Musa Çitil. He was soon after released by the authority of the prosecutor. The applicant is not aware of any further action taken by the prosecutor over his complaints and he himself has not been arraigned on the basis of his statement to the Derik gendarme. At no point during his detention did he have access to a doctor or a lawyer.

On 26 October 1993, the newspaper Özgür Gündem reported that the applicant's family had been threatened by the security forces to the effect that they should leave their village or their houses would be demolished and they would be killed.

On 19 August 1993, the applicant was arrested by the security forces and remanded in custody on charges of separatism under the Anti-Terrorism Law. He was detained for a period of 22 days and interrogated over 15 days. During this time, the applicant was kept naked and subjected to torture. When brought before the public prosecutor in Sirnak, he denied the allegations and claimed that he was being tortured because of his reporting for his newspaper. On 18 November 1993, the applicant was released on bail. Following four hearings, the applicant was acquitted of the charges against him on 23 June 1994.

While released on bail pending trial, the applicant was arrested on 28 January 1994 at the office of Özgür Gündem in Diyarbakır. Following torture by the gendarmes, the applicant was forced to sign a statement of admission. On 28 June 1994, the applicant was arrested for membership of the PKK and remanded in custody pending his trial.

The respondent Government state as follows.

The applicant was detained by Derik Gendarme Commander Units upon intelligence reports that he was visiting village protectors and threatening that they should join the PKK or they would be killed. On 19 February 1993, he was taken by the Gendarme Commander before the Derik public prosecutor to whom were submitted three written intelligence reports and the applicant's testimony signed by him on that date in which he denied the allegations of making threats. The applicant appeared before the public prosecutor on a second occasion on the same day when he again denied the allegations and this time complained that he had been severely ill-treated. The Government state that no reliable evidence of ill-treatment was given. The applicant was then taken before a justice of the peace. After questioning, the applicant was released on the ground of inadequate evidence.

The Derik public prosecutor ceded jurisdiction in the matter to the prosecutor attached to the Diyarbakır State Security Court where the applicant was indicted but later acquitted on 2 August 1993 of having made threats (Articles 188-191 of the Criminal Code).

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), 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.

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, 5, 6, 10, 13, 14 and 18 of the Convention. He states that there is an administrative practice of violation of each of these provisions of the Convention at the highest levels of the security forces.

As to Article 2 he claims that the threats to his life by agents of the State constitute violations of that Article.

As to Article 3 he refers to the treatment to which he was exposed, which in his opinion constituted torture.

As to Article 5 he states that he was never informed of the legal basis for his arrest, contrary to paragraph 2 of that Article. He considers that the fact that Turkey has made a derogation under Article 15 of the Convention with regard to Article 5 does not remove the Commission's competence to scrutinise the facts of the applicant's arrest and detention, in particular in view of the absence of safeguards against abuses such as torture. His own experiences during his detention were such as to render that detention a violation of Article 5 notwithstanding any claim as to the derogation under Article 15.

As to Article 6 he refers to the fact that there seems to have been no effort to pursue his complaints which were recorded by a prosecutor prior to his release. The failure to act to vindicate his rights represents, in his opinion, a denial of justice and of access to court contrary to Article 6.

As to Article 10 the applicant states that the treatment to which he was subjected was because of his profession as a journalist. Consequently, his right and duty to seek, receive and impart information was repudiated.

As to Article 13 he alleges that he has been denied the possibility of remedies against the arbitrary use of power by the security forces. His detention and torture demonstrate the absence of effective legal safeguards or constraints in that part of Turkey, an absence of the rule of law which extends beyond the police and military to paralyse the prosecution and judicial authorities.

As to Article 14 the applicant complains of a systematic denial of the protection of the rule of law in south-eastern Turkey against persons of Kurdish identity and origin. He considers that he has been

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a victim of a violation of Article 14 in conjunction with each substantive right he alleges to have been violated and that the ground of discrimination has been that of his ethnic origin.

As to Article 18 he claims that the Turkish Government have as a matter of policy restricted his rights for purposes which are incompatible with the guarantees of the Convention. In fact the Government and their law enforcement agencies are combating the violent actions of the PKK in a manner which ignores the State's obligations under the Convention.

The applicant submits that adequate and effective remedies are unavailable to him. The prosecutor present in Derik Gendarme station, who recorded his statement of complaint, has failed to act to vindicate his rights, and he is not in a position under Turkish law to pursue a civil claim until the prosecutor has commenced criminal proceedings. The Emergency Laws prevent any accountability of the security forces, and the reality of officially sanctioned violations of his rights at the level of senior command in the security forces renders inoperable any conceivable domestic remedies.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 14 July 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 22 April 1994 after two extensions in the time-limit. The applicant submitted further information on 16 December 1993 and observations in reply on 12 July 1994 after one extension in the time-limit.

THE LAW

The applicant makes complaints in respect of his arrest and detention, alleging, inter alia, that he was tortured. He invokes Article 2 (right to life), Article 3 (prohibition on inhuman and degrading treatment), Article 5 (right to liberty), Article 6 (right of access to court), Article 10 (right to receive and impart information), Article 13 (right to effective national remedies for Convention breaches), Article 14 (prohibition on discrimination) and Article 18 (prohibition on using authorised Convention restrictions for ulterior purposes).

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.

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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 note that the applicant failed to take any steps to secure a medical examination to certify the alleged ill-treatment, by for example requesting the public prosecutor to refer him to a forensic medical centre. They also point out that there is an ongoing investigation by the Derik public prosecutor into the allegations. 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 if the perpetrators of the alleged ill-treatment 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 Derik, the applicant submits that he had already made complaint of torture to that official on 19 February 1993 but that no step such as providing for medical examination was taken. He calls in question the efficacy of entrusting the investigation to the prosecutor who had already failed to take any action on his complaints.

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 that the Government accept that the applicant complained of torture when he appeared before the public prosecutor on 19 February 1993 and that no steps were taken in response to this complaint.

Furthermore, while the Government refer to the inquiry now pending before the same public prosecutor, the Commission notes that about two years have elapsed since the actual event 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 applicant's allegations, 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, Yağıgiz 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.

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, which have not formally been brought before the local instances for fear of reprisals.

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 refer to the intense campaign of terrorism which has been conducted in Turkey and which threatens the integrity and indivisibility of the State. They consider that the applicant's statements are inconsistent since he refers to being obliged to sign a statement after torture whereas in the written statement of the applicant dated 19 February 1993 denies the allegations that he had

made threats or operated on behalf of the PKK. They point out that the ill-treatment alleged would have left visible signs but that he did not attempt to obtain medical examination of his physical condition. They submit that the applicant's acquittal on the charges of making threats six months after his arrest indicates that the judicial system is functioning effectively.

The applicant maintains his account of events. He refers to having drawn the public prosecutor's attention to the soaking blindfold round his neck but that the prosecutor took no steps to have him medically examined. As regards the statement referred to by the Government, he points out that a copy has not been provided and that it is likely that in addition to the admission which he recalls being required to sign there is a further statement which truthfully records his testimony to the questioning.

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.

Secretary to the Commission President of the Commission

(H.C. KRÜGER) (C.A. NØRGAARD)

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[illegible]

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

CASE OF TEKIN v. TURKEY

(52/1997/836/1042)

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JUDGMENT

STRASBOURG

9 June 1998

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SUMMARY[1]

Judgment delivered by a Chamber

Turkey – treatment in police custody (Law No. 2935 on the State of Emergency, Decrees Nos. 285 and 430).

I. ESTABLISHMENT OF THE FACTS

Court will exercise fact-finding powers only in exceptional circumstances – Commission had opportunity to see and hear oral testimony – where key witnesses failed to attend hearings before Commission, respondent State not justified in complaining of insufficiency of evidence – acceptance of facts as found by Commission.

II. ARTICLE 2 OF THE CONVENTION

Facts found by Commission do not support conclusion that applicant suffered interference with right to life.

Conclusion: no violation (unanimously).

III. ARTICLE 3 OF THE CONVENTION

Applicant held in cold, dark cell, blindfolded and treated so as to leave wounds and bruises on body – inhuman and degrading treatment.

Conclusion: violation (six votes to three).

IV. ARTICLES 5 § 1 AND 6 § 1 OF THE CONVENTION

Complaints not pursued.

Conclusion: not necessary to examine.

V. ARTICLE 10 OF THE CONVENTION

Not established that applicant's detention and treatment in custody amounted to interference with freedom of expression.

Conclusion: no violation (unanimously).

1. This summary by the registry does not bind the Court.

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VI. ARTICLE 13 OF THE CONVENTION

Public prosecutor to whom applicant complained of ill-treatment on release from custody took no action – investigation commenced after communication of application by Commission inadequate.

Conclusion: violation (seven votes to two).

VII. ARTICLES 14 AND 18 OF THE CONVENTION

No evidence of breaches of these provisions.

Conclusion: no violation (unanimously).

VIII. ARTICLE 50 OF THE CONVENTION

A. Damage: compensation for non-pecuniary damage.

B. Costs and expenses: awarded on an equitable basis.

Conclusion: respondent State to pay applicant specified sums (eight votes to one).

COURT'S CASE-LAW REFERRED TO

4.12.1995, Ribitsch v. Austria; 18.12,1996, Aksoy v. Turkey; 24.4.1998, Selçuk and Asker v. Turkey

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In the case of Tekin v. Turkey[1],

The European Court of Human Rights, sitting, in accordance with Article 43 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A[2], as a Chamber composed of the following judges:

Mr R. BERNHARDT, *President*,
Mr THÓR VILHJÁLMSSON,
Mr F. GÖLCÜKLÜ,
Mr C. RUSSO,
Mr J. DE MEYER,
Mr J.M. MORENILLA,
Mr L. WILDHABER,
Mr K. JUNGWIERT,
Mr V. TOUMANOV,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 28 March and 22 May 1998,

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 27 May 1997, within the three-month period laid down by Articles 32 § 1 and 47 of the Convention. It originated in an application (no. 22496/93) against the Republic of Turkey lodged with the Commission under Article 25 by Mr Salih Tekin ("the applicant"), a Turkish citizen, on 14 July 1993.

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Notes by the Registrar

1. The case is numbered 52/1997/836/1042. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and its position on the list of the corresponding originating applications to the Commission.

2. Rules of Court A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol. They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

The Commission's request referred to Articles 44 and 48 and to the declaration whereby Turkey recognised the compulsory jurisdiction of the Court (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, 3, 5 § 1, 6 § 1, 10, 13, 14 and 18 of the Convention.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings and designated the lawyers who would represent him (Rule 30).

3. The Chamber to be constituted included *ex officio* Mr F. Gölcüklü, the elected judge of Turkish nationality (Article 43 of the Convention), and Mr R. Ryssdal, the President of the Court (Rule 21 § 4 (b)). On 3 July 1997, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr C. Russo, Mr J. De Meyer, Mr J.M. Morenilla, Mr L. Wildhaber, Mr K. Jungwiert, and Mr V. Toumanov (Article 43 *in fine* of the Convention and Rule 21 § 5).

4. As President of the Chamber (Rule 21 § 6), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Government of Turkey ("the Government"), the applicant's lawyers and the Delegate of the Commission on the organisation of the proceedings (Rules 37 § 1 and 38). Pursuant to the orders made in consequence and to the Government's request for an extension of the time-limit for the filing of their memorial, the Registrar received the applicant's memorial on 21 January 1998 and the Government's memorial on 4 February 1998.

5. Subsequently Mr R. Bernhardt, the Vice-President of the Court, replaced Mr Ryssdal, who had died on 18 February 1998, as President of the Chamber (Rule 21 § 6, second sub-paragraph).

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 25 March 1998. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*
Mr M. ÖZMEN, *Co-Agent*,
Mr A. KAYA,
Mr K. ALATAŞ,
Mr F. POLAT,
Miss A. EMÜLER,
Miss M. ANAYAROĞLU, *Advisers*;

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(b) *for the Commission*
Mr H. DANELIUS, *Delegate*;

(c) *for the applicant*
Mr K. BOYLE, Barrister-at-Law,
Ms A. REIDY, Barrister-at-Law, *Counsel*,
Mr K. YILDIZ, Kurdish Human Rights Project, *Adviser*.

The Court heard addresses by Mr Danelius, Mr Boyle and Mr Özman, and also the Government's replies to its questions.

AS TO THE FACTS

I. CIRCUMSTANCES OF THE CASE

7. The applicant, Mr Salih Tekin, a Turkish citizen of Kurdish origin, was born in 1964 and lives in Diyarbakır. Prior to the events in question, he had been employed as a journalist for the newspaper *Özgür Gündem*.

The facts in the case are disputed.

A. The applicant's detention

8. It was not disputed that in February 1993, during a visit to his family in the hamlet of Yassıtepe, the applicant was arrested, on suspicion of threatening village guards, by gendarmes under the command of Officer Harun Altın and taken to Derinsu Gendarme Station.

The applicant alleged that his arrest took place on the morning of 15 February 1993, whereas the Government claimed that it occurred on 17 February 1993.

9. He was held at Derinsu until 19 February 1993.

He alleged that during his time in custody there he was detained in a cell without any lighting, bed or blankets, in sub-zero temperatures, and fed with only bread and water. He claimed to have been assaulted in his cell by gendarmes, including Officer Altın. He stated that he would have died of cold had his three brothers not been permitted to enter his cell on the night of 18 February and wrapped him in extra clothing.

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The Government denied that Mr Tekin had been ill-treated. They stated that it would have been impossible for the temperature in the security room to have dropped below freezing point, since it was situated in the centre of the building and surrounded by other units heated by coal-burning stoves. They also denied that his brothers had been allowed to join him there.

10. On the morning of 19 February 1993, the applicant was taken to Derik District Gendarmerie Headquarters. He was released on the same day.

He alleged to have been tortured at Derik, through the application of cold water, electric shocks and beatings, with the purpose of forcing him to sign a confession statement. He claimed that the District Gendarmerie Commander, Musa Çitil, threatened him with death if he returned to the area.

The Government contested that any ill-treatment had taken place.

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B. Applicant's complaint to public prosecutor Hasan Altun

11. Prior to being released, Mr Tekin was brought before the public prosecutor, Hasan Altun.

It was not disputed that he complained to Mr Altun of having been tortured and ill-treated at both Derinsu and Derik. The applicant claimed in addition that he had handed Mr Altun a wet piece of cloth with which he had been blindfolded while being hosed with water. Mr Altun recorded these allegations, but took no further action in relation to them.

12. The Supreme Council of Judges and Prosecutors consequently decided to commence an investigation into the reasons for Mr Altun's inaction, which led to disciplinary proceedings being launched against him. During the hearing before the Court the Government confirmed that these proceedings had not yet been concluded.

13. Mr Tekin returned to Diyarbakır on 20 February 1993. He did not see a doctor after his release. The following week he lodged a complaint about his treatment with the Human Rights Association ("HRA"), which advised him to make an application to the Commission.

C. Criminal proceedings against the applicant

14. Since the offence with which the applicant was charged (see paragraph 8 above) fell within the competence of the State Security courts (see paragraph 29 below), a Derik public prosecutor issued a decision of non-jurisdiction and referred the case to the Diyarbakır State Security Court.

Following a hearing on 13 May 1993, the applicant was acquitted on 2 August 1993.

D. Proceedings against gendarme officers Altın and Çitil

15. Following the Commission's communication to the Government on 11 October 1993 of Mr Tekin's application, the Ministry of Justice (International Law and External Relations General Directorate) contacted the public prosecutors' office in Derik on 18 December 1993, informing them of the applicant's complaints. A preliminary investigation was opened.

16. Officer Altın was questioned in connection with Mr Tekin's allegations by a public prosecutor in Daday district on 20 April 1994, at the request of the Derik public prosecutor, Bekir Özenir.

17. Mr Özenir issued a decision of non-prosecution in relation to officers Altın and Çitil on 4 May 1994, on the grounds that there was no evidence that they had ill-treated or threatened Mr Tekin, other than the latter's unsubstantiated allegations.

18. However, this decision was not made final following the intervention of the Ministry of Justice, which took the view that Mr Tekin should be given the opportunity to file an appeal against it. Furthermore, because of the identities of the defendants and the nature of the allegations against them, the Ministry of Justice considered that the alleged offences might fall within the scope of the Law on the Prosecution of Civil Servants, over which the public prosecutor had no jurisdiction (see paragraph 30 below).

19. A decision of non-jurisdiction was subsequently issued by the office of the Derik public prosecutor on 4 May 1995 and the case was referred to the Derik District Administrative Council.

20. In this connection, on 14 July 1995, a statement was taken from Commander Çitil by a Gendarme Lieutenant Colonel.

21. The Derik District Administrative Council submitted its summary investigation report to the office of the Mardin Provincial Governor on 5 September 1995. On 12 September 1995, this report was referred to the Mardin Provincial Administrative Board (see paragraph 30 below). The latter decided, on 13 September 1995, that, due to lack of evidence, officers Altın and Çitil were exempt from public prosecution.

22. This decision was subject to an automatic appeal to the Council of State (see paragraph 30 below). The latter confirmed the decision of non-prosecution.

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E. Commission's findings of fact

23. The Commission conducted an investigation into the facts, with the assistance of the parties. It accepted written material, including witness statements, reports about Turkey, documents relating to the applicant's detention in Derinsu and Derik Gendarme Stations and to the investigation on the domestic level into the applicant's allegations, and a floor plan of Derinsu Gendarme Station. In addition, three Delegates of the Commission heard the oral evidence of seven witnesses in Diyarbakır on 8 November 1995 and a further hearing took place before the Commission in Strasbourg on 7 March 1996. The witnesses included the applicant, his father, Haci Mehmet Tekin, officers Harun Altın and Musa Çitil, and three neighbours of the applicant's father, Sinan Dinç, Mehmet Dinç and Halit Tutmaz, who alleged to have spoken to the applicant shortly after his release.

The Commission had requested the attendance of the public prosecutors Hasan Altun, Bekir Özenir and Osman Yetkin (the latter was the public prosecutor at the Diyarbakır State Security Court), but none of them appeared to give evidence.

24. The Commission was unable to determine the date of the applicant's arrest or the precise details of his treatment in custody. However, cautiously evaluating the evidence, the Commission was satisfied that the applicant had been kept in a cold and dark cell and blindfolded and treated in a way which left wounds and bruises on his body in connection with his interrogation.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. State of Emergency

25. 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 xconfrontation has, according to the Government, claimed the lives of thousands of civilans and members of the security forces.

26. 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.

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."

B. General provisions against ill-treatment, threats and unlawful detention

27. The Turkish Criminal Code makes it a criminal offence:

(a) to deprive someone unlawfully of his or her liberty (Article 179 generally, Article 181 in respect of civil servants),

(b) to issue threats (Article 191),

(c) to subject someone to torture or ill-treatment (Articles 243 and 245).

28. 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.

C. Prosecution for terrorist offences and offences allegedly committed by members of the security forces

29. 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.

30. 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 26 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

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file to the Administrative Council. A decision by the Council not to prosecute is subject to an automatic appeal to the Council of State.

PROCEEDINGS BEFORE THE COMMISSION

31. Mr Tekin applied to the Commission on 14 July 1993. He alleged that he had been ill-treated while being held in detention in gendarme stations in Derinsu and Derik from 15-19 February 1993 and that this event had not been adequately investigated by the State authorities. He invoked Articles 2, 3, 5 § 1, 6 § 1, 10, 13, 14 and 18 of the Convention.

32. The Commission declared the application (no. 22496/93) admissible on 20 February 1995. In its report of 17 April 1997 (Article 31), it expressed the opinion that there had been no violation of Articles 2, 10, 14 and 18 (unanimously), but that there had been violations of Articles 3 and 13 (thirty-one votes to one) and that it was not necessary to examine the applicant's other complaints (unanimously). The full text of the Commission's opinion and of the dissenting opinions contained in the report is reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT

33. In their written and oral submissions, the Government asked the Court to find that the applicant's allegations had been unsubstantiated and that there had been no violation of the Convention.

34. The applicant asked the Court to find violations of Articles 2, 3, 10, 13, 14 and 18 of the Convention and to award him just satisfaction pursuant to Article 50.

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AS TO THE LAW

I. ESTABLISHMENT OF THE FACTS

35. The Government challenged the Commission's findings of fact.

1. *Note by the Registrar*. For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* 1998), but a copy of the Commission's report is obtainable from the registry.

They pointed out that had the applicant's allegations of severe ill-treatment been true, he would have required hospital treatment following his release. In these circumstances it was suspicious that he had not produced any medical reports, particularly since his work as a journalist would have made him aware of the need for this type of evidence. His claim that his brothers had been allowed to join him in his cell was unbelievable. In addition, the facts that he had denied all the charges against him, despite allegedly having been tortured with the purpose of extracting a confession, and that he had not made any allegation concerning electric shocks in his original application to the Commission but only during the hearing of witnesses in Ankara, raised further doubts about the truth of his testimony. Furthermore, they reasoned that if it was true that he had been subjected to electric shocks on the last day of his detention, this would have been easy to establish since this kind of torture leaves marks which remain noticeable for three or four days. Finally, the Government submitted that cloth of the type which the applicant had handed to the public prosecutor could not have been used as a blindfold because of its loose style of weaving.

36. At the hearing before the Court, the Commission's Delegate stated that the applicant's account of events at the hearing in Ankara had been precise, detailed and consistent and had not given the impression of being an invented story. It was true that he had made somewhat varying and probably exaggerated assessments of the temperature in his cell in Derinsu and it could not be excluded that he had also exaggerated the nature and intensity of the ill-treatment to which he claimed to have been subjected. Nonetheless some of the details of his account had the ring of truth: for instance, it was unlikely that he would have invented the incident when his brothers joined him in his cell. What undoubtedly weakened the applicant's case was the lack of any medical evidence. The Commission had considered whether this omission was such as to undermine the reliability of his allegations in general, but considered that it could not be conclusive.

The Commission's Delegates in Ankara had also found the applicant's father, Hacı Mehmet, to be a credible witness who had confirmed important elements in the applicant's story. For example, he had described how he and his other sons had waited in the cold outside the gendarme station at Derinsu and how at some stage his sons had been allowed to visit their brother in his cell and had used this occasion to warm Salih's cold body. He also confirmed that after the applicant's release there had been bruises and wounds on his body which they had treated with medication.

Against these statements had to be weighed the testimony of other witnesses.

The Commission had requested the attendance of three public prosecutors, including Mr Altun (see paragraph 11 above), whose testimony would have greatly assisted the Commission in assessing the issues under Articles 3 and 13 of the Convention. Unfortunately, none of these prosecutors appeared to give evidence at the hearings and no valid excuse had been given for their non-attendance.

Of the witnesses for the Government who did attend the hearings, the Commission's Delegates had found the evidence of the three neighbours (see paragraph 23 above), who described the applicant's return to the village after his detention, to be unconvincing, particularly their statements concerning the applicant's praise for the quality of his treatment in police custody, which the Commission considered to be implausible in view of the fact that there was a record of Mr Tekin's complaint of ill-treatment made to the public prosecutor only hours previously.

Gendarme Officer Altın (see paragraphs 8-9 above) had given a detailed account of the applicant's treatment at Derinsu, denying all allegations of ill-treatment and stating that Mr Tekin had been kept in good conditions, in a room which had not been cold, and had been provided with water and three meals a day. The Commission, however, had serious doubts about Officer Altın's credibility in view of the fact that, two years earlier, he had told the public prosecutor that he had no recollection whatsoever of the applicant, despite the fact that there had apparently only been a small number of detainees at the Derinsu Gendarme Station during 1993.

When making a final evaluation of the evidence, the Commission had been convinced beyond reasonable doubt that Mr Tekin had been detained in extreme conditions and had undergone physical ill-treatment.

37. The applicant asked the Court to accept the Commission's findings of fact.

38. The Court reiterates that under its case-law the establishment and verification of the facts are primarily a matter for the Commission (Articles 28 § 1 and 31 of the Convention). While the Court is not bound by the Commission's findings of fact and remains free to make its own appreciation in the light of all the material before it, it is only in exceptional circumstances that it will exercise its powers in this area. Such exceptional circumstances may arise in particular if the Court, following a careful examination of the evidence on which the Commission has based its conclusions, finds that the facts have not been proved beyond reasonable doubt (see the Selçuk and Asker v. Turkey judgment of 24 April 1998, *Reports of Judgments and Decisions* 1998, p. ..., § 53).

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39. The Court has examined the findings in the Commission's report and the evidence on which the latter based its conclusions, principally the transcripts of the hearings before it, with a view to determining whether any such exceptional circumstances arise in the present case.

40. In this connection, it considers it to be of particular significance that the Commission and its Delegates had the opportunity to see and hear the applicant and other witnesses give their testimony and answer questions put by the members of the Commission themselves and by lawyers for the Government and the applicant. It notes that the Commission found the applicant's testimony to be consistent and convincing, whereas it found the evidence given by the witnesses for the Government to be flawed and unreliable (see paragraph 36 above).

41. It is true that, as the Government have pointed out, the applicant was unable to provide any independent evidence, for example medical reports, to substantiate his allegations of ill-treatment. However, in this respect the Court notes that the State authorities took no steps to ensure that Mr Tekin was seen by a doctor during his time in detention or upon his release, despite the fact that he had complained of ill-treatment to the public prosecutor, Mr Altun, who was under a duty under Turkish law to investigate this complaint (see paragraphs 11 and 28 above). Furthermore, it observes that those witnesses who were best placed to shed light on the veracity or otherwise of the applicant's story, namely the public prosecutors involved in his case, and particularly Mr Altun, who saw him immediately after his release from custody, failed without good cause to comply with the Commission's requests to attend its hearings.

The Court recalls that Article 28 § 1 (a) of the Convention places the State concerned under a duty to "furnish all necessary facilities" to the Commission for its investigation of the facts underlying a petition. It does not consider that, in the circumstances of the present case, when key witnesses failed to attend before the Commission, the respondent State can be justified in complaining of the insufficiency of the evidence on which the Commission based its findings.

42. In the light of the above considerations, and having itself examined the documents available in the case, the Court decides to accept the facts as found by the Commission.

II. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

43. The applicant alleged that his treatment in police custody had amounted to a violation of Article 2 of the Convention, which provides, *inter alia*:

> "1. Everyone's right to life shall be protected by law. ..."

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44. He alleged that he had been threatened repeatedly with death by Officer Altın and other gendarmes on the way to Derinsu Gendarme Station, where he had been held in sub-zero conditions with the intention on the part of the gendarmes that he would freeze to death. Moreover at Derik Gendarmerie Headquarters, Commander Çitil, after having tortured the applicant, threatened to "open up two holes in his head" if he came back to the area.

45. The Government denied that the ill-treatment alleged by the applicant had taken place (see paragraph 35 above).

46. The Commission found no indication that the applicant's right to life had not been protected by law.

47. The Court notes that the facts as found by the Commission, which it has decided to accept, do not support the conclusion that the applicant was treated in such a way as to amount to an interference with his right to life within the meaning of Article 2.

It follows that there has been no violation of Article 2.

III. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

48. The applicant claimed to have been tortured in violation of Article 3 of the Convention, which reads as follows:

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

49. He submitted that his experiences of suffering whilst in detention, taken as a whole, amounted to torture. Thus, in Derinsu Gendarme Station he claimed to have been blindfolded while being aggressively interrogated, assaulted and threatened with death, detained for four days in total darkness in sub-zero temperatures with no bed or blankets, and denied food and liquids; all this despite the fact that the gendarmes were aware that he only had one kidney. At Derik Gendarmerie Headquarters he had again been blindfolded, and also stripped naked, hosed with cold water, beaten with a truncheon on his body and the soles of his feet, and had electric shocks administered to his fingers and toes.

50. In connection with this complaint also, the Government denied that Mr Tekin had been ill-treated.

51. The Commission, taking the treatment suffered by the applicant as a whole, found that the conditions of detention and the treatment to which he had been subjected constituted at least inhuman and degrading treatment within the meaning of Article 3.

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52. The Court recalls that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and/or mental effects and, in some cases, the sex, age and state of health of the victim (see the above-mentioned Selçuk and Asker judgment, p. ..., § 76).

53. The Court notes that the Commission found that the applicant was held in a cold and dark cell, blindfolded, and treated, in connection with his interrogation, in a way which left wounds and bruises on his body (see paragraph 24 above).

The Court has assessed these facts against the standards imposed by Article 3. It recalls that, in respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 (see the Ribitsch v. Austria judgment of 4 December 1995, Series A no. 336, p. 26, § 38). It considers that the conditions in which the applicant was held, and the manner in which he must have been treated in order to leave wounds and bruises on his body, amounted to inhuman and degrading treatment within the meaning of that provision.

54. It follows that there has been a violation of Article 3.

IV. ALLEGED VIOLATIONS OF ARTICLES 5 § 1 AND 6 § 1 OF THE CONVENTION

55. Before the Court, the applicant did not pursue his claims in respect of Articles 5 § 1 and 6 § 1 of the Convention.

56. In such circumstances, it is not necessary for the Court to consider these complaints.

IV. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

57. The applicant alleged that his ill-treatment was linked to his employment as a journalist and that there had been 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. ...

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> 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."

58. He contended that the threats he experienced as well as the severity of his treatment, especially at Derinsu, were motivated in part by his employment as a journalist for the newspaper *Özgür Gündem*, which, because of its Kurdish separatist stance, was considered hostile by those who abused him. He stated that on his arrest and at Derinsu Gendarme Station he was questioned by Officer Altın about his work as a journalist and was threatened with death because of it. At Derik Gendarmerie Headquarters, Commander Çitil had said to him:

> "You want to come here and mix things up. *Özgür Gündem* is a banned newspaper. You are writing news about the region. Furthermore, you are threatening village guards. I am going to send you to the public prosecutor but if you come back to this region again we will put two holes in your head."

59. The Government made no particular submissions in connection with this complaint.

60. The Commission did not find sufficient evidence to corroborate the applicant's complaint that his arrest and detention were due to the fact that he was a journalist with *Özgür Gündem*.

61. The Court notes the above finding by the Commission. It does not find it established that the applicant's detention and treatment in custody amounted to interferences with his right to freedom of expression.

It follows that there has been no violation of Article 10.

V. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

62. The applicant claimed to have been denied an effective domestic remedy in respect of his Convention complaints, in violation of Article 13 of the Convention, which states:

> "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."

63. He asked the Court to find not only that he in particular had been denied an effective remedy for his complaints of ill-treatment, but also to hold generally that the modifications to the law introduced by the State of

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Emergency legislation (see paragraphs 25-30 above), by offering officials in the region *de jure* or *de facto* immunity, operated to deny any effective remedy to victims of abuse of power, thus rendering it impossible for the State to satisfy its obligations under Articles 1 and 13 of the Convention.

64. The Government submitted that domestic remedies in respect of allegations of ill-treatment in custody were effective and available to every citizen. This was borne out by the fact that the public prosecutor's inactivity had lead to an investigation being held into his conduct of Mr Tekin's case.

65. The Commission observed that it was undisputed that the applicant had complained to Mr Altun, the Derik public prosecutor, of having been tortured during custody in Derinsu Gendarme Station and Derik Gendarmerie Headquarters, but that Mr Altun took no action in this respect. It considered that the investigation subsequently commenced into the applicant's allegations was inadequate, and, in any case, could not have made up for the initial inactivity. In the absence of the evidence of the public prosecutors involved in the case (see paragraph 23 above), and on the basis of the available material, the Commission formed the view that the investigation into the applicant's allegations of torture was so inadequate as to amount to a denial of an effective remedy.

66. The Court recalls that the nature of the right safeguarded under Article 3 of the Convention has implications for Article 13. Where an individual has an arguable claim that he has been tortured or subjected to serious ill-treatment by agents of the State, the notion of an "effective remedy" 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 complainant to the investigatory procedure (see the Aksoy v. Turkey judgment of 18 December 1996, *Reports* 1996-VI, p. 2287, § 98).

67. The Court notes that, on his release from custody, Mr Tekin complained of ill-treatment to Mr Altun, the public prosecutor. The latter, however, failed to take any action in respect of this complaint. It was not until some ten months later, following the Commission's communication of the application to the Government, that an investigation was commenced into the applicant's allegations. Moreover, even once the investigation had been opened, a further four months elapsed before a statement was taken from Officer Altın, and it would appear that no attempt was made to question Commander Çitil before the decision was taken on 4 May 1994 that there was insufficient evidence to merit a prosecution against either of the officers accused by Mr Tekin of ill-treating him (see paragraphs 16-18 above). Subsequently, a full year later, a decision of non-jurisdiction was issued and the investigation was transferred to the Derik District Administrative Council, at the request of which, on 14 July 1995, a statement was finally taken from Commander Çitil (see paragraphs 20-21 above).

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68. The Court does not consider that the above investigation can properly be described as thorough and effective such as to meet the requirements of Article 13.

It notes the applicant's request that it examine the operation of remedies generally within the State of Emergency area, but it does not consider that the evidence established by the Commission enables it to reach any conclusion in this connection.

69. In conclusion, there has been a violation of Article 13.

VI. ALLEGED VIOLATIONS OF ARTICLES 14 AND 18 OF THE CONVENTION

70. The applicant submitted that because of his Kurdish origin the various alleged violations of his Convention rights were discriminatory, in breach of Article 14, which states:

> "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."

He also claimed that his experiences represented an authorised practice by the State in breach of Article 18, which provides:

> "The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

71. The Government did not address these allegations beyond denying their factual basis.

72. The Commission examined the applicant's allegations in the light of the evidence submitted to it, but considered them unsubstantiated.

73. The Court, relying on the facts as found by the Commission, does not have before it any evidence substantiating the alleged breaches of the above provisions.

It follows that there has been no violation of Articles 14 and 18 of the Convention.

VII. APPLICATION OF ARTICLE 50 OF THE CONVENTION

74. The applicant claimed just satisfaction pursuant to Article 50 of the Convention, which states:

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

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A. Damage

75. The applicant claimed compensation in respect of non-pecuniary damage of 25,000 pounds sterling (GBP) and aggravated damages of GBP 25,000.

76. The Government stated that, in the event that the Court found that there had been a violation of the Convention, this finding would be sufficient satisfaction for the applicant.

77. The Court considers that an award should be made in respect of non-pecuniary damage bearing in mind its findings of violations of Articles 3 and 13 of the Convention. Having regard to the high rate of inflation in Turkey, it expresses the award in pounds sterling, to be converted into Turkish liras at the rate applicable on the date of settlement (see the above-mentioned Selçuk and Asker judgment, p. ..., § 115). It awards the applicant GBP 10,000.

78. The Court rejects the claim for "aggravated damages" (see the above-mentioned Selçuk and Asker judgment, p. ..., § 119).

B. Costs and expenses

79. The applicant claimed a total of GBP 19,770.11 in respect of the legal costs and expenses incurred in the proceedings before the Commission and the Court. This sum took into account the legal aid received by him from the Council of Europe.

80. The Government submitted that only those costs and expenses which were fully documented should be awarded and that the sum of GBP 1,200 which the applicant claimed in respect of "administrative support" should not be payable by the State.

81. The Court, deciding on an equitable basis, awards GBP 15,000 in respect of legal costs and expenses, together with any value added tax which may be payable.

C. Default interest

82. According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of the adoption of the present judgment is 8% per annum.

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been no violation of Article 2 of the Convention;

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2. *Holds* by six votes to three that there has been a violation of Article 3 of the Convention;
3. *Holds* by eight votes to one that it is not necessary to consider the applicant's complaints under Articles 5 § 1 and 6 § 1 of the Convention;
4. *Holds* unanimously that there has been no violation of Article 10 of the Convention;
5. *Holds* by seven votes to two that there has been a violation of Article 13 of the Convention;
6. *Holds* unanimously that there has been no violation of Articles 14 or 18 of the Convention;
7. *Holds* by eight votes to one that the respondent State is to pay the applicant, within three months:
   (a) in respect of non-pecuniary damage, GBP 10,000 (ten thousand pounds sterling), to be converted into Turkish liras at the rate applicable on the date of settlement;
   (b) in respect of costs and expenses, GBP 15,000 (fifteen thousand pounds sterling), together with any value added tax which may be payable; and
   (c) that simple interest at an annual rate of 8% shall be payable on the above sums from the expiry of the above-mentioned three months until settlement;
8. *Dismisses* unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 9 June 1998.

Signed: Rudolf BERNHARDT
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 § 2 of the Convention and Rule 53 § 2 of Rules of Court A, the following separate opinions and declaration are annexed to this judgment:
(a) dissenting opinion of Mr Gölcüklü;
(b) dissenting opinion of Mr De Meyer;
(c) declaration by Mr Toumanov.

Initialled: R.B.
Initialled: H.P.

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DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

(*provisional translation*)

To my great regret, I am unable to share the majority's opinion in this case for the following reasons:

The Court held that it was bound by the Commission's opinion both as regards the findings and establishment of the facts and as regards the evaluation and interpretation of those facts. In my opinion, the Commission has not established anything; it reached a conclusion on the basis only of the statements of the applicant and his father, with no account being taken of the inconsistencies and contradictions in them. On the contrary, the Commission sought, with too great a zeal, to explain those inconsistencies and fill gaps in the applicant's statements. For example: why didn't the applicant take the trouble to have himself examined by a doctor after his release? The answer is given by the Commission: "the applicant was at that time in such a state of shock that he did not do what would have seemed reasonable in the circumstances" (see paragraphs 188-9 of the Commission's report); the Commission expressed the view in paragraph 190 of its report that the piece of wet cloth around the applicant's neck that was handed over to the public prosecutor was, among other items of evidence, the "crucial one" proving that the applicant had actually been subjected to ill-treatment. The father's testimony, which was not obtained until about two years after the alleged events, is described in the same way. In short, as far as the Commission was concerned everything said by the applicant and his father appears to be truth itself; the Government had told only lies and were unconvincing in its explanations.

I can only express surprise at the Court's decision simply to adopt the Commission's findings (see, on this subject, paragraphs 9-11, 23, 24, and 40-42 of the judgment and paragraphs 42-47, 76, 77, 79-88 and 97-119 of the Commission's report).

I therefore conclude that the facts of the case have not been proved beyond all possible doubt in coming to a finding of a violation of Article 3.

While the above considerations spare me the necessity of expressing my view on the other issues in the case, I would like to add that I find the sum awarded to the applicant for costs and expenses to be most excessive, as three lawyers, two of them British, were unnecessary in proceedings modelled on others in which the Court had already given a decision and in which the same lawyers had acted.

DISSENTING OPINION OF JUDGE DE MEYER

(provisional translation)

Did the applicant really suffer the ill-treatment he alleged?

Like the Commission, the Court found that he had, on the sole basis of the statements of the applicant[1] and his father[2].

The statements were even less capable of sufficing in the instant case as the applicant had not even taken the trouble to have himself examined by a doctor after his release[3], which is difficult to understand on the part of a journalist inclined to be militant[4].

It is true that the denials of the two gendarmes implicated by the applicant[5] and the hearsay evidence of the three village guards questioned by the Commission[6] are scarcely convincing[7], but that is not enough to show "beyond all reasonable doubt" that the applicant's allegations were true.

It nevertheless remained the case that the applicant's complaint to Mr Altun, the public prosecutor[8], did not result in an inquiry being held[9].

It is unacceptable that the public prosecutor did not himself seek a medical report on the applicant's condition on release and merely recorded the complaint without taking any further action[10].

In my opinion, the applicant's "case" was not appropriately "heard" within the meaning of Article 6 of the Convention.

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1. See §§ 9-11, 23, 24 and 40-42 of the judgment and §§ 42-47, 76, 77, 79-88 and 97-119 of the Commission's report.
2. See §§ 23, 24, 36 and 40-42 of the judgment and §§ 120-129 of the Commission's report. The father's statements were not obtained until about two years after the alleged events. They are somewhat confused and essentially did no more than reproduce what had been said by the applicant.
3. See §§ 13, 36 and 41 of the judgment. It will be recalled that in the Ribitsch case the applicant had a medical examination both on the day of his release and the next day (see the judgment of 4 December 1995, Series A no. 336, p. 9, § 13).
4. See § 7 of the judgment and § 86 of the Commission's report. He could not have been unaware that the wet cloth he had handed over to Mr Altun, the public prosecutor, (see §§ 77 and 78 of the Commission's report and § 11 of the judgment) was of less evidential value than a medical certificate would have been.
5. See §§ 89-92 and 130-148 of the Commission's report.
6. See §§ 149-158 of the Commission's report.
7. See §§ 36 and 40 of the judgment.
8. See §§ 76-78 of the Commission's report.
9. See §§ 11, 12 and 67 of the judgment.
10. See § 51 of the Commission's report.

On the other hand, it does not appear to me to be possible in the present case to find a violation of Article 13[1]. The investigations opened in Turkey concerning Mr Altun[2] and the officers Altin and Çitil[3] tend to indicate that a remedy existed. If those investigations have not (or not yet) produced a conviction, it is undoubtedly because of lack of sufficient evidence.

The respondent State has committed a grave breach of the obligations incumbent on it under Article 28 of the Convention in that none of the three public prosecutors invited by the Commission to cooperate in the Commission's investigation attended to give evidence[4].

The Court should have held of its own motion that that provision had been infringed[5].

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1. See §§ 66-69 of the judgment.
2. See § 12 of the judgment.
3. See §§ 15-22 of the judgment.
4. See §§ 23 and 41 of the judgment and §§ 93-95 and 171 of the Commission's report.
5. Of course, the failure of the three "key witnesses" to appear cannot be used to make up for the fact that the evidence on which the Commission and the Court relied in accepting the truth of the applicant's allegations was insufficient (see §§ 41 and 42 of the judgment).

DECLARATION BY JUDGE TOUMANOV

I voted for no violation of Article 3 of the Convention.

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

Strasbourg, 25 March 1998

Cour/Misc (98) 204
Or. Eng.

No. 76014

CASE OF TEKIN v. TURKEY

(52/1997/836/1042)

VERBATIM RECORD

of the hearing held on 25 March 1998

(Document not revised by the registry of the Court and subject to corrections in accordance with Rule 47 § 2 of Rules of Court A)

(English version)

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Present:

Court:

Mr R. Bernhardt, **President,**
Mr Thór Vilhjálmsson,
Mr F. Gölcüklü,
Mr C. Russo,
Mr J. De Meyer,
Mr J.M. Morenilla,
Mr L. Wildhaber,
Mr K. Jungwiert,
Mr V. Toumanov, **Judges,**
Mr A.B. Baka,
Mr G. Mifsud Bonnici,
Mr I. Foighel,
Mr P. Jambrek, **Substitute Judges,**
Mr H. Petzold, **Registrar,**

Government of Turkey, Party:

Mr M. Özmen, **Co-Agent,**
Mr A. Kaya
Mr K. Alataş
Mr F. Polat
Ms M. Anayaroğlu, **Advisers**

European Commission of Human Rights:

Mr H. Danelius, **Delegate,**
Mrs A. Van Steijn, **Secretariat;**

Applicant:

Mr K. Boyle,
Mrs A. Reidy, **Counsel,**
Mr S. Tekin, **Applicant.**

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(The hearing was opened at 9.30 a.m. by Mr Bernhardt, President of the Court.)

THE PRESIDENT: I declare open the public hearing in the case of Tekin v. Turkey.

The case was brought before the Court by the European Commission of Human Rights on 27 May 1997. In pursuance of Article 43 of the Convention, a Chamber of the Court was constituted on 3 July 1997 to hear the case.

In reply to the Registrar's enquiry made in accordance with Rule 33 § 3 (d) of Rules of Court A, Mr Salih Tekin, being the applicant who had lodged the complaint with the Commission under Article 25 of the Convention, indicated that he wished to take part in the proceedings now pending before the Court. In accordance with Rule 30, he designated Mr Boyle and Ms Hampson, both barristers-at-law from the University of Essex, as his representatives.

The Government are represented by their co-Agent, Mr Özmen, Legal Counsellor at the Ministry of Foreign Affairs, and, as advisers, by Mr Kaya, Mr Alataş, Mr Polat, Ms Emüler and Ms Anayaroğlu, experts. The Commission is represented by Mr Danelius, as Delegate, assisted by Ms van Steijn, member of the Secretariat. The applicant is represented by Mr Boyle and Ms Reidy, also barrister-at-law, as counsel.

I welcome the representatives in the name of the Court.

Having consulted the Agent of the Government, the Delegate of the Commission and the representatives of the applicant, I have determined the order of addresses as follows: Mr Danelius for the Commission will speak first, then Mr Boyle for the applicant, and finally Mr Özmen for the Government.

I call Mr Danelius.

Mr DANELIUS: Mr President, I was informed this morning that you have been elected President of the European Court of Human Rights during this week and I would like to start my statement this morning by conveying to you my most cordial congratulations upon your election.

Mr President, as you know, the present case is one of the cases from South East Turkey in which delegates appointed by the Commission have heard oral evidence. The hearings before the delegates took place, first in Diyarbakır on one occasion and then in Strasbourg. The Commission's

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conclusions in its report are based to a very large extent on this oral evidence. There is of course also some written evidence which is referred to in the Commission's report and which has had some relevance for the Commission's findings.

The main issue in the case related to Article 3 of the Convention. The question there is whether the applicant, Salih Tekin, was, as he alleges, exposed to torture or other inhuman or degrading treatment during his detention in February 1993. During that month, he was first detained at the Derinsu gendarmerie station and he complains that he was kept there in an extremely cold cell and that he was given very little to eat and drink. He also complains that he was physically ill-treated at the gendarmerie station in Derinsu and subsequently also, and in an even more serious manner, at the Gendarmerie Headquarters at Derik, where he was taken from Derinsu. This treatment had left bruises and other marks on his body.

There are also some subsidiary questions in the case: one concerns freedom of expression. In particular, it is alleged that the treatment to which Salih Tekin was exposed was due to the fact that he had been active as a reporter for a newspaper, by the name of *Özgür Gündem*, which was regarded by the authorities as a newspaper supporting separatist Kurdish ambitions and was therefore looked upon unfavourably by the authorities. There is also a question as to whether Salih Tekin had at his disposal a remedy satisfying the requirements of Article 13 of the Convention and there are also a few more issues which relate to Articles 14 and 18 of the Convention.

The essential and, at the same time, the most difficult question in the case concerns the evaluation of the evidence and the establishment of the facts. We must ask ourselves whether and to what extent the evidence permits us to draw clear conclusions about what happened during Salih Tekin's detention in February 1993, first in Derinsu and then in Derik, and we must keep in mind that a high degree of probability is required for a finding of a violation. The facts must be established beyond reasonable doubt.

I do not find it necessary, and indeed the time available would not permit me, to go into any details as regards the evidence, which is analysed rather extensively in the Commission's report and which, in so far as the oral evidence is concerned, is available to the Court in the form of full transcripts of the hearings before the delegates. But there are some general aspects of the evidence to which I would like to draw your attention.

One crucial point is the question how Salih Tekin's own credibility is to be assessed. His testimony must of course be examined critically, since he was speaking on his own behalf in support of his own application and this

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might affect the character of the testimony. On the other hand, I think it is fair to say that Salih Tekin's testimony before the delegates was, generally speaking, precise, detailed and consistent and did not give the impression of being just an invented story.

There was of course a problem of dates. Was Salih Tekin detained for four days as he stated, or only for two days as was affirmed by Government witnesses and as also seemed to appear from written records? Indeed, it was pointed out that Salih Tekin himself had signed a custody note indicating 17 February - and not 15 February - as the date of his arrest. On the other hand, before he was released on 19 February he had, in his statement to the public prosecutor, referred to his detention during four days. The Commission did not find the entry in the custody record of the Derinsu gendarme station to be conclusive, since the accuracy of such records can sometimes be seriously doubted. I refer here, for instance, to the comments on this matter which the Commission made in its report on the **Aydin v Turkey** case. In the end, the Commission did not find it possible to reach a conclusion on this point but left the question of the length of his detention open.

Salih Tekin has also made somewhat varying and probably exaggerated assessments of the temperature in his cell at Derinsu, and it cannot be excluded that, if he had been exposed to ill-treatment, he also exaggerated the nature and intensity of that ill-treatment. But this is different, I submit, from considering that he had simply invented the whole story which he told the delegates on this matter.

There were, in fact, in Salih Tekin's account of what had happened, various details which were very special and which would be unlikely to be found in a made-up story, for instance, the fact that his brothers had been let into his cell at Derinsu and had helped him not to freeze. This may look like a surprisingly friendly gesture by the gendarmes, but it is also unlikely that it should have been invented by Salih Tekin.

There is also the strange element of the piece of cloth that we know that Salih Tekin handed over to the public prosecutor and which, in his submission, had been used as a blindfold during interrogation and had been forgotten and left around his neck.

What undoubtedly weakens Salih Tekin's case is the lack of any medical evidence. It is indeed difficult to see why he should not, if he had been severely ill-treated, have gone to see a doctor after his release. The Commission considered whether this element was such as to make Salih Tekin's allegations generally unreliable but considered that this element

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could not be conclusive, although it made it necessary to analyse the rest of the evidence even more attentively.

The general impression remained, however, that on the whole there was nothing in Salih Tekin's answers to the numerous questions put to him during a very lengthy interrogation before the Commission's delegates which made it likely that he had invented the whole story about his experiences during his detention. Nevertheless, the delegates, in their minds, did not *a priori* exclude that this could have been the case and therefore paid particular attention to whether the other evidence supported or contradicted what Salih Tekin had alleged.

In this respect, an important piece of evidence was the testimony of Salih Tekin's father, Hacı Mehmet Tekin. In the evaluation of his evidence it was, of course, necessary to take into account precisely the fact that he was Salih's father and that he could therefore be inclined to support what his son had said. But having seen and heard Hacı Mehmet, the delegates considered that it was not justified to discard his testimony for that reason. Hacı Mehmet was an elderly, rather colourful gentlemen, who spoke without fear, who was not very precise as regards details, who may well have recalled some facts incorrectly, but who seemed to the delegates to be on the whole credible in the sense that he told them what he believed at that time to be the truth. The delegates therefore were of the opinion that, as regards the main facts, but not in regard to all details, Hacı Mehmet's account was trustworthy.

Hacı Mehmet did confirm important elements in Salih's story. He described how he and his other sons had waited in the cold outside the gendarme station at Derinsu, how they had been worried about Salih's fate, and how at some stage the brothers had been allowed in to visit Salih in his cell and had used this occasion for warming up his cold body. He also confirmed that after Salih's release there had been bruises and wounds on his body which they had treated with medication. He believed, however, wrongly as it seems, that Salih, after his release, had gone to see a doctor.

In summary, the delegates considered Hacı Mehmet's testimony to be an important confirmation of some important parts of Salih Tekin's story.

But Salih Tekin's and his father's declarations, of course, had to be weighed against other evidence and particularly against evidence by those public officials who had been responsible for Salih's detention or had been in contact with him during his detention or who had been engaged in investigations after the events.

There were three public prosecutors whose statements would have been interesting and who had been summoned by the Commission to give evidence.

The first public prosecutor and the most important one who had been summoned was the Derik public prosecutor, Hasan Altun who saw Salih Tekin just before his release on 19 February 1993, and who then took his statement in which Salih complained that he had been forced to sleep in a cold cell, that he had been subjected to cold water torture and beaten with truncheons, forced to make up statements, been blindfolded and threatened to be killed if he returned to the area. Salih Tekin had specifically stated that he wanted to lodge a complaint against the officers in charge at Derinsu and Derik and he had handed over the wet blindfold to Hasan Altun. All this appears from an official record dated the same day, 19 February 1993 and Hasan Altun heard all these complaints but apparently did nothing to investigate whether Salih had in fact been subjected to treatment of the kind he described.

Hasan Altun thus appeared to be a crucial witness in the case, not only to allow the Commission to assess the issue relating to Article 3 of the Convention but also to determine whether there had in reality existed an effective remedy as required by Article 13 of the Convention. But unfortunately Hasan Altun failed to appear before the delegates to give evidence. He did not turn up either at the first hearing in the Diyarbakır or at the second hearing in Strasbourg. No valid excuse was given. At the first hearing it was said in general terms that he and other witnesses had not had time to prepare themselves for the hearing and at the second hearing the excuse was as we understood it that Hasan Altun felt that he would not be able to say anything of interest and therefore did not find his presence necessary. This was of course quite an unacceptable excuse since it cannot be the task of the witness to decide whether the evidence he can give is relevant or not.

The second public prosecutor to be heard and who had been summoned was Bekir Özenir. Bekir Özenir was the Derik public prosecutor who had issued a decision of non-prosecution in respect of two gendarmes - Harun Altun and Musa Çitil - those two who had been accused by Salih Tekin of being responsible for his treatment at Derinsu and Derik. It would have been interesting to learn from Bekir Özenir whether he had made any investigation, whether he had seen and questioned Salih Tekin or any other persons and what he in general remembered about the case. However Bekir Özenir did not turn up. No reasons for his absence were given.

And the same thing happened with the third public prosecutor, Osman Yetkin. Osman Yetkin was public prosecutor at the Diyarbakır State

Security Court and was apparently in charge of the prosecution against Salih Tekin which finally resulted in his acquittal. Osman Yetkin did not appear before the delegates. We were told that he had no time to prepare himself for the first hearing and at the second hearing that he considered he had nothing of interest to say.

The absence of all these public prosecutors, for reasons which could in no way be considered acceptable, must in the Commission's view to some extent weigh in the applicant's favour in the total evaluation of the evidence in the case.

I then come to other witnesses who actually appeared and gave evidence before the delegates. Let me start by commenting on three witnesses who were heard at the Government's request at the second hearing in Strasbourg. These three persons were all from the hamlet where the Tekin family lived, Yassıtepe. They were all close neighbours of the Tekin family in that hamlet. The testimonies which these three persons gave were in some respects very strange. Let me mention a particularly striking example. Two of the three villagers described Salih Tekin's return to the village after his detention. The witness Sinan Dinç referred to the time when Salih Tekin had returned from his detention in the following words and I quote: "In the evening we went to his house to welcome him back. We shook hands. I asked him what had happened. He said: 'they took my statement but the station commander treated me well.'" And his brother Mehmet Dinç went even further and stated that Salih Tekin on his return to the village had said the following and I quote again: "The station commander even gave me a blanket. I was very pleased with the way he treated me." These are indeed most curious statements when we know that Salih Tekin had immediately before that, when he was brought before the prosecutor before being released, complained to the public prosecutor about serious ill-treatment. Why should he in such circumstances make an entirely different statement to his neighbours by emphasising that he had been very well treated. Such statements by the neighbours were sufficient in the eyes of the delegates and in the eyes of the Commission to create serious doubts about their credibility. Our general impression was that the main concern of these three witnesses was to testify in a way which would please the Government party in the proceedings and that therefore it was unsafe to rely in any respect on their testimonies.

There were two further witnesses, Harun Altun and Musa Çitil. Both at the time gendarmes, one at Derinsu and one at Derik and both accused by Salih Tekin of having been involved in the ill-treatment inflicted upon him. Harun Altun had been commander at the Derinsu gendarme station and was therefore according to Salih Tekin the person who had been responsible for keeping him in an extremely cold cell and who was also

responsible for his treatment in general in Derinsu. He had also, according to Salin Tekin, directly participated in a physical assault upon him in his cell. Musa Çitil had been the commander of the gendarmerie in Derik and was in such capacity responsible for what had happened to Salih Tekin in Derik. Moreover, Musa Çitil had, according to Salih Tekin, personally threatened him with death if he returned to the area.

After the application to the Commission, which contained of course the applicant's allegations, had been communicated to the Turkish Government, an investigation about Harun Altın and Musa Çitil had been made in Turkey which, however, had resulted in a decision of non-prosecution on the ground that Salih Tekin's allegations of ill-treatment and threats had not been proven.

In these circumstances, the testimonies of Harun Altın and Musa Çitil, although important, had to be evaluated with some caution since they had personal interest in protecting themselves against suspicions of serious breaches of their professional duties and it could indeed be expected that they would deny any involvement in any illegal action against Salih Tekin and that is in fact what they did.

Harun Altın gave a detailed account of how Salih Tekin had been treated at Derinsu. He denied all ill-treatment and said that Salih had been kept in good conditions, in a room which had not been cold and he had been given water and three meals a day. However, this statement is to be compared with the recorded statement which Harun Altın had made to the public prosecutor on 20 April 1994, that is almost two years earlier and thus much closer to the actual events. On that occasion, Harun Altın had said that he did not remember Salih Tekin at all. It seems most unlikely that he then told the truth, since there had apparently been only very few detainees at the Derinsu gendarme station during the whole year of 1993 and the arrest of Salih Tekin would seem to have attracted some attention in view of the charges against him.

According to the custody ledger of Derinsu, which I admit does not necessarily reflect the full truth, only six persons had been detained at Derinsu in 1993 and Salih Tekin was the only one suspected of a PKK-related offence. The general impression is therefore that Harun Altın was prepared to state what he thought, on each occasion, would best serve his own interests in protecting himself against accusations of improper behaviour. The Commission therefore thought that not much weight could be given to his testimony.

Musa Çitil, who had been the commander at Derik, stated in essence that Salih Tekin's stay at Derik had been affected according to normal

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procedures and denied that any ill-treatment had occurred or that there had been any threats against him. It seems that whatever had happened in reality, Musa Çitil was anxious to point out that there had been no irregularities at Derik. It is noticeable, however, as pointed out by the applicant in his memorial to the Court, that in another case, **Aydin v Turkey**, a very serious event was found by the Commission and the Court to have taken place at the gendarmerie station at Derik, also during the period when Musa Çitil was the commander of the station. It is of course not possible in the present case to draw any conclusions from that fact but it shows at least that such occurrences were not excluded at that gendarmerie station.

When making a final evaluation of the evidence, the Commission found that the balance was in favour of the applicant. The Commission was thus convinced beyond reasonable doubt that Salih Tekin had been detained in extreme conditions and had undergone physical ill-treatment. As to the precise nature of those conditions and the treatment, the Commission thought that in view of the requirement that violations of the Convention must be proven beyond reasonable doubt, it was necessary to make a cautious assessment. The Commission found it proven, however, that the cell in Derinsu had been extremely cold and that his detention had therefore not been humane. It also found it proven that Salih Tekin had left Derik with traces on his body which were the result of ill-treatment during his detention. The Commission therefore without reaching a definite conclusion as to the nature of the ill-treatment concluded that Salih Tekin had been exposed to at least inhumane treatment contrary to Article 3.

The Commission also found a violation of one other Article of the Convention, namely Article 13. On this point I can mainly refer to the Commission's report and simply emphasise the fact that Salih Tekin's complaint about torture, which was made before the public prosecutor, Hasan Altun, was apparently not acted upon at all and that the investigations which subsequently took place were initiated only after the Commission had communicated the application to the Government. This could not be considered as having sufficed to constitute an effective remedy. And as I have already said, the prosecutors who were responsible for the investigations and who had been summoned to give evidence before the delegates did not turn up. Consequently, there was no opportunity to ask them for any details about their acts or their failure to act.

Salih Tekin's allegations also concerned some further Articles of the Convention in respect of which the Commission found no violation. I shall not refer here to Articles 5 and 6, because Salih Tekin has indicated in his written memorial that he accepts the Commission's finding in regard to these

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Articles. It remains, however, to say something about Articles 2, 10, 14 and 18.

It is unusual that Article 2 is applied in a case where no killing has actually taken place. However, I accept that such an application of Article 2 is not excluded. The first sentence, which requires protection of the right to life, could possibly be violated in special circumstances where there has been no killing but only a threat to life or in a situation where there has been a serious danger to a person's life. But in the present case, the Commission found it appropriate to take all the aspects of Salih Tekin's treatment into account in its consideration of the case under Article 3, and did not find that there was also a violation of Article 2.

The problem under Article 10 is perhaps more difficult. It is indeed clear that the applicant was a reporter of the newspaper *Özgür Gündem* which was, as I said, a newspaper disliked by the authorities, and probably considered by them to have some links with the PKK or groups close to that organisation. It is also well known that *Özgür Gündem* as such was exposed to various interferences both in the form of confiscation and seizure of some issues of the newspaper and in the form of attacks on its premises. Moreover, many persons who worked for *Özgür Gündem* as journalists or simply as distributors of the newspaper were in many cases attacked or threatened in unclear circumstances, some of them even killed. One case of this kind - Yaşa v Turkey - will in fact be heard by your Court at its session next month.

Against this general background, it could be suspected that the applicant's arrest and detention and the treatment to which he was exposed was due to his work as a journalist. The applicant, in his memorial to the Court, has accepted that there is insufficient evidence to establish that the sole explanation as to why he was arrested and ill-treated was because he was a working journalist, but he had admitted that there is sufficient evidence to establish that the fact that he was a journalist working for *Özgür Gündem* was a material factor in the treatment to which he was exposed in the hands of the gendarmes.

The Commission has found that the probable cause of the measures taken against the applicant was that he was considered to have threatened village guards. It remained in the eyes of the Commission a matter of guesswork whether or to what extent the ill-treatment was also a kind of sanction or reprisal for journalistic activities, or was aimed at preventing his further activities of this kind. The Commission therefore did not find it possible to conclude that Article 10 had been violated.

As to Articles 14 and 18, I shall be very brief and simply say that the Commission found the allegations of violations of these Articles to be unsubstantiated.

Mr President, this is all I had to say in this case. As to further details, I simply refer to the Commission's report, and I thank you for your attention.

THE PRESIDENT: Thank you. Mr Boyle, you have the floor.

Mr BOYLE: Mr President, may I first add congratulations to you on behalf of my colleague and myself on your election as the President of the Court of Human Rights. The applicant maintains all the submissions in his memorial. However, before the Court this morning I shall make three main submissions only.

First, that the conditions of detention and the treatment which the applicant was exposed to in February 1993, in Derinsu and Derik gendarme stations in the province of Mardin. The Commission, as the Court has just heard, considered that the applicant was a victim of at least inhuman and degrading treatment. The applicant would submit that he was a victim of torture. The second submission is that the applicant, who at the material time was a journalist, was also a victim of a violation of Article 10 of the Convention. As you have heard, the Commission found that not to be the case. Third, that in the light of all the evidence, the Court should rule that he has been a victim of practices in violation of the Convention. The Commission chose not to decide the question as to whether the applicant was a victim of aggravated breaches of the Convention, in particular with respect to Articles 3 and 13.

Mr President, in asking the Court to consider these claims, the applicant is not disputing the primary findings of fact found by, or accepted by, the Commission, but he is seeking to have the Court come to its own legal appreciation of the totality of the facts.

It is an unusual case, in that the applicant, Salih Tekin, is complaining about continuous experiences in violation of Article 3 in two different locations over a period which he claims lasted five consecutive days and four nights in February 1993, while he was in the custody of the Turkish authorities.

His case is that these cumulative experiences of suffering taken as a whole amount to torture and he submits that his status as a journalist for a pro-Kurdish newspaper was one motive, even if it was not the only motive, for the extreme conditions of detention that he endured at Derinsu and the

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deliberate ill-treatment perpetrated against him by gendarmes in Derik. The extremities of his treatment at the hands of the gendarmes are, he submits, impossible to understand without regard to his status as a journalist working for what those who abused him considered an organ of the PKK, the newspaper *Özgür Gündem*.

Mr Tekin also submits to the Court that he is a victim of aggravated violations of the Convention. He says that the treatment that he was subjected to, combined with the total failure to investigate his complaints, complaints which were vividly and immediately brought to the attention of the public prosecutor, as you have heard from the Delegate, on the evening of 19 February 1993, flow directly from official toleration of such abuse at all levels of the authorities at the material time, in the state-of-emergency region.

Mr President, the applicant told the Commission's delegates that, following his arrest at his father's house, he was interrogated, assaulted and threatened with death in Derinsu gendarme station and thereafter detained at Derinsu from 15 until the morning of 19 February. It was not disputed that the weather was particularly severe, with blizzard conditions. He was kept in a cell in Derinsu in complete darkness, without bed or blankets and in freezing conditions throughout that time. He was not given any meals, but only bread and water after the first day. When he protested about his detention, he was assaulted in his cell by gendarmes, including as you have heard by Harun Altin, the station commander. He was prevented from freezing to death by forcing himself to keep awake and by the fact that on the 18th night he was joined in the cell by his three brothers who wrapped him in extra clothing that they had. On the morning of 19 February, he was brought to Derik central gendarme station. There he was blindfolded, ordered to take off all his clothes, and while naked, he was assaulted, hosed with water, subjected to electric shock and to beatings to the soles of his feet. The purpose of this treatment was to force him to sign a prepared statement of admission that he had threatened village guards. He refused to sign this statement and was brought before the gendarme commander, Musa Çitil, who threatened him with death if he returned to the area. At no point in Derinsu or in Derik did he have access to a doctor. Late on the afternoon of 19 February, he was brought before a prosecutor, to whom he complained of this treatment and to whom he handed a wet blindfold that had been left around his neck. When he asked to be referred to a hospital, the prosecutor refused and told him that he was being released. After receiving attention and medication from his family overnight at his home, he fled the area on the morning of 20 February, returning to Diyarbakır. He did not go to a doctor there, but obtained medication from a pharmacy. After a week recovering, he made a statement to the Human Rights Association and an application to the

European Commission of Human Rights. He also made a statement about his experiences to the newspaper *Yeni Ulke* which was published on 28 February.

On 2 June 1993, he was acquitted by a state security court in Diyarbakır of a charge of threatening village guards and, as you have heard, his complaint to the public prosecutor, Harim Altun, led to no result. He also informed the Commission that he had been the victim, or has been the victim, of torture on several occasions since these events at the hands of other gendarmes.

Mr President, as the Court has heard, the Commission largely accepted the truth of the applicant's account of what had happened to him. The Commission's assessment of the witnesses, heard from both the Government's side and the applicant's, is before the Court and you have heard the Delegate speak on this matter. It is thus unnecessary for me to discuss those questions further, but in assessing the applicant's claims, the Court will note that none of the witnesses produced by the Government as to the facts of the case were believed by the Commission.

On the other hand, with allowance being made for lack of precision in the testimony of his father and possible exaggeration of certain elements of his own experience, the applicant and his father were believed by the Commission.

I now turn to the issue of the Commission's characterisation under Article 3 of the Convention of the treatment suffered by the applicant. As the Court has heard from the Delegate, the Commission concluded that the conditions of detention and the treatment to which the applicant had been subjected constituted "at least inhuman and degrading treatment".

The applicant has no quarrel with the decision of the Commission that it should not assess his experiences in the two gendarme stations separately so as to determine if there had been discreet violations of Article 3 in each of these places. He accepts, in the circumstances of this case, that it was appropriate to treat his experience as a whole for the purposes of Article 3. However, he submits that it remains necessary to have regard to the different elements of his experiences in the different places in order to determine whether his treatment crossed a threshold of suffering from inhuman and degrading treatment to torture.

The Commission's report does not make explicit all the elements of his treatment either arising from the conditions under which he was held or the violence inflicted upon him. Its approach may not give sufficient weight to the cumulative effects in terms of physiological and physical suffering of these different elements. It may also not have given adequate weight to the

relevance of the subjective factor of the applicant's health. It is accepted by the parties that the applicant had only one kidney. The need to keep warm in such circumstances is, as he explained to the delegates, particularly important. His call for hot drinks in Derinsu were ignored. As a reading of the transcript of his evidence makes clear, his chief concern when held in the extreme cold conditions in Derinsu was that he might die because of damage to his kidney.

In the transcript, he repeats and repeats his constant concern about his kidney coming to harm and he told the gendarmes about his kidney.

The applicant's request to the Court is that it should read his detailed account given in the transcript under examination and cross-examination as to the conditions in Derinsu as well as about the violence perpetrated against him in Derik. The terms of the Commission's conclusion in its report that the applicant was the victim of treatment which constituted at least inhuman and degrading treatment might indeed be thought to be such as to require the Court to read this evidence in making its own judicial assessment.

As the Delegate has informed the Court, there is an issue over the question of whether the applicant spent two days and two nights or four days and four nights in Derinsu. It is unnecessary for me to repeat these points except to note one thing: that the Government in their memorial claim that the Commission finally accepted that the applicant had been detained for two days and nights. But this is a mistaken reading of the relevant paragraph, paragraph 177, where it is clear that the Commission did not come to a conclusion on the matter. The applicant claims that he was detained for four days and four nights at Derinsu but he submits that, even if the duration of his experience is to be taken as two days and nights, his deliberate subjection to the conditions of detention which the Commission has accepted as being how he described them - given his medical conditions - constitutes treatment that amounts to torture when it is followed, as it was immediately, by the intentional cruelty to which he was subjected at Derik.

The Commission considered the piece of cloth which he gave to the prosecutor as proof of his having been blindfolded. It considered that as strong evidence of his claim that he was ill-treated in Derik. The applicant's claim to have been ordered to strip naked and to have been hosed with cold water finds support from the fact that this Court has held that precisely the same treatment was meted out to Sukran Aydin in the same gendarme station a few months later in June 1993. The applicant also told the delegates that he had been subjected to electric shocks to his fingertips as well as beatings on the soles of his feet. While the Commission expresses itself as adopting a cautions interpretation because it could not rule out that

there may have been certain exaggerations, nevertheless the applicant submits that to keep a person in cold and dark conditions without food or heat even for two days and two nights, when the state of the health of that person is taken into account, is clearly in violation of Article 3.

But when that suffering, because it must have caused considerable suffering, is added to by the deliberate abuse to which he was subjected immediately following in another police station, the accumulative experience, it is submitted, amounts to treatment which represents that level of very serious and cruel suffering that constitutes torture under the Convention. The purpose of his treatment and detention in the applicant's view was not only to have him confess to a crime he did not commit but to punish and intimidate him because of his occupation as a journalist.

I now turn to the question of his status as a journalist.

The Commission held "... that it has not found evidence to corroborate the applicant's complaint that his arrest and detention was due to the fact that he was a journalist with *Özgür Gündem*" and the delegate has noted that the Commission accepted that the probable cause of the applicant's arrest was the accusation that he had been putting pressure on the village guards, an accusation later dismissed by the local court. And it considered that it would appear probable that his ill-treatment was a result of that accusation.

Mr President, the applicant believes that a distinction needs to be made between the given grounds for his arrest and the experiences that he was subjected to after his arrest. It is not a distinction that the Commission makes consistently, nor one that the applicant has made consistently in pleadings. Nevertheless, the complaint that the Commission actually found admissible in his case, with respect to Article 10, was the treatment to which he was subjected occurred because of his profession as a journalist and that consequently his right to seek, receive and impart information had been repudiated. The applicant does not deny that his arrest was at least in part motivated by the fact that he was accused, falsely, as it turned out, of threatening village guards. But he submits that the threats he experienced, as well as the extremity of his treatment, especially at Derinsu, was motivated in part because he was who he was - a journalist on a paper which was considered hostile by those who abused him. The gendarme officers made that motive abundantly clear.

The applicant wishes to draw attention to the series of threats to his life which began immediately on his arrest by Harun Altun. In the summary of his evidence to the Commission's report, and more extensively in the transcript, it is clear that on his arrest, and at Derinsu, he was questioned

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about his work as a journalist and was threatened with death because of it. He believes that his detention in extreme conditions of cold was directly linked to the hostility of Altun towards him because of his association with *Özgür Gündem*. His experiences in Derik, which culminated with the threat to "open up two holes in his head" made by Musa Çitil, should he return to the area, was a threat directly related to his being a journalist and intended to deter him from acting as a journalist. It is worth citing what, according to the applicant's testimony, Musa Çitil said to him. "You want to come here and mix things up. *Özgür Gündem* is a banned newspaper. You are writing news about the region. Furthermore, you are threatening village guards. I am going to send you to the public prosecutor but if you come back to this region again, we'll put two holes in your head." The applicant has never returned to his home village because of the threats made while he was in detention in February 1993.

The applicant asks the Court to have regard to material matters of evidence to which the Commission did not refer, which he says constitutes corroboration. First the fact that the statement that was drawn up in Derik and signed by him, records his occupation as a journalist, as does the note signed by Musa Çitil delivering him to the prosecutor. Secondly the statement taken down by the public prosecutor, Hasan Altun, which is set out in paragraph 176 of the Commission's report, records the applicant's belief that the gendarmes were prejudiced against him because he wrote for *Özgür Gündem*.

And the third matter of evidence, Mr President, arises from the decision of the Mardin Provincial Administrative Board of 13 September 1995, not to prosecute the gendarmes Altun and Çitil, which refers to his journalist status as well as his supposed political opinions as the reasons for his detention.

The Commission quotes from the Administrative Board decision at paragraph 71 of its report and I quote: "it says that the applicant who is referred to as the complainant was detained for having sympathy with the PKK terrorist organisation, for being a reporter on a like-minded organ of the press and for having a hostile attitude towards the State and its soldiers."

An official document recording the deliberations of the Mardin Administrative Board, which cites as a reason for the applicant's detention that he was a reporter on a like-minded organ of the press, is surely evidence corroborating his claim that his status and work as a journalist was a factor in explaining what happened to him at the two gendarme stations. The applicant also noted the references made, indeed the hostile references made, to his status as a journalist with *Özgür Gündem* in the Government's pleadings, including in their memorial. For the Government it is clearly

immaterial to the case that he is a journalist in what they regard as a PKK newspaper.

Mr President, I turn to my final submission. The applicant asks the Court to consider his claim to have been a victim of an aggravated violation of Articles 3, 10, 13 in conjunction with 14 of the Convention. He states that on the facts of his case and the other evidence submitted in his memorial, it is established that he is a victim of practices contrary to the Convention. As the Court will be aware, this is the third case to come before it alleging violation of Article 3 arising from interrogation practices of Turkish gendarmes in the emergency region. All three cases were from the province of Mardin. All three occurred in 1993.

This is the second case in which it is alleged that Musa Çitil presided over a gendarme station in which torture occurred. In the **Aydin v Turkey** case, the Court determined that torture had occurred. This is the second case in which a prosecutor failed to act on evidence of the ill-treatment of detainees. In the present case, the Government accept that the prosecutor failed to do his duty. In **Aksoy v Turkey**, the Court found that the Mardin prosecutor failed to act on the evidence of torture before him.

The present case is another case among many that includes a finding by the Commission that applicants had no adequate or effective remedies in Turkey. It is also another case among many in which there is a finding that there was violation of Article 6 or 13 of the Convention. It is submitted that the Court is faced with a pattern of violations in this and other cases from South East Turkey. The violations are not random matters arising in the context of a situation of overall conformity with the Convention's guarantees. There are systemic violations which result from the existence of law and official policies as well as attitudes encouraged by such laws and policies that create virtual impunity for State officials in South East Turkey.

The applicant has offered extensive analysis of those policies and the legal framework which supports them in his memorial. He asks that the Court considers that evidence. He asks that the Court have regard in particular to the findings of the European Committee on the Prevention of Torture. For the second time, that committee has published findings confirming a practice of torture in Turkey. As the committee notes:

> "to say that torture is an isolated incident, as some are wont to say, is to fly in the face of the facts".

Mr President, that concludes my plea on behalf of the applicant. It remains only to ask that should the Court find in his favour that it award

just satisfaction and legal costs, as he has been set out in his memorial, and he also asks that any legal costs awarded be paid direct to his UK-based lawyers. I thank you, Mr President.

THE PRESIDENT: Thank you, Mr Boyle. I now call Mr Özmen for the Government.

Mr ÖZMEN: Mr President and the honourable Members of the Court, distinguished Delegate of the Commission and distinguished member of the Secretariat and my learned colleagues on the opposite side.

Before starting, I would like to express my cordial congratulations, Mr President, for his election as the President.

Mr President, the applicant, Mr Tekin, alleged that he was tortured while he was under custody of gendarme forces, both at the Derinsu and Derik stations. He was taken into custody on 15 February 1993 at Derinsu and transferred to Derik on 19 February and after being brought before the public prosecutor, Mr Hasan Altun, he was released on the same day. According to the applicant's account, he was kept for four days at the Derinsu station, where he was blindfolded and slapped in the face by the gendarmerie commander, Harun Altın, and left in a cell which was freezing cold without being given any food, water, bed or blankets.

On the last night, his three brothers were allowed to join him in the cell because they quarrelled with the soldiers and told them that they should be put in the same cell. Thus, the applicant's three brothers warmed him up. On the next day, he was again blindfolded and brought to the Derik station where he was beaten with truncheons and *falaka*, sprayed with cold water and subjected to electric shocks. The applicant contended that torture at the Derik station continued for about three hours after which he had fainted.

As he came round, his statement was taken by the gendarmes and brought before the public prosecutor, Mr Hasan Altun, to whom he complained about torture and handed over a piece of cloth as evidence of the fact he had been blindfolded.

He made no effort to produce any medical evidence. If we analyse the story up to here, we find some points contradictory and illogical. First, if the acts of torture, as aggravated as the applicant alleged, were inflicted on him, he would have been hospitalised and kept under medical treatment for a considerable time. This all more so, where the applicant's state of health is concerned, because he asserted that he had only one kidney. Therefore, it is hard to conceive how the applicant could stand such violence without suffering a complication caused as a result of having been kept in a freezing

cold cell for four days and thereafter tortured with cold water spray, truncheon, falaka and even electric shocks. Despite all these allegations, no kidney disease had been complained of.

Second, although he had allegedly been subjected to torture to force him to admit that he had threatened the village guards to give up their arms in favour of the terror organisation, the PKK, he had denied all the charges against him without exception.

Third, the assumption that the applicant's three brothers were allowed into the cell to warm him up is illogical. Besides being against the rules, it is unbelievable to let close relatives be eye-witnesses to ill-treatment, and then just let them go and notify the competent authorities about the unlawful conduct of the gendarmes.

Fourth, the applicant did not claim in his application to the Commission that he was subjected to electric shocks. This claim was made at a later stage during the hearing of witnesses held by the fact-finding delegation. This late claim leads us to draw attention to the fact that it amounted to an expansion of the application with respect to that claim. Furthermore, if it was true that the applicant was subjected to electric shocks on the last day of his detention, it would have been very easy to establish evidence of this kind of torture since its marks would remain noticeable for at least three or four days. Indeed, this fact is also relevant for the allegation of having been beaten with a truncheon. However, strange as it could be, there is no medical report whatsoever. We do not share the assumption of the Commission that the applicant was in shock, and for that reason could not visit a doctor to produce a medical report, or that he did not need any medical treatment because his family provided the necessary medication. The Government submit that in cases where torture or ill-treatment is at issue medical evidence is required and if there is none, despite the fact that it was possible and easy to obtain any, as was the case, no other evidence may take the place of it or complement its lack. Therefore, the approach of the Commission to substitute the statements taken from the applicant and from his father in place of medical evidence is unacceptable.

When we compare the present case with the case of **Aksoy v Turkey**, we find a remarkable discrepancy between them. In the **Aksoy** case, although Mr Aksoy was illiterate he managed to produce a medical report, and neither the Commission nor the Court ignored the necessity of providing medical evidence in that case. As for the present case, the Commission deviated from requiring medical evidence in torture and drew its conclusion merely on the basis of oral evidence taken from the applicant, and from his father.

At this point it is also noteworthy to recall the applicant's inclination, as a journalist working for a newspaper which was devoted to the propaganda of the PKK, to do everything to promote the campaigns which would tarnish the image of Turkey. In view of this fact, and knowing that some organisations like the Human Rights Association from Diyarbakır and the Kurdish Human Rights Project from London would back up the applicant, how could it be plausible to assume that the applicant - with this given inclination - would be reluctant to expose the marks of torture? No, on the contrary, he would never hesitate to demonstrate any wrong-doing from which he had suffered - let alone torture. he would at least take photographs of the marks and wounds that occurred as a result of torture, which would be of no difficulty in view of the fact that he was a journalist and the members of the said associations would be very active in achieving the best results.

Fifth, the piece of cloth which was handed over to the public prosecutor, Mr Hasan Altun, was a *kefiye*, a kind of scarf worn over the head or round the neck which cannot be used as a blindfold because its loose style of weaving is not appropriate for that purpose. This fact has been overlooked by the Commission. But not only this, the Commission has also overlooked the fact that the applicant's father has stated that he and the applicant waved to each other while the applicant was being put in a military vehicle to Derik, which meant that there was no blindfold on the applicant's eyes. This fact was recorded on page 131 of the verbatim record of the witnesses' hearing held at Diyarbakır and was also referred to in our final pleadings to the Commission, dated 26 July 1996. However, remarkably, no reference was made in the report of the Commission. On the other hand, it is to be stressed that there was nothing to screen from him, since he was an inhabitant of, and a journalist assigned to report news from the place as well as the vicinity, and thus knew everywhere as much as the gendarmes.

Mr President, it is true that the applicant had claimed that he had been tortured by the gendarmes, but under the context of counteracting the accusations against him. He was brought before the public prosecutor, Mr Hasan Altun, with respect to the accusation that he had threatened the village guards to give up their arms and as a counteract, he had made the cliche claim. Beyond that, he had never made any formal complaint to the competent public prosecutor. Had he done so, the public prosecutor would be in a position to commence an investigation. However, the fact that he had not made any formal complaint, but just introduced the cliche claim relating to torture had been evaluated by the public prosecutor only as a plea of defence and no further. In other words, the public prosecutor did not consider the claim of torture convincing enough to commence an investigation. Indeed, the appearance of the applicant at that time must have played a significant role. If there was any *prima facie* evidence showing that the claim of torture was true, the public prosecutor would act in accordance with the law and

institute an investigation, as he did not hesitate in putting down what the applicant had claimed.

It is to be underlined here that there is no sign which would lead us to doubt that the public prosecutor, Mr Hasan Altun, would refrain from recording, if the applicant ever appeared to have been tortured. In this connection, the testimonies of the three village guards, who were also the neighbours of the applicant's father, should be taken into consideration. These three villagers have testified that they have not seen any wounds, bruising or swelling on the applicant's face and that they have heard nothing from the applicant that he had been tortured.

It is another fact that these three village guards were friends of the applicant and they have testified in favour of him so that the State security court has decided for the acquittal of the applicant. However, the Commission has found these three villagers incredible, without taking the cultural context of their statements into consideration. Whereas on the other hand, it attached significance to the cultural context of the statements of the applicant himself and of his father, which appear from paragraph 171 at page 28 of the report. Of course, it is strange to make such a conclusion when the applicant is concerned, since he was a journalist and made himself a master of political agitation as one of his articles which has been included with our final pleadings to the Commission dated 26 July 1996 shows.

Turning to the cultural qualifications of the three villagers, it was obvious that their conceptions were not more sophisticated than the applicant's father. However, despite the fact that all three villagers have testified in favour of the applicant before the State security court, the denial of Halit Tutmaz, stating that he had not given any testimony about the applicant prior to his appearance before the delegates, was considered to the prejudice of all three witnesses. If due attention were paid, it could easily be understood that Halit Tutmaz meant that he had not given any testimony on the matter at issue, which was quite true. His previous testimony was in fact on a different matter, which was on the accusation levelled at the applicant of whether he had threatened the village guards. The Commission has overlooked this point, as well as many others. It has relied only, and merely, on the statements of the applicant and his father which were conflicting and not credible in nature.

The Government would like to stress that the applicant was not so insistent on his allegations of torture before the domestic authorities. As I submitted a few minutes ago, he had made a summary claim with respect to torture but within the context of a defence plea against the charges which he had faced and had made no further attempt to exhaust the domestic remedies. He said to the public prosecutor, Mr Hasan Altun: "I was kept in

freezing-cold custody, subjected to water torture, beaten with a truncheon and blindfolded throughout the period of custody". This statement was indeed very abridged when compared with the one made before the delegation after a considerable time had passed after the alleged incident. This difference between the two statements raises doubts as to the question of whether he had developed his claims with the help of the team-work carried out by the associations which played a leading role in certain individual applications before the Commission.

From this picture, we conclude that the applicant reserved the details of his claims until the hearing held by the delegation of the Commission and in this manner avoided giving necessary details to the domestic authorities and as a consequence he did not even bother to make the necessary application against the decision of non-prosecution rendered by the public prosecutor, Mr Bekir Özenir.

The Government object to the assumption of the Commission that the investigations carried out by the domestic authorities were flawed and perfunctory and submit that, as regards the first public prosecutor, Mr Hasan Altun, it could be that he had found no indications to persuade him to commence an investigation and that he had acted within the margin of appreciation conferred on public prosecutors by Article 153 of the Code of Penal Procedure which stems from Article 160 of the German Code of Penal Procedure (*Straf Process Ordnungsgesetz*).

As regards the second public prosecutor, Mr Bekir Özenir, since there was no convincing evidence he took the decision of non-prosecution on 4 May 1994. However, the applicant did not take any steps to appeal against this decision. Thus, the decision of non-prosecution became final. Under these conditions, it cannot be concluded that the investigation was flawed or perfunctory because there was no other option for the public prosecutor in a case where more than a year had elapsed since the incident and no medical evidence was provided.

The Government would also like to submit that the assumption of the Commission that the failure of the public prosecutors to appear before the delegation as witnesses has adversely affected the establishment of facts is unacceptable, since this assumption is against the facts of the general tendency of the Commission with regard to the applications against Turkey. As a matter of fact, in a number of Turkish cases, although the public prosecutors were heard by the delegations, the Commission has always relied on documentary evidence and nor on the oral evidence taken from the public prosecutors. It is also a fact that none of the public prosecutors in this case were eye-witnesses to the alleged incident.

At this point, the Government would also like to refer to Article 15 of the UN Resolution on the Basic principles on the Independence of the Judiciary which was endorsed by the General Assembly on 29 August 1985 and on 13 December 1985. According to this Article:

> "The judiciary shall be bound by professional secrecy with regard to their deliberations and to their confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters."

It is to be noted that, in Turkish law, public prosecutors belong to the judiciary.

Besides this UN Resolution, we are of the opinion that there is no rule of the Commission to compel the public prosecutors to appear and give oral evidence before it. As for the Government, it rests with them to serve the summons on the public prosecutors requested to be heard and that is all. It is also to be noted that in Turkish law public prosecutors are not ordinary civil servants as wrongly evaluated by the Commission.

As concerns the questions put by the Court, for the first question, I would like to submit the information that the disciplinary proceedings commenced against the first public prosecutor, Mr Hasan Altun, has not yet been concluded. However, we have been informed that in a short time the proceedings concerned will be concluded.

As for the second question relating to the decision of non-prosecution taken by the Administrative Board of Mardin, I would like to submit that this decision was subject to an automatic appeal to the Supreme Administrative Court as prescribed by the law and the outcome of this appeal is in the affirmative, that is, the Supreme Administrative Court confirmed the decision of non-prosecution.

Finally, Mr President, I would like to state that we maintain our observations submitted to the Court in our memorial and now I would like to comment on the compensation claims made by the applicant's side. The Government submit that the conclusion of the Commission was based merely on the statements of the applicant and his father and therefore the allegations in the present case have not been substantiated and there is no violation in relation to any Article of the Convention and no need to award any compensation to the applicant. If the reverse were the case, a finding of any violation would suffice to satisfy the applicant in relation to non-pecuniary damage. In case of a finding of any violation, it would not be

necessary to award any compensation for pecuniary damage because no pecuniary damage has occurred.

Concerning the legal costs and fees, the Government would like to reiterate their observations on the fact that no violation whatsoever took place, therefore fees and costs should be incurred by the applicant's side. If the reverse would be the case, unless each and every item is documented, none of them should be payable. Besides the Government object to any payment which would be made under the heading of administrative support.

Mr President, thank you for your patience, I respectfully request the Court to dismiss the case. Thank you Sir.

THE PRESIDENT: Thank you Mr Özmen. Mr Danelius do you like to add anything?

Mr DANELIUS: no thank you Mr President.

THE PRESIDENT: Mr Boyle?

Mr BOYLE: Mr President, may I raise a number of matters arising from my colleague's statement to the Court. First of all I understand him to confirm a matter over which there was some uncertainty, namely, in addition to the applicant having complained of torture to the public prosecutor, he also complained about his treatment in the State Security Court in June 1993. He in fact told the delegates that he had made such a complaint but there was no confirmation by way of court documentary record and I understood my colleague to confirm that he had complained. That is material in this respect, Mr President, that there are now two official records of his complaints at the time to corroborate his own oral testimony.

With respect to the arguments made by my colleague on the situation of prosecutors under Turkish national law, may I make the observation that whatever the position under Turkish national law, it is clear that the Government are responsible for the acts of all the State's agents and those agents can engage the responsibility of the State. And should the prosecutors not appear as they were requested, the Commission is and was free to draw such conclusions that it wished, from the evidence presented, where these prosecutors had not appeared.

Finally Mr President, with respect to the issues on the medical testimony, may I say, as I have said in the applicant's memorial, that he accepts that medical evidence is the best evidence, but that does not mean it is the only evidence, and that credible evidence cannot be given of facts as to ill-treatment and injury by testimony, in particular testimony before

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experienced delegates. The point is repeated that this applicant had sought to be sent to a hospital by a prosecutor and it was refused. The point should also be made that he was not seen by a doctor, in apparent violation of Turkish law, either in Derinsu or in Derik. The fact was that the Commission's assessment of his state of mind when he left the gendarme station is correct, that he was confused. He was able in effect, if one reads the transcript, to treat himself. He knew the medication for his kidney. He purchased Primnol to cleanse his kidney and antibiotics and ointments for his feet and shoulders, that is according to the evidence presented on page 55. So in those circumstances the applicant relies on the Commission's assessment as to his state of mind in explaining why his failure to go to a doctor does not damage his general credibility. Thank you very much Mr President.

THE PRESIDENT: Mr Özmen, would you like to add anything?

Mr ÖZMEN: Nothing to add, thank you.

THE PRESIDENT: Are there any questions from the Members of the Court? If it is not the case then I thank those who have appeared this morning before the Court, the Delegate of the Commission, the counsel for the applicant and the Agent for the Government. The hearing is closed.

(The hearing was closed at 11 a.m.)

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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 Britain. KHRP is a registered charity. It is committed to the protection of human rights of all persons living within the Kurdish areas, irrespective of race, religion, sex, political persuasion or other belief or opinion. Its supporters include people of Kurdish and non-Kurdish origin.

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

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Yasa v. Turkey; Tekin v. Turkey – Two of a series of cases brought by Kurds with the assistance of the Kurdish Human Rights Project

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