Salman v Turkey

İlhan v Turkey

# Torture and Extra-Judicial Killing

A case report



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

KHRP

Kurdish Human Rights Project

# SALMAN v. TURKEY
# &
# İLHAN v. TURKEY:

# Torture and Extra-Judicial Killing



**December 2001**

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# FOREWORD

In June 2000 two new judgments were handed down in the series of cases brought to the European Court of Human Rights by the Kurdish Human Rights Project (KHRP) working with the Human Rights Association of Turkey, Diyarbakir branch on behalf of Kurdish applicants. Both *Salman v Turkey* and *İlhan v Turkey* raise the grim reality that public officials carry out torture against detainees in Turkey. The prohibition on torture enshrined in Article 3 of the European Convention on Human Rights is considered to be one of the most fundamental of the rights protected by the Convention. For Agit Salman, the torture was so serious that he died as a result, and the Court held that Turkey had also violated the right to life protected by Article 2 of the Convention, while Abdüllatif İlhan has never fully recovered from the injuries inflicted upon him.

The cases of *Salman v Turkey* and *İlhan v Turkey* which are the subject of this Case Report form part of an ongoing litigation project that KHRP began in 1992. Involving the representation of more than 450 applicants so far, this project has resulted in judgment being handed down in 35 KHRP-assisted cases to date.[1] Issues raised by these cases include extra-judicial killing, 'disappearances', torture, village destruction and restrictions on freedom of expression. For those victims and their families who take their cases to Strasbourg, the outcome provides a measure of redress, but the cases have a far wider impact, helping to raise awareness within Turkey itself and internationally of the ways in which Turkish law and practice fall short of international human rights standards.

The litigation of cases before the European Court of Human Rights requires many years of hard work and commitment by many individuals and organisations in Turkey, the UK and the rest of Europe.[2] In particular, the close partnership between KHRP and the Diyarbakir branch of the Human Rights Association of Turkey has been crucial.

The litigation project is not KHRP's only activity. KHRP also works to tackle human rights violations in all the Kurdish regions including not only Turkey but also Syria, Iraq, Iran and parts of the former Soviet Union. We carry out research, conduct fact-finding missions and trial observations and publish reports, all aimed at establishing the facts and raising awareness of human rights violations being perpetrated against Kurds wherever they are. We also carry out a proactive media strategy and produce a regular newsletter, *Newsline*, and maintain a website.

As one of our activities aimed at raising awareness of Turkey's violation of its international human rights obligations, our series of Case Reports aims to make the process and outcome of the cases as widely accessible as possible. The Introduction to this Report assesses the legal aspects of the two cases, and sets them in the socio-political context existing in Turkey. The first section outlines the facts as presented by the different parties and the findings of both the Commission (since both cases were brought

[1] A list of the judgments can be found in Appendix F.

[2] In addition to the Human Rights Association of Turkey - Diyarbakir Branch, the Turkish Bar Associations, the University of Essex, the Bar Human Rights Committee of England and Wales, the Human Rights Committee of the Norwegian Bar Association.

under the old system that operated before Protocol 11 came into effect, under which the Commission examined the facts) and the Court on the facts. The legal proceedings are then summarised, and finally the applicant's complaints under the Convention including the legal arguments put forward by all the parties and the Commission and Court's reasoning and findings. The reports of the Commission and Court are appended, together with a summary guide to the system and procedure under the European Convention on Human Rights and a list of judgments in KHRP cases to date.

KHRP warmly thanks Gita Parihar, Iris Golden, Stephen Vasil and Clare O'Connell for their contributions towards drafting this report. Thanks are also due to the lawyers in Turkey and in the UK who represented the applicants before both the Turkish authorities and the European Court of Human Rights. Without the dedication and hard work of these and many others, KHRP's achievements would not be possible.

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London
December 2001

# INTRODUCTION

The cases of *Salman v Turkey* and *İlhan v Turkey* highlight the prevalence of torture and the serious threats to the right to life that are sadly a phenomenon in Southeast Turkey.

Agit Salman was arrested by police in the early hours of 28 April 1992 and taken to the Adana Security Directorate, a place where he claimed to have been subjected to torture some two months previously. Twenty-four hours after his arrest, he was rushed to hospital and pronounced dead on arrival. Abdüllatif İlhan was apprehended by soldiers during a raid on his village, Aytepe, early in the morning of 26 December 1992. Despite being badly bruised and only half conscious after being beaten by soldiers, he was taken to the gendarme station at Mardin where he was tortured. Although his condition deteriorated, he was denied medical treatment and was not released until the following evening, after which he was rushed to hospital and placed in intensive care. A year later, he was still suffering from a 60% loss of function on his left side; nine years later, he is still disabled.

In both cases, the former European Commission of Human Rights had found it necessary to carry out fact finding hearings since the facts were disputed. The Commission took oral evidence from a large number of witnesses including police officers and other officials and also considered medical evidence. In both cases, the Commission concluded that the Government should be held responsible. The Commission was satisfied, beyond a reasonable doubt, that Agit Salman was questioned during the period of his detention and suffered physical ill-treatment of a serious degree prior to his death. In the case of Abdüllatif İlhan, the Commission found the Government's explanations of how the applicant obtained his injuries to be unconvincing, and concluded that there had been a violation of Article 3.

In its judgment, the Court agreed with the Commission that ill-treatment had occurred for which the authorities were responsible, and that therefore a violation of Article 3 of the Convention had occurred. The Court in both cases went on to consider whether the ill-treatment suffered was severe enough to amount to torture, rather than the lesser violation of inhuman or degrading treatment. This was because the Convention intentionally distinguishes between them, in order to attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering (the Court cited the case of *Ireland v UK*). Finding that very serious and cruel suffering had occurred, and also noting a purposive element in the definition of torture as contained in the UN Convention against Torture (which defines torture in terms of intentional infliction of severe pain or suffering with aims such as obtaining information, inflicting punishment or intimidating), the Court went on to find in both cases that the treatment amounted to torture. In the case of Salman, the Court emphasised in particular the infliction of "*falaka*" (beating the soles of the feet) and a blow to the chest, while in İlhan, it highlighted the delay in receiving proper medical treatment. These findings are positive developments which show the Court treating the violations as extremely serious and taking the opportunity to display its disapproval.

In cases against Turkey the Court has frequently found that Article 2 (the right to life) requires an effective official investigation, and that this procedural obligation is a part of the State's obligation under that Article. In *Salman v Turkey* the Court again found that the authorities' failure to investigate the circumstances surrounding Agit Salman's death amounted to a violation of Article 2, in addition to the violation of Article 2 in respect of responsibility for the death itself. In *İlhan v Turkey*, the Court reaffirmed the principle that Article 2 may be in issue in some cases concerning the use of substantial force, albeit that the force used does not prove to be lethal (although there was no violation of Article 2 on the facts of *İlhan*).

While the Court acknowledged in the *İlhan* case that in some circumstances it might find a procedural violation of Article 3 due to the failure to investigate the allegations of ill-treatment, as it had found in the case of *Assenov v Bulgaria* in 1998, it held that the complaints concerning the lack of an effective investigation should be dealt with under Article 13 (right to an effective remedy), and did go on to find a violation of that Article. It is disappointing that the Court decided to deal with the question of ineffective remedies solely under Article 13, a subsidiary provision which carries less weight than the substantive provisions of Articles 2 or 3, particularly since arguably it is the lack of procedural safeguards, impunity and indifference of the system to claims of violations of fundamental rights that create the climate in which such violations can occur.

Similarly, it is regrettable that the Court has yet again failed to address the question of whether the violations found in these cases formed part of an officially tolerated practice. Its failure to address this question is perhaps surprising because the Court itself, in the *Salman* judgment, refers to a report of the European Committee for the Prevention of Torture which states that *falaka* is one of the forms of ill-treatment in common use in the Adana Security Directorate where Salman was held. A finding that killings, ill-treatment, ineffective investigations and other common violations were part of a practice would send a strong message to the Turkish Government and to the other States Parties.

In addition to raising serious violations of fundamental rights, these cases also raise the all too familiar occurrence of official intimidation of applicants to the European Court – Agit Salman's wife, who brought the petition to the Court, was herself taken in to the Security Directorate on three occasions. She was blindfolded, beaten and kicked, questioned about her application to the European Commission of Human Rights and told she should drop her case.

In sum, the cases of Salman *v Turkey* and *İlhan v Turkey* serve as a shameful record, and a damning indictment of Turkey's human rights record.

# PART I: SALMAN v TURKEY (No. 21986/93)

## SUMMARY OF SALMAN v TURKEY

The case of *Salman v Turkey* was brought by Mrs Behiye Salman ('the applicant'), a Turkish citizen of Kurdish origin born in 1942 from Adana in Southeast Turkey. Her application to the European Commission of Human Rights ('the Commission') was brought on her own behalf, and on behalf of her deceased husband, Agit Salman. Agit Salman was born in Omerli in 1948. At the time of events in this case he was working as a taxi driver at the Aksoy taxi rank in Adana. The applicant alleged that her husband, on or about 29 April 1992, while in custody at the Adana Security Directorate, was subjected to torture that led to a cardiac arrest. The applicant claimed before the European Court of Human Rights ('the Court') that the Turkish authorities had violated the right to life (Article 2), prohibition of torture or inhuman and degrading treatment (Article 3) and the right to an effective remedy (Article 13) of the European Convention on Human Rights ('the Convention'). The applicant also alleged that she was hindered in the exercise of her right of individual petition (formerly Article 25, now Article 34). She claimed pecuniary and non-pecuniary damages under Article 41 of the Convention. The Court found the State responsible and held that violations of Articles 2, 3, 13 and 25 had occurred.

## THE FACTS

### The facts as presented by the applicant

On 28 April 1992, at about 1:00 a.m., police officers went to the applicant's house, looking for her husband, Agit Salman as part of an operation to apprehend persons suspected of involvement in the Kurdistan Workers' Party (PKK). He was later found at the Aksoy taxi rank where he was working in his taxi, and was arrested by a team of three police officers. Agit Salman had previously been taken into custody on 26 February 1992 by police officers from the Anti-Terror Branch and had been released at 5:30 p.m. on 27 February 1992. He told his wife and son Mehmet that on that occasion he had been beaten and immersed in cold water.

Agit Salman was registered in the custody record at Adana Security Directorate at 3:00 a.m. There are no records of what happened to him from the time of his apprehension at 1:30 a.m. until 3:00 a.m. At about 1:30 a.m. on 29 April 1992, he was taken to Adana State Hospital by the interrogation team. Dr Ali Tansi declared him dead on arrival and concluded that he had died 15-20 minutes previously.

During his twenty-four-hour detention, Agit Salman was subjected to torture, which led to his cardiac arrest. An initial medical examination of the body noted graze wounds on the front of the right armpit, a graze on the front of the left ankle and a traumatic ecchymosis on the front of the chest.

On 29 April 1992, Mehmet Salman was brought by the police to the Security Directorate, where the Public Prosecutor informed him that his father had died of a heart attack. The family filed a complaint with the Public Prosecutor the same day. On 30 April 1992, Ibrahim Salman, the applicant's brother-in-law went to identify the body. The body was released to the family who undertook to bury it the day before May Day. While preparing the body for burial, Ibrahim Salman noticed bruising and marks on the back resembling holes. The family arranged for four colour photographs of the body to be taken as evidence.

On 24 January 1996, the applicant was taken to the Security Directorate, blindfolded, beaten and kicked, and questioned about her application to the European Commission of Human Rights. She was told that she should drop her case to the Commission and a statement was taken by officers on which her thumbprint was placed. On 7 February 1996 and 10 February 1996 the applicant was questioned about her statement of means: firstly by the prosecutor and thereafter by the Chief Prosecutor at the Security Directorate.

**The facts as presented by the Government**

Agit Salman fell ill while being detained in the police cells at the Security Directorate. He was not interrogated by police officers between the time of his arrest and his falling ill in his cell. He told the police officers that his heart was giving him problems and was therefore put in a van and taken to the hospital on a journey lasting 15-17 minutes. During this journey there was a brief two-minute stop while one of the officers applied mouth-to-mouth resuscitation and a heart massage.

An autopsy report was issued to the effect that the case should be referred to the Istanbul Forensic Institute for clarification of the actual cause of death. In its report of 15 July 1992, the Institute found that the wounds and marks on Agit Salman's body could have been caused by resistance or struggle on arrest and the breakage of the sternum corpus could have been caused by attempted resuscitation. They were of the opinion that death was caused by stoppage of the heart due top neurohemeral changes brought about by the pressure of the incident because of his existing heart disease.

**Proceedings before the domestic authorities**

The family of Agit Salman filed a complaint with the Public Prosecutor on 29 April 1992. On 19 October 1992, the Adana Public Prosecutor issued a decision not to prosecute on the basis that there was no evidence justifying a prosecution. He stated that at about 1:15 a.m. on 29 April 1992 Agit Salman had informed officers that his heart was giving him problems and he had been taken to Adana State Hospital where he died. According to the forensic report, Agit Salman had a longstanding heart disease and any superficial injuries could have occurred on arrest. The report concluded that his death was the result of a heart attack brought on by the pressure of the incident and his heart problem.

On 13 November 1992, the applicant appealed against the decision not to prosecute, claiming that Agit Salman had been interrogated and died under torture.

On 25 November 1992, the President of the Tarsus Assize Court rejected the applicant's appeal.

On 22 December 1992, the Minister of Justice referred the case to the Court of Cassation which quashed the non-prosecution decision and sent the file to the Adana Public Prosecutor for the preparation of an indictment.

The indictment charged ten police officers with homicide under case number 1994/135. Hearings took place before the Adana Aggravated Felony Court, with oral statements given by six of the ten police officers. Statements were also given by the father of Agit Salman; the applicant and Dr Ali Tansi, the doctor on duty in the emergency unit at Adana State Hospital.

On 26 December 1994, the Adana Aggravated Felony Court found that it could not be established that the defendants had exerted force or violence on Agit Salman or threatened him or tortured him in order to force him to confess. The Court concluded that superficial traumas on his body could have other causes, for example, they could have been inflicted during his arrest. The forensic reports indicated that Agit Salman died as a result of his previous heart condition, compounded with superficial traumas, but there was no evidence to show that these superficial traumas were produced by the defendants. The Court acquitted the defendants on the grounds of inadequate evidence.

**The findings of fact by the European Commission of Human Rights**

The facts of the case, particularly those concerning the events of 28-29 April 1992, were disputed by the parties. The Commission therefore conducted an investigation with the assistance of the parties in accordance with former Article 28(1) of the Convention. The Commission based its findings on the evidence given orally before its Delegates and evidence submitted in writing in the course of the proceedings.

The Commission heard from witnesses which included: the applicant; her son Mehmet Salman; her brother-in-law Ibrahim Salman; Ahmet Dinçer and Şevki Taşçi, police officers who apprehended Agit Salman; Omer Inceyılmaz, Servet Özyılmaz and Ahmet Bal, custody officers on duty over the period of Agit Salman's detention; Ibrahim Yeşil, Erol Çelebi and Mustafa Kayma, interrogation team officers who took Agit Salman to the hospital; Tevfik Aydin, the Adana Public Prosecutor who attended the autopsy; Dr Ali Tansi, the doctor who declared Agit Salman dead; Dr Fatih Şen, who conducted the autopsy on the body; Dr Derek Pounder, Professor at Aberdeen University, a forensic pathologist expert called by the applicant; and Dr Bilge Kirangil, a member of the Istanbul Institute Forensic Medicine which had reviewed the autopsy carried out by Dr Fatih Şen.

Witnesses were heard by the Delegates in Ankara from 1 to 3 July 1996 and in Strasbourg on 4 December 1996 and 4 July 1997. The Commission also requested an expert opinion on the medical issues in the case from Professor Cordner, Professor of Forensic Medicine at Monash University, Victoria (Australia) and Director of the Victorian Institute of Forensic Medicine.

The Commission also took account of the various documents submitted to it by the parties. These included reports by the UN Special Rapporteur on Torture, a report from the UN Committee Against Torture dated 1993, a report by the Human Rights Foundation of Turkey entitled "Deaths in Detention Places or Prisons (12 September 1980 to 12 September 1994)" and four colour photographs of the body of Agit Salman taken by journalists.

The Commission further took into account the following documents: a statement by the applicant submitted with her application to the European Court of Human Rights; documents relating to the alleged intimidation of the applicant; and statements of the police officers involved in the incident. Official documents and reports were also submitted by the Government, including the detention request and custody record of the Adana State Directorate.

The Commission also considered the medical and expert reports concerning the death of Agit Salman. These included the record of the examination of the body of Agit Salman dated 28 April 1992; the toxicology report dated 14 May 1992; the histopathological report dated 18 May 1992; an autopsy report dated 21 May 1992; the report of the Istanbul Forensic Medicine Institute dated 15 July 1992; the report and additional report of Professor Pounder, both submitted on 26 November 1996; and the report of Professor Cordner dated 12 March 1998.

**Regarding the detention of Agit Salman on 26 February 1992**

The Commission found that Assistant Superintendent Ibrahim Yesil, as the officer in charge of Agit Salman's file, would have met him in the context of questioning or interrogation during his period of detention. Witness statements from the applicant and others indicated that Agit Salman had been beaten and kept under cold water during the night he was detained. As a result of this he had been absent from work with a chill. The Commission considered this evidence, that Agit Salman was subject to ill treatment during his detention on 25-26 February 1992 when he was under the responsibility of Ibrahim Yeşil as investigating officer, to be highly persuasive.

**Regarding the arrest of Agit Salman on 28 April 1992**

The Commission accepted the oral evidence of the applicant and Mehmet Salman who asserted that police officers went to Agit Salman's house looking to arrest him. However

the Commission found the oral and written accounts of the police officers concerning the apprehension of Agit Salman to be contradictory. Assistant Superintendent Ahmet Dinçer and officer Şevki Taşçi stated in their oral testimony that they had to take Agit Salman by the arms and lead him to the car, that this did not involve the use of force, and that Agit Salman did not receive any marks in the process. They both, however, commented that when in the car, Agit Salman showed signs of breathlessness. In contrast, the written statements taken by the Public Prosecutor from the arresting officers stated that there had been some pushing and pulling in order to force Agit Salman into the car. While the statements referred to Agit Salman breathing heavily, they did not state that this had caused any concern at the time.

The Commission considered that it could not be regarded as established that Agit Salman had suffered any injury on arrest and that the circumstances surrounding his arrest could not be regarded as providing a satisfactory explanation for any marks later found on his body. On the evidence before the Commission, it was apparent that Agit Salman's medical condition was not such that the amount of nervousness he experienced on arrest would have had any tangible effects on his breathing, short of the later stages of cardiac arrest. It had not been suggested that from the moment of his arrest until his death twenty-four hours later he was in a state of prolonged cardiac failure, which would in any event have been noticeable. The Commission therefore found that the officers exaggerated events with the benefit of hindsight.

With regard to the detention of Agit Salman, the Commission noted that insofar as there were written records of the overall detention period, there was a period of one and a half hours not accounted for. The Commission noted that the arrest report signed by Ahmet Dincer gave the time of apprehension as 1:30 a.m., whereas the custody record noted the time of arrival as 3:00 a.m.

The Commission found that there was no doubt that Ibrahim Yeşil, as the interrogation team leader, was assigned Agit Salman's file and that it was his responsibility to carry out any questioning of Agit Salman. The Commission found that the police officers' assertion that Agit Salman had not been questioned during the twenty-four hours following his apprehension to be implausible, inconsistent and lacking in credibility. Two other suspects connected with the same incidents in respect of which Agit Salman was apprehended were interrogated shortly after his arrest and detention. There was no explanation as to why there would have been a delay in questioning Agit Salman. Yeşil's claim that he was not important to them was not convincing given the list of suspicions against him.

**Circumstances surrounding the death of Agit Salman**

The Commission noted that according to the testimony of Mehmet and Ibrahim Salman, it was only 3.5 – 4km from the Security Directorate to the hospital. The Commission made note of the fact that travelling this distance at 50km per hour would render the time of travel at a little less than 5 minutes. One of the police officers stated that there was a

narrow bridge to cross and a lot of junctions. However, the Commission doubted that at 1:00 a.m. they would have posed time-consuming obstacles, particularly if the police officers were concerned to reach the hospital as soon as possible.

The autopsy finding that Agit Salman's lungs weighed 300g each was consistent with a rapid death in the view of both Professor Pounder and Professor Cordner. Since Dr Tansi was of the view that death had occurred 15 to 20 minutes before arrival at the hospital, the Commission considered that Dr Bilge Kirangil's opinion that death was not particularly rapid was not supported by the surrounding circumstances.

The Commission noted that the first time evidence was given about the alleged resuscitation attempt en route to the hospital was to the Commission's delegates in July 1996. Given this and the previous doubts as to the evidence given by the police officers, the Commission found the evidence concerning the attempted resuscitation to be of dubious reliability.

**Medical and expert reports concerning the death of Agit Salman**

The Government had submitted in its final observations that no weight should be given to the opinion of Professor Cordner, who was instructed by the Commission delegates. They pointed out that Professor Pounder, the applicant's expert, studied and worked for eight years in Australia where Professor Cordner is based. However, the Commission did not consider that those professional contacts were such as to cast doubt on Professor Cordner's integrity or objectivity.

The Commission found that there was no disagreement among the doctors as to the finding that Agit Salman had an underlying heart disease. There was also no disagreement that Agit Salman would have been able to live and work normally without suffering any disability or visible symptoms. However, there was disagreement as to what had triggered the cardiac arrest.

The Commission observed that the dating of the bruise on the middle of the chest was crucial to finding that the bruise was separate from the fracture and thus to the probability of the fracture being caused by CPR rather than an unexplained violent trauma. The Commission found that there was no strong medical evidence for finding that the bruise was unconnected with the fractured sternum. It considered that the location of the bruise and the absence of other indications such as broken ribs supported the view that the bruise was caused at the same time as the fracture and thus by an unexplained application of force.

Professor Pounder was of the opinion that the marks under the right armpit and right little toe resulted from the application of electricity. Professor Cordner found that it was not possible to draw any such conclusions from the poor quality photograph. The Commission considered that there was insufficient evidence to attribute the marks under

the armpit or the colouration of the right little toe, to injuries occurring during Agit Salman's detention.

The Commission could not establish an explanation for the marks and abrasions on the left ankle recorded by Dr ⇔en. It recalled that Professor Cordner had found that very small faint marks could be seen on Agit Salman's right ankle. The Commission observed that these marks accorded with Professor Pounder's description of how the injuries could have been the result of *falaka* (beating on the soles of the feet). With regard to the other injuries, the Commission found that the photographs taken of the body were of poor quality and that, as they were taken after the autopsy, certain marks on the body could have occurred as a result of handling after death. The Commission considered that the discolouration on the sole of the left foot, apparent from the photographs, strongly suggested bruising. It noted that a person with such bruising would not be able to walk without being in pain or with a limp. As there was no evidence of Agit Salman being impaired in his ability to walk at the time of his arrest, this was an indication of another unexplained injury having occurred during his detention.

The Commission concluded that the medical evidence very strongly suggested that Agit Salman died rapidly from cardiac arrest after the occurrence of physical trauma during his detention, which had not been satisfactorily accounted for. It considered that the autopsy examination conducted by Dr Fatih ⇔en was incomplete, due to the lack of photographs and histopathological analysis of marks, and was therefore an unreliable basis on which to draw conclusions as to the cause of death of Agit Salman.

The Commission took the medical evidence together with the evidence of the police officers which the Commission had found to be unreliable in this case. It was satisfied, beyond a reasonable doubt, that Agit Salman was questioned during the period of his detention and suffered physical ill-treatment of a serious degree prior to his death.

The Commission noted that the applicant did not receive the news that her husband had died until the evening when her son returned from the Security Directorate. The body of Agit Salman would have been examined during the day and the Commission did not consider that there was any acceptable explanation for this delay.

**The findings of fact by the European Court of Human Rights**

The Court noted that, under the Convention system prior to 1 November 1998, the establishment of the facts was primarily the prerogative of the Commission (formerly Article 28 § 1 and 31). The Court accepted the facts as established by the Commission.



## THE LEGAL PROCEEDINGS

### Chronology of events, including legal proceedings

| | |
|---|---|
| 26 February 1992 | Agit Salman taken into custody by police officers from the Anti-Terror Branch of the Adana Security Directorate. |
| 27 February 1992 | Agit Salman released at 17:30. |
| 28 April 1992 | Agit Salman taken into custody. |
| 29 April 1992 | Agit Salman brought to Adana State Hospital and declared dead on arrival. Mehmet Salman brought to Security Directorate and informed that his father had died of a heart attack. |
| 21 May 1992 | Autopsy report issued. |
| 15 July 1992 | Istanbul Forensic Medicine Institute issued opinion. |
| 19 October 1992 | The Adana Public Prosecutor issued decision not to prosecute on basis that there was no evidence to justify a prosecution. |
| 13 November 1992 | Applicant appealed against decision not to prosecute, claiming that Agit Salman had been interrogated and died under torture. |
| 25 November 1992 | President of the Tarsus Assize Court rejected the applicant's appeal. |
| 22 December 1992 | Minister of Justice referred the case to the Court of Cassation. |
| 20 May 1993 | Applicant, assisted by the Kurdish Human Rights Project, applied to the European Commission of Human Rights alleging violations of Articles 2, 3, 5, 13, 14 and 18 of the Convention. |
| 16 February 1994 | Court of Cassation quashed decision not to prosecute and referred case back to the Adana Public Prosecutor to prepare indictments. |
| 26 December 1994 | Adana Court acquitted defendants on grounds of inadequate evidence. |
| 3 January 1995 | Acquittal became final. |
| 20 February 1995 | Commission declared application admissible. |
| 24 January 1996 | Applicant summoned to the Anti-Terror Department at the Adana Security Directorate. Statement taken from her by police officers, upon which her thumbprint was placed. Applicant blindfolded, kicked and struck. The applicant summoned a second time (and possibly a third) in relation to her statement of means. |
| 1-3 July 1996 | Evidence heard by Commission delegates in Ankara. |
| 4 December 1996 | Evidence heard by Commission delegates in Strasbourg. |
| 4 July 1997 | Evidence heard by Commission delegates in Strasbourg. |
| 1 March 1999 | Commission adopted former Article 31 Report. |
| 7 June 1999 | Commission referred case to European Court of Human Rights. |
| 2 February 2000 | Hearing before the European Court in Strasbourg. |
| 31 May 2000 | Court delivered judgment and held Turkey in violation of Articles 2, 3, 13 & 25(1). |

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

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

The examination of the case by the Court may, if necessary, involve an investigation. States are obliged to furnish "all necessary facilities" for the investigations (Article 38). In the establishment of the facts, witnesses may be examined and investigations may be conducted, although, once again, this is rare. It is also worth noting that the role of the Committee of Ministers is reduced to supervising the execution of judgments.

The procedure involved in lodging a complaint with the former Commission has already been explained in KHRP's previous publications including *Ergi v Turkey* and *Aytekin v Turkey – A Case Report* (London, August 1999).[2]

## The investigation under the old procedure

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

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[1] The new system is described in Appendix E.

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

In *Salman*, the Commission decided to conduct an investigation. As well as considering documentary evidence, 16 of the 20 witnesses who were summoned to appear gave oral evidence at three hearings in Ankara and Strasbourg between July 1996 and July 1997. The Commission also requested an expert opinion on the medical issues.

**Preliminary Objections to the Court's Jurisdiction**

**The Government** objected that the applicant had not exhausted domestic remedies, as required by Article 35 (formerly Article 26) of the Convention, by making proper use of the available redress through the instituting of criminal proceedings, or by bringing claims in the civil or administrative courts. They referred to the Court's upholding of their preliminary objection in the Aytekin case (*Aytekin v Turkey*, judgment of 23 September 1998, Reports 1998-VII, p.2807).

The Government maintained that the applicant had been a party to the criminal proceedings brought against the police officers accused of torturing her husband and causing his death and that she had failed to appeal to the Court of Cassation against their acquittal. The Court of Cassation had previously quashed the decision not to prosecute the officers and could not be considered as an ineffective remedy. The applicant could also have obtained from domestic judicial bodies the compensation for pecuniary and non-pecuniary damages sought in the Strasbourg proceedings.

**The applicant**'s counsel maintained that the applicant's appeal against the decision not to prosecute had been rejected before she introduced her complaints before the Commission. She submitted that the procedure whereby the Minister of Justice referred the case to the Court of Cassation was an extraordinary remedy which the applicant was not required to exhaust. She also submitted that a further appeal would have served no purpose in light of the inadequate investigation and the lack of evidence before the courts.

**The Commission** rejected the Government's arguments. It noted that the Public Prosecutor had refused to initiate a prosecution against the police officers allegedly concerned in the detention and interrogation of the applicant's husband and that on 13 November 1992, the appeal against this decision had been rejected by the Tarsus Assize Court. The Government pointed out that the decision of the Public Prosecutor was being reviewed. However the Commission found that in view of the delays involved and the serious nature of the alleged crime, it was not satisfied that the review carried out pursuant to the exercise of a discretionary power by the Minister of Justice could be regarded as an available and sufficient remedy required to be exhausted under Article 26. The applicant therefore, was not required to pursue other legal remedies in addition to the Public Prosecutor's inquiry and the appeal against his decision.

**The Court** dismissed the Government's preliminary objection insofar as it related to the administrative proceedings brought by the applicant. It held that a Contracting State's obligation under Articles 2 and 13 of the Convention to conduct an investigation capable

of leading to the identification and punishment of those responsible in cases of fatal assault might be rendered illusory if in respect of complaints under those Articles an applicant were to be required to exhaust an administrative law action leading only to an award of damages.

The Court considered that the limb of the Government's preliminary objection regarding civil and criminal remedies raised issues concerning the effectiveness of the criminal investigation which were closely linked to those raised in the applicant's complaints under Articles 2, 3 and 13 of the Convention. It therefore joined the preliminary objection concerning remedies in civil and criminal law to the merits.

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

Before the Court, the applicant in *Salman* complained that Turkey had violated Articles 2, 3, 13, and former Article 25(1) of the Convention. The Court held that there had been a violation of Articles 2, 3, 13, and former Article 25(1) as set out in Table 1 below.

***Table 1***

| Articles allegedly violated | Commission's opinion | Court's judgment |
|---|---|---|
| Article 2 (right to life) | Violation (unanimous) | Violation |
| Article 3 (prohibition of torture) | Violation (unanimous) | Violation |
| Article 6 (right to fair trial) | No determination | Not claimed before the Court |
| Article 13 (right to an effective remedy) | Violation (unanimous) | Violation |
| Former Article 25 (right of exercise of individual petition) | Violation (unanimous) | Violation |
| Alleged practice by the authorities of infringing Articles 2, 3 and 13 | Commission held not necessary to determine | Court held not necessary to determine |
| Article 18 | No Violation (unanimous) | Not claimed before the Court |



**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** asserted that her husband, Agit Salman, had died as a result of torture at the hands of police officers at the Adana Security Directorate. She also asked the Court to endorse the Commission's view that there had been a violation of Article 2 of the Convention on the ground that the investigation into the death of her husband had been so inadequate and ineffective as to amount to a failure to protect the right to life.

**The Government** maintained that the applicant's allegations were unfounded and that the autopsy and the Istanbul Forensic Medicine Institute report established that Agit Salman had died of a cardiac arrest brought on by the excitement surrounding his apprehension and detention. They further contended that the allegations that he had suffered torture were unsubstantiated.

**The Commission** expressed the opinion that Article 2 had been infringed on the ground that Agit Salman had died following torture in police custody and also on the ground that the authorities had failed to carry out an adequate criminal investigation into the circumstances surrounding the death of Agit Salman.

**The Court** held that where an individual is taken into police custody in good health and is found to be injured on release, it is incumbent on the State to provide a plausible explanation of how these injuries were caused. The obligation on authorities to account for the treatment of an individual in custody is particularly stringent where that individual dies. Agit Salman was taken into custody in apparent good health and no plausible explanation had been provided for his injuries.

The Court found that the Government had not accounted for the death of Agit Salman by cardiac arrest during his detention at the Adana Security Directorate and that their responsibility for his death was engaged and a violation of Article 2 had occurred.

The Court also came to the conclusion that the authorities failed to carry out an effective investigation into the circumstances surrounding Agit Salman's death. This, in turn, rendered recourse to civil remedies equally ineffective. The Court accordingly dismissed these aspects of the Government's preliminary objection and held that there had been a violation of Article 2 in that respect.

In its reasoning, the Court held the autopsy examination to be of critical importance in determining the facts surrounding Agit Salman's death. The difficulties experienced by the Commission in determining the facts surrounding Agit Salman's death derived in large part from the failings of the post mortem examination, in particular the lack of proper forensic photographs of the body and the lack of dissection and histopathological analysis. The Court considered that the defects in the autopsy investigation fundamentally undermined any attempt to determine police responsibility for Agit Salman's death. The lack of medical support for the applicant's allegations of torture formed the basis of the Public Prosecutor's decision not to prosecute. Under these circumstances, an appeal to the Court of Cassation had no effective prospect of clarifying or improving the evidence available.

**Article 3: Prohibition of torture or inhuman and degrading treatment or punishment**

Article 3 of the Convention provides as follows:

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

**The applicant** submitted that Agit Salman was subjected to ill-treatment amounting to torture while in the custody of the Adana Security Directorate. She claimed that he was subjected to "falaka" which consists of repeated beating of the soles of the feet with a strong instrument and is known for its ability to cause severe pain and agony. He also received a strong blow to the chest and possibly electric shock treatment. No other plausible explanation was forthcoming from the authorities. She further argued that the claim he had been tortured had never been properly investigated by the authorities in violation of the procedural aspect of Article 3 of the Convention.

**The Government** denied there was any sign of torture revealed by the medical evidence. They also disputed that there were any failings in the investigation.

**The Commission** referred to the jurisprudence of the Court, according to which ill-treatment *"must attain a certain minimum level of severity"* (*Ireland v the United Kingdom*) if it is to fall within the scope of the provision, and the standard of proof *"beyond reasonable doubt"* must be met. In light of its evaluation of the evidence, the Commission was satisfied, beyond reasonable doubt, that Agit Salman suffered serious ill-treatment during custody. This ill-treatment, which led to his death, had not been accounted for. The Commission was in no doubt that the physical and mental anguish inflicted on Agit Salman could be described as very serious and cruel suffering, amounting to torture under Article 3 of the Convention.

**The Court** reiterated the Commission's findings of ill-treatment, and added that the application of "falaka" was reported by the European Committee for the Prevention of Torture (CPT) to be common practice, *inter alia*, in the Adana Security Directorate. Moreover, as the Government had failed to adequately account for these injuries, the Court considered the injuries to be attributable to a form of ill-treatment for which the authorities were responsible. The Court also followed the Commission's reasoning on whether in this particular case, the ill-treatment could be considered "torture" as opposed to "inhuman and degrading treatment". The Court held that the treatment fell within the definition of torture and that there had been a breach of Article 3 of the Convention.

**Article 13: Right to an effective remedy**

Article 13 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** complained of both a lack of access to court and a lack of effective remedies in respect of her complaints. More specifically:

- the failure to prosecute and to establish that Agit Salman was the victim of torture or unlawful killing;
- the lack of an effective and thorough investigation;
- no effective access to the investigatory procedure, nor payment of compensation where appropriate; and
- systematic and systemic violations of the right to an effective remedy.

**The Government** argued that the applicant had not appealed against the acquittal of the police officers. Before the Court, it added that the investigation into the incident and the prosecution and trial of the police officers provided an effective remedy into the applicant's allegations.

In conformity with the Court's earlier case law (*Aydin v Turkey, Kaya v Turkey*) the Commission found it appropriate to examine the applicant's complaints about remedies under Article 13 of the Convention alone.

**The Commission** recalled that in concluding that there was a violation of Article 2, it found that the investigation and criminal proceedings were fundamentally flawed. It noted that according to the Court, the requirements of Article 13 are broader than the procedural requirements of Article 2 and thus they required further examination. In particular, the procedure was found to be inadequate in respect of:

- the defects in the forensic procedure, involving the failure to take photographs and to carry out tests to find out the cause of marks on the body;
- the forensic report being the basis of the decision of the Public Prosecutor not to prosecute; and
- the acquittal of the police officers also on the basis of a lack of evidence that Agit Salman had been tortured.

In view of the inadequate evidence before the courts, and the fact that the applicant had already appealed unsuccessfully against the decision not to prosecute, the Commission was not persuaded that the possibility of further appeal against the acquittal constituted an effective remedy within the meaning of Article 13. The Commission concluded that the applicant had been denied an effective remedy in respect of the death of her husband and thereby access to any other available remedies at her disposal, including a claim for compensation.

**The Court** recalled that Article 13 requires the State Party to provide a domestic remedy to deal with the substance of an "arguable complaint under the Convention" and that "*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*".

The Court found the Government to be responsible under Article 2 and 3 and therefore the applicant's complaints were considered "arguable" for the purposes of Article 13. Given the fundamental importance of Article 2, Article 13 requires, "*in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life.*" In the present case where no such investigation had taken place, the Court found a violation of Article 13.

**Alleged violation of Article 18 of the Convention**

Article 18 of the Convention states the following:

*"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** argued that Article 18 imposes a requirement of good faith on the State Party. According to the applicant, the evidence disclosed a concerted attempt by the police officers involved in the arrest and detention of Agit Salman to create a fabricated account of what happened to bring about his cardiac arrest, which conduct was calculated, inter alia, to frustrate the ability of the Convention to secure the protection of the rights contained therein. This represented a violation of Article 18.

**The Government** denied any factual or juridical basis for these complaints.

**The Commission** found that there had been no violation of Article 18.

**The Court** did not consider it necessary to examine this complaint separately.

**Former Article 25 (now replaced by Article 34): Right of petition**

Former Article 25 para 1.1 provides as follows:

> *"The Commission may receive petitions addressed to the Secretary General of the Council of Europe from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognizes the competence of the Commission to receive such petitions. Those*

*of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right."*

**The applicant** alleged that she was summoned before the domestic authorities three times, where she was blindfolded, beaten and explicitly told to drop her case before the Commission.

**The Government** denied these allegations and referred to the applicant's legal aid application, saying the applicant had to be contacted since further information was needed.

**The Commission** recalled that "*former Article 25 para 1 imposes an obligation on a Contracting State not to hinder the right of the individual effectively to present and pursue a complaint with the Commission.(...) In this respect the Convention must be interpreted as guaranteeing rights which are practical and effective as opposed to theoretical and illusory*" (citing the case of *Cruz Varas and others v Sweden*).

The right of individual petition is considered to be of fundamental importance to the effective protection of the substantive rights and freedoms provided for in the Convention. The Commission was of the view that any deliberate or repeated interferences with that right should be regarded *"with the gravest concern"*. The questioning of applicants by public authorities in circumstances such as those that exist in Southeast Turkey, where complaints against authorities might give rise to a legitimate fear of reprisals, could amount to a breach of former Article 25 (*Akdivar and others v Turkey*).

The Commission accepted the applicant's evidence that she was summoned by the authorities having already found her to be a credible and reliable witness. The documents provided by the Government substantiated that she had in fact been questioned by police officers at the Anti-Terror Department. The Commission found the questioning of an applicant by the police about any aspect of an application to the Commission to be unacceptable, save in exceptional circumstances which had not been shown to exist here and in any event such questioning, because of its intimidatory nature, should only take place where the applicant is accompanied by her own lawyer. The Commission also noted that no explanation had been given as to why the applicant was interrogated more than once and, on the first occasion, by officers of the Anti-Terror Department.

The Commission concluded that Turkey failed to comply with their obligation under former Article 25 paragraph 1 of the Convention.

**The Court** reiterated that it is of utmost importance for the effective operation of the system of individual petition instituted by former Article 25 that applicants or potential applicants should be able to communicate freely with the Convention organs without being subjected to any form of pressure from the authorities to withdraw or modify their claim (quoting *Akdivar v Turkey, Aksoy v Turkey, Kurt v Turkey,* and *Ergi v Turkey*). In determining whether a form of illicit and unacceptable pressure had been exerted, regard

was had to the particular circumstances of the case, in particular, the reality of the situation in Southeast Turkey and the vulnerability of the applicant. The Court found that blindfolding would have increased the applicant's vulnerability and disclosed, in the circumstances of the case, oppressive treatment. The Court shared the Commission's concerns about the questioning of the applicant and likewise came to the conclusion that the respondent State had failed to comply with its obligations under former Article 25 (1).

**Administrative practice of Convention breaches**

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

**The Court**, having regard to its previous findings, did not find it necessary to determine whether the failings identified in this case were part of a practice adopted by the authorities.

**Just satisfaction: Compensation under Article 41**[3]

Article 41 of the Convention provides as follows:

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

**Pecuniary and non-pecuniary damages**

**The applicant** claimed a total of £39,320.64 in pecuniary damages, calculated by taking into account the age of the victim, his monthly income and the average life expectancy in Turkey. Having regard to the severity and number of violations, the applicant also claimed £60,000 in non-pecuniary damages in respect of her husband and £10,000 in respect of herself.

**The Government** rejected the claim that there was a violation to be compensated.

**The Court** acknowledged the existence of a "direct causal link" between the violation of Article 2 and the loss suffered by the victim's widow and children of the financial support he provided for them. It therefore awarded the complete sum of pecuniary

[3] Formerly Article 50.

damages claimed by the applicant. The Court awarded £25,000 for non-pecuniary damages suffered by Agit Salman and £10,000 for non-pecuniary damages suffered by the applicant in her personal capacity, referring to the violations of the substantive articles found in the judgment and to awards made in comparable cases.

**Costs, expenses and default interest**

**The applicant** claimed a total of £43,050.56 including all fees and costs, less legal aid received from the Council of Europe.

**The Government** made no comments as to the fees claimed.

**The Court** awarded the sum of £21,544.58 together with any VAT chargeable, less the FRF 11,195 received by way of legal aid from the Council of Europe. The default interest has been determined to be 7.5% per annum, as applicable in the United Kingdom.

# PART II: İLHAN v TURKEY (No. 22277/93)

## SUMMARY OF İLHAN v TURKEY

In the case of *İlhan v Turkey*, Nasır İlhan ('the applicant'), a Turkish citizen of Kurdish origin filed an application with the European Commission of Human Rights ('the Commission') on behalf of his brother Abdüllatif İlhan. The applicant alleged that gendarmes assaulted his brother during a raid on the village of Aytepe. As a result of the injuries he suffered at the hands of the gendarmes, Abdüllatif fell into critical condition, placing his life in jeopardy. Nevertheless, he was denied medical treatment during his stay in police custody. When he was finally hospitalised after a delay of 36 hours, he was not provided with adequate medical care. As a result, he never fully recovered from his injuries and continues to suffer grave health problems. The injuries he sustained prevented him from taking his case to the European Commission himself. The applicant alleged a violation of Articles 2, 3, 6, 13 and 14 of the European Convention on Human Rights ('the Convention'). The case was subsequently referred to the European Court of Human Rights ('the Court'). The Court delivered its judgement on 27 June 2000 and held that the injuries inflicted on Abdüllatif İlhan, as well as the prolonged delay in hospitalising him, must be considered to be acts of torture. The Court also found a violation of Article 13 and awarded just satisfaction in addition to non-pecuniary damages according to Article 41 of the Convention.

## THE FACTS

### The facts as presented by the applicant

#### *A) The apprehension of the two men*

Abdüllatif İlhan, born in 1956, is a peasant and the married father of six children. For many years, he and his family lived in the village of Kaynak. In early 1991, State security forces descended upon Kaynak, burning buildings and destroying most of Abdüllatif İlhan's livestock. Bereft of their home and means of subsistence, his family fled and found refuge in Aytepe, a village located in southeastern Turkey, approximately 60 to 70 kilometres from the town of Mardin. The security forces suspected that this village, primarily inhabited by Kurds, was a centre of PKK (Kurdistan Workers' Party) aid and support. Indeed, a few months prior to the alleged incident, soldiers had raided the village and beaten some of the villagers, including İbrahim Karahan, a witness in the present case.

At approximately 7:30 a.m. on 26 December 1992, soldiers on duty at the Mardin Province and the Konak village military stations, raided the village of Aytepe. Due to their previous experiences with the State security forces, Abdüllatif İlhan and İbrahim Karahan were afraid that they would be detained and brutalised, and so hid in a garden near the village. However, the soldiers found them and, without asking any questions,

started to kick and beat the two men with the butts of their rifles. During this assault, Abdüllatif suffered a serious blow to the right side of his head, knocking him unconscious. After Abdüllatif İlhan lost consciousness, the soldiers plunged him in the nearby river in order to revive him, even though it was winter and three inches of snow lay on the ground. As a result of this attack, Abdüllatif İlhan's left eye had swollen shut and bruises covered his body.

İbrahim Karahan had to carry Mr. İlhan to the village on his back. Here he was told to leave him on the ground and to show his and Abdüllatif İlhan's home to the soldiers, who then proceeded to search the houses, but found nothing. Meanwhile, as he lay on the ground, Abdüllatif İlhan was asked by the gendarme commander, Şeref Çakmak, what had happened to him. When he told the commander that he had been beaten and thrown into the river, the commander accused Abdüllatif of lying.

***B) Incidents at the Gendarme Station***

İbrahim Karahan and Abdüllatif İlhan were first taken to the gendarme station at Konaklı. Since Abdüllatif İlhan remained in critical condition and was only half-conscious, he first had to be carried by Mr Karahan and then by a mule. The journey lasted several hours, exposing Abdüllatif İlhan, still clad in wet clothes, to the brisk, cold air. Abdüllatif İlhan was left in the station canteen, while İbrahim Karahan and Veysi Aksoy (who had also been apprehended for his suspected dissemination of PKK propaganda) were put in a small cell. Two hours later, they were brought to the Mardin Provincial Gendarme Headquarters in the city centre where they were detained until the following evening. In his application, the applicant alleged that gendarmes tortured Abdüllatif during his detention at the Mardin gendarme station. According to Karahan's statement, he and Abdüllatif İlhan were placed in the cafeteria of the Mardin Provincial Gendarme Headquarters. Two men came to the cafeteria in civilian dress. One of these men was a doctor, who, without examining Abdüllatif or attending to his injuries, declared that Abdüllatif was faking his condition. In a statement taken by Şeref Çakmak, from around the time of 17:00 onwards, Abdüllatif İlhan's condition began to deteriorate. As the day progressed, he became unable to walk without the assistance of others. Just before he provided his statement to the gendarme authorities, Abdüllatif lost control of his bowels. Despite the severity of his condition, he received no medical attention. Both men were detained until the following evening.

***C) Hospital Treatment***

The witness İbrahim Karahan stated that, after his release from custody and with the help of another man, he managed to bring Abdüllatif to Mardin State Hospital. At 19:10 on 27 December 1992, İlhan and Karahan were admitted for treatment. According to hospital records, İbrahim Karahan was treated for trauma to the right ear. A report signed by Dr Mehmet Aydogan on the same day noted that Abdüllatif, although conscious and responsive, still remained in a life-threatening condition. He was diagnosed as having a

concussion, hemadermy in the left eye, and left hemipalegia. Dr. Aydogan recommended that Abdüllatif be taken to Diyarbakir State Hospital immediately. After persuading the doctor to allow the use of an ambulance, İbrahim Karahan brought Abdüllatif to Diyarbakir State Hospital. İbrahim Karahan then telephoned Nasır İlhan, Abdüllatif's brother (the applicant), and told him what had happened.

On 28 December 1992, Nasır arrived at the hospital. Abdüllatif İlhan lay in the intensive care ward; he had ceased speaking and was drifting in and out of consciousness. Nasır noticed that his brother's left eye was livid and swollen shut, and he had a gash across his forehead above his right eye. The following day, Nasır took Abdüllatif to a clinic where he paid for CAT scans to be taken. On the basis of these tests, Dr Omer Rahmanli decided that, although there had been haemorrhaging, surgery was not necessary. Abdüllatif remained in the hospital for 19 days.

Afterwards, Abdüllatif İlhan continued to return to the hospital for examinations at intervals of about two months. On 11 June 1993, the doctor's report noted that he was suffering from a 60% loss of function on his left side. Today, nine years later, he is still disabled as a result of his treatment by the gendarmes.

**The facts as presented by the Government**

***A) The apprehension of the two men***

In their Final Submissions to the European Commission of Human Rights, the Government of Turkey ("the Government") refer to the operation report recorded on 26 December 1992 by the Mardin First Gendarmerie Intelligence Team.

Based on several intelligence reports suggesting that residents of Aytepe might be harbouring members of the PKK, the Government decided to conduct a search of the village. As the operation began on 26 December 1992, the teams noticed İbrahim Karahan and Abdüllatif İlhan acting as lookouts. Both men started to run away from the security forces, even after they were officially ordered to stop and surrender. Since he disobeyed these orders, Abdüllatif İlhan was described as offering "resistance to security forces."[4] While he was running, Abdüllatif İlhan slipped and fell on a rocky surface, injuring his left eye and left leg. In support of their version of events, the Government also referred the Commission to the decision of the Mardin Public Prosecutor not to prosecute. The Prosecutor stated that injuries suffered by Abdüllatif İlhan resulted from an accidental fall during his flight from the security forces. Consequently, none of the gendarmes, either directly or indirectly, had caused his injuries. The Prosecutor concluded that the gendarmes did not manifest any intent to harm Mr İlhan, nor had any negligence on their part contributed to his accident. Later, the gendarme apprehended Veysi Aksoy, a resident of Aytepe who was suspected of disseminating propaganda for the PKK, Abdüllatif İlhan and İbrahim Karahan. Initially, they were transported to

[4] Report dated 27 December 1992 from Şeref Çakmak to the Mardin Public Prosecutor.

Konaklı Gendarme Headquarters. At approximately 21:00 or 21:30, they were transferred to Mardin Provincial Gendarme Headquarters.

***B) Incidents at the Gendarme Station***

In its final submission to the Commission, the Government admits that it transported İbrahim Karahan, Abdüllatif İlhan and Veysi Aksoy to Konaklı Gendarme Headquarters, and later transferred them to Mardin Provincial Gendarme Headquarters.

Şeref Çakmak stated that he had called a doctor and a paramedic to examine Mr. İlhan. Çakmak further testified that, after an examination, the doctor suspected that Abdüllatif was exaggerating his symptoms "in order to get released".

***C) Hospital Treatment***

The Government claimed that Abdüllatif İlhan was treated appropriately during his hospitalisation, but refrained from commenting on the possibility that his treatment was unduly and dangerously delayed. He was first brought to the nearest State Hospital in Mardin, and then transferred to the better-equipped Diyarbakir State Hospital where he was placed under the care of a physician. In support of this claim, they referred to Şeref Çakmak's official letter to Mardin State Hospital, dated 27 December 1992, requesting that both Abdüllatif İlhan and İbrahim Karahan be treated in hospital for injuries sustained from a fall. Additionally, in their observations on the application, the Government mentioned the "forensic report" written by Dr Omer Rahmanli at Diyarbakir State Hospital on 27 December 1992 that *"indicates that Mr Abdüllatif İlhan has been 'hospitalized' which in deed (sic) means that he had been taken under medical treatment following the incident."*

**Proceedings before the domestic authorities**

Abdüllatif İlhan failed to file a complaint with the Public Prosecutor. However, in a written report of 27 December 1992 directed to the Public Prosecutor, Abdulkadir Gungoren and Şeref Çakmak stated that İlhan and Karahan had run away from the security forces, despite numerous orders to stop. It was during their futile flight from authorities that Abdüllatif İlhan and İbrahim Karahan had fallen on the rocks and sustained their injuries. According to eyewitness accounts, Karahan had hidden from the security forces, but had not run away.

On 11 February 1993, the Public Prosecutor made public his decision not to prosecute any members of the gendarmerie; instead, he indicted Abdüllatif İlhan for resisting officers in contravention of Article 260 of the Turkish Penal Code.

On 30 March 1993, Abdüllatif İlhan appeared before the Mardin Justice of the Peace. According to the minutes, he accepted the Government's description of events. In his defence, he stated that he had not understood the gendarmes' warnings until after the incident; he had only taken flight out of fear. The Court found Abdüllatif guilty and charged him a fine of 35.000 Turkish lira (TRL), which was suspended. The applicant stated that he was not allowed to attend the Court hearing. He also claimed that his brother had not been provided with a Kurdish interpreter. Indeed, it is evident from the Court minutes that Abdüllatif had not understood the proceedings of the Court.

**Findings of fact by the European Commission of Human Rights**

The documentary evidence considered by the Commission included statements of the applicant and his brother taken by the Human Rights Association of Turkey (IHD), the incident report dated 26 December 1992, statements of Abdüllatif İlhan and İbrahim Karahan taken by the gendarmes, and medical reports from Mardin and Diyarbakir State Hospitals.

The Commission's Delegate took oral evidence from the following eleven witnesses: Abdüllatif İlhan (the victim), Nasır İlhan (the applicant), İbrahim Karahan, Şeref Çakmak (commander of the central gendarmerie of Mardin Province), Ahmet Kurt (deputy commander of Konaklı gendarme station), Selim Uz (soldier), Dr Mehmet Aydogan (Mardin State Hospital), Dr Omer Rahmanli (brain surgeon at Diyarbakir State Hospital), Dr Selahattin Varol (Chief Consultant at Diyarbakir State Hospital), Abdulkadir Gungoren (Public Prosecutor at Mardin), and Nuri Ay (paramedic soldier).

Findings concerning the apprehension

According to the Commission's findings, neither Commander Kurt nor Commander Çakmak witnessed the apprehension of the two men. The Commission seriously questioned the credibility of their testimony. Selim Uz claimed that he found Abdüllatif İlhan concealed in the bushes and that upon seeing the gendarmes, he had run away, falling twice near the river. However, Uz also admitted that he could not see exactly what had happened.

Thus, the Commission did not accept the evidence of the gendarme witnesses, dismissing their testimony as implausible and contradictory. It concluded that the Government had not produced a witness who was able to confirm the Government's assertion that İlhan had sustained his injuries from falling on the rocks near the river.

The incident report signed by Çakmak, Kurt and Uz on 26 December 1992 stated that both Karahan and İlhan had failed to stop when ordered, and that as İlhan was trying to escape from the security forces, he had fallen down a slope, injuring his left eye and leg. The report also contained what appeared to be the signatures of Karahan and İlhan. However, İlhan is illiterate and usually used his thumbprint in order to authorise documents. Although the report was supposedly written and signed at the scene by those

present, the Commission noted that Kurt and Uz signed the report later. Consequently, it determined that the document was unreliable and misleading.

The Commission accepted the testimony of Abdüllatif İlhan and İbrahim Karahan, describing it as credible and convincing.

Findings concerning the incidents at the gendarme station

The doctor identified by the Government as having examined Abdüllatif İlhan at the gendarme station, Dr Osman Hayri Savur, failed to appear to testify. The paramedic who purportedly assisted the doctor in his ministrations stated that he could not remember ever having treated someone under the conditions described in the present case. Furthermore, no infirmary or medical records were produced to corroborate that treatment was given. The Commission concluded that it could not determine the identity of the person who treated İlhan for his injuries. It determined that at most he received perfunctory first aid treatment and that the attending physician failed to care for the wounds to his head.

Findings concerning hospital treatment

On 29 September 1997, the Commission's Delegate noted that Abdüllatif İlhan's loss of function on the left side of his body was still apparent. However, on the basis of the testimony of doctors, the Commission found that the delay in treatment had not been shown to have appreciably exacerbated the long-term effects of the head injury.

**Findings by the European Court of Human Rights**

The Court noted that, under the Convention system prior to 1 November 1998, the establishment of the facts was primarily the prerogative of the Commission (formerly Articles 28 §1 and 31). Next the Court addressed the Government's claim that the Commission had given undue weight to the testimony of Abdüllatif İlhan and İbrahim Karahan. In the Government's opinion, neither İlhan nor Karahan had offered a credible or consistent account of the events that transpired in December 1992. The Court refuted these allegations by observing that the Commission had taken into account the Government's criticism of these witnesses and had assessed the evidence with the required level of circumspection, scrupulously examining all of the evidence. Therefore, the Court accepted the facts as established by the Commission.

## THE LEGAL PROCEEDINGS

### Chronology of events, including legal proceedings

| | |
|---|---|
| 26 December 1992 | Abdüllatif İlhan and İbrahim Karahan are apprehended by gendarmes at the village of Aytepe; an incident report is issued by the gendarmes. |
| 26 December 1992, between 15.30 and 16.00 | A. İlhan and İ. Karahan are taken into custody and brought to Konaklı. |
| 26 December 1992, between 21:00 and 21:30 | The Mardin gendarmes transfer both detainees from Konakı to Mardin. |
| 27 December 1992 | Ş. Çakmak writes a report directed to the Public Prosecutor Abdulkadir Gungoren. |
| 27 December 1992, around 17:00 to 17:30 | Statements of both detainees taken by Şeref Çakmak; İbrahim Karahan describes A. İlhan's condition as deteriorating. |
| 27 December 1992, 19:10 | A. İlhan and İ. Karahan are admitted for treatment at Mardin State Hospital; Şeref Çakmak signs an order requesting that both be treated. |
| 27 December 1992 | Dr Aydogan issues a report stating that A. İlhan, suffering from hemipalegia and a bruised left eye, was in a life-threatening condition. |
| 28 December 1992 | The applicant arrived at Diyarbakir State Hospital where his brother had been transferred and paid for CAT scans to be taken. CAT scan revealed haemorrhaging. |
| 11 January 1993 | A. İlhan is discharged from hospital. |
| 11 February 1993 | The Public Prosecutor issues the decision not to prosecute the gendarmes; instead he indicts A. İlhan for violating Article 260 of Turkish Penal Code, resisting officers. |
| 30 March 1993 | A. İlhan appears before the Mardin Justice of Peace Court. |
| 11 June 1993 | A report from Dr. Rahmanli and Dr. Varol states that A. İlhan is suffering from 60% loss of the left side of his body. |
| 24 June 1993 | Mr Nasır İlhan files an application against Turkey with the European Commission on Human Rights, alleging violations of Articles 2, 3, 13 and 14 of the Convention. |
| 20 July 1993 | The Commission registers the application. |
| 22 May 1995 | The Commission declares the application admissible. |
| 29-30 September 1997 and May 1998 | Commission Delegates hear witnesses in Ankara. |

| | |
|---|---|
| 1 March and 23 April 1999 | The Commission issues its Article 31 Report. |
| 20 September 1999 | The Commission refers the case to the Grand Chamber of the European Court of Human Rights. |
| 2 February 2000 | Hearings before the Court are held in Strasbourg. |
| 27 June 2000 | Court delivers its judgment and holds that Turkey had breached Articles 2 and 13 of the Convention. |

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

On 1 November 1998, Protocol 11 of the European Convention on Human Rights came into operation.[5] The Protocol established a full-time single court to replace the former European Commission of Human Rights and the former European Court of Human Rights. Under the new procedure, all applications are to be submitted to the European Court. Each case is registered and assigned to the Judge Rapporteur who may refer the application to a three-judge committee. The committee, by unanimous decision, can declare the application inadmissible. An oral hearing may be held to decide admissibility, although this is rare. If the application is not referred to a Committee, a Chamber of seven judges will examine it in order to determine the merits of the case and any issue as to the Chamber's competence to adjudicate in the case.

The examination of the case by the Court may, if necessary, involve an investigation. States are obliged to furnish "all necessary facilities" for the investigations (Article 38). In the establishment of the facts, witnesses may be examined and investigations may be conducted, although, once again, this is rare. It is also worth noting that the role of the Committee of Ministers is reduced to supervising the execution of judgments.

The procedure involved in lodging a complaint with the former Commission has already been explained in KHRP's previous publications including *Ergi v Turkey* and *Aytekin v Turkey – A Case Report* (London, August 1999).[6]

**The investigation under the old procedure**

Under the old pre-Protocol 11 procedure, if the Commission considered it necessary, it was able to "undertake ... an investigation for the effective conduct of which the State

[5] The new system is described in Appendix E.

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

concerned shall furnish all necessary facilities" pursuant to the former Article 28(1)(a). In the case of individual complaints, where the facts were in dispute and the allegations were amenable to clarification from oral testimony, the Commission's action under Article 28(1)(a) took the form of investigations whereby the applicant's and the Government's witnesses gave oral evidence before a select number of Commission delegates (usually three). Investigation hearings were held in *camera* with the parties in attendance. For convenience, the hearings were usually conducted in the country whose conduct was in issue.

In *İlhan*, the Commission decided to conduct an investigation. As well as considering documentary evidence, 11 witnesses gave oral evidence before Delegates.

**Preliminary objections to the Court's jurisdiction**

**Incompatibility *ratione personae***

**The Government** contended that the application should be dismissed as being outside of the Court's jurisdiction *ratione personae* since Nasır İlhan could not claim to be a victim of the alleged violations. Moreover, Nasır İlhan could not claim to be the representative of his brother because there were already legal representatives litigating on behalf of Abdüllatif İlhan before the Convention organs. According to the Government, Abdüllatif İlhan was capable of pursuing his legal affairs and did not require the assistance of others to do so. An extension of the definition of the Court's jurisdiction *ratione personae* to comprise individuals in Nasır İlhan's position would unfairly expand the category of persons who could lodge applications and claim compensations for themselves.

**The Commission** did not share this view and found that the application by Nasır İlhan on behalf of his brother was justified and did not constitute an abuse of the Convention system. Contrary to the Government's insistence, Abdüllatif İlhan's poor health prevented him from filing the application himself. The Court went on to point out that Abdüllatif consented to the proceedings on his behalf and even participated in the fact-finding stage of the application by testifying before delegates of the Commission. Indeed, in his statement of 15 December 1993 taken by the Human Rights Association of Turkey (IHD), Abdüllatif İlhan stated that he became disabled because of his maltreatment by the gendearmes on 26 December 1992. Due to his poor health, he was not able to exercise his rights under the European Convention personally. As a result, his brother made the application in his stead.

**The Court** emphasized that, under Convention case law, the provisions of Article 35 § 1 (formerly Article 26) should be applied with a modicum of flexibility and without excessive formalism. As a general principle, the Convention should be interpreted in the light of its purpose, namely, the protection of human rights and fundamental freedoms. Consequently, the Court should interpret its rules in a manner that makes enforcement of the rights protected by the Convention practical and effective. Of course, since the system of individual petition established by Article 34 (formerly Article 25) of the

Convention prohibits an application by means of an *actio popularis*, the applicant must show that he has been "directly affected" by the alleged offence.

Therefore, the question of whether the applicant can claim damages in his own right has to be answered separately from the question of the validity of his application. In the present case, since Abdüllatif is the victim, his brother made it clear in his application that he was acting on behalf of his brother who was unable to act for himself.

Even though the Court acknowledged it would have been more appropriate to have put the name of Abdüllatif as the applicant, it concluded that Nasır İlhan's procedure was not abusive, because:

- Abdüllatif İlhan consented and appeared in Ankara to give evidence;
- There was no conflict of interest involved;
- Nasır İlhan took charge of his brother's care from the moment he was in the hospital and ensured that he received proper treatment; and
- With regard to Article 3 of the Convention: *"the Court considers that special considerations may arise where a victim of an alleged violation of Article 2 and 3 of the Convention at the hands of the security force is still suffering form serious after-effects to his health."*

Therefore, the Court dismissed the Government's preliminary objection that Nasır İlhan was outside of the Court's jurisdiction *ratione personae*.

**Exhaustion of domestic remedies**

**The Government** argued that the applicant had not exhausted domestic remedies, as required by Article 35 of the Convention. In particular, they referred to the fact that neither Abdüllatif İlhan nor his brother Nasır complained to the Public Prosecutor about the incidents alleged in the instant case. Moreover, Abdüllatif had made no complaint when he appeared before the Mardin Justice of the Peace Court.

At the hearing before the Court, **the applicant**'s counsel argued that the Mardin Public Prosecutor was aware of Abdüllatif İlhan's and İbrahim Karahan's injuries, that he expressed his concern about their conditions, and that his decision not to prosecute evinced such knowledge by referring to Abdüllatif İlhan as the injured party.

**The Court** recalled that the rule of exhaustion of domestic remedies (Article 35 § 1 of the Convention) does not require applicants to use remedies that are neither accessible nor effective. The Court stated that the rule of exhaustion of domestic remedies must be applied *"with some degree of flexibility and without excessive formalism."* An applicant should not in every instance be required to pursue municipal means of redress when the prospect of a fair and just remedy is illusory. On the contrary, the circumstances of a particular case have to be taken into account, especially the context in which the available domestic remedies operate, as well as the personal circumstances of the applicant. Then,

the Court must inquire whether the applicant did everything *"that could reasonably be expected of him or her to exhaust domestic remedies."*

With regard to administrative remedies, the Court recalled that it could not expect an applicant to exhaust domestic remedies that only lead to a possible award of damages grounded on a theory of the strict liability of the State when a case involves allegations under Articles 2, 3 or 13. All of these articles require State Parties to conduct investigations leading to the identification and punishment of those responsible. Concerning a civil action for redress, Abdüllatif İlhan was not able to pursue an action in tort because the Public Prosecutor failed to launch an investigation into the identities of those alleged to be responsible. With regard to the criminal law remedies, the Court noted that the Public Prosecutor had been informed of Abdüllatif İlhan's serious injuries and was accordingly under a duty to investigate. Thus, the preliminary objection that the applicant had failed to exhaust the domestic remedies available to him was declared unfounded.

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

| Articles allegedly violated | Commission's opinion | Court's judgment |
|---|---|---|
| Article 2 (right to life) | Violation | No violation (12 votes to 5) |
| Article 3 (prohibition of torture) | Violation (unanimous) | Violation (unanimous) |
| Article 13 (right to an effective remedy) | Violation (29 votes to 3) | Violation (unanimous) |
| Article 14 (prohibition of discrimination) | No violation (unanimous) | Not considered |
| Alleged practice by the authorities of infringing Articles 2, 3 and 13 | Commission held not necessary to determine | Court held not necessary to determine |

**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 form 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** alleged a violation of Article 2 on the following grounds:

- His brother was the victim of a life-threatening attack by State agents.
- State authorities failed to provide his brother with prompt medical attention.
- The domestic legal system lacked an effective mechanism for ensuring protection of the right to life, including an effective prosecutorial system.
- His brother received repeated kicks and blows from rifle butts, placing his life in danger.
- When apprehended by security forces, his brother was not taken to the hospital, despite his injury.
- State authorities wilfully denied treatment, thereby aggravating the situation.
- There was no inquiry into the cause of his brother's life-threatening injuries.

- Turkey's failure to investigate violations of the right to life is systemic, disclosing a systematic practice.

According to the applicant, Article 2 was not confined to the use of lethal force but included the use of potentially lethal force, namely, force that could foreseeably result in death. Abdüllatif's treatment by the gendarmes clearly violated the proviso that the State's use of force may not exceed what is necessary to achieve one of the objectives listed in paragraph 2 of Article 2. Indeed, there was no justification of the assault on Abdüllatif since he did not resist arrest.

The Convention concerns the civil liability of States and not the criminal liability of the perpetrator; therefore the issue of the *mens rea* of the perpetrator was irrelevant.

**The Government** argues that the injury was the outcome of a fall and generally held that Article 2 was not applicable to the present case, because:

- The victim was still alive;
- His condition was not life-threatening; and
- The gendarmes or hospital staff did not act negligently.

**The Commission** said that Article 2 also applies to cases of life threatening attack where the victim survived (see *Osman v UK, Yasa v Turkey*). In this case, the seriousness of the injury was such that it may be appropriately considered as falling within the scope of the right to life guaranteed in Article 2.

The Commission also referred to the principle that provisions of the Convention be applied so as to make its safeguards practical and effective (e.g., *McCann v UK*).

The exceptions listed in Article 2.2 must be strictly construed, and the right secured by this provision should not be restricted to intentional killings, but extended to those situations where it is permitted to use force that may result in an unintentional deprivation of life. Use of force must never be more than "absolutely necessary" for the achievement of one of the permitted purposes set out in sub-paragraphs a, b and c. The exceptions enunciated in this Article require a stricter and more compelling test of necessity than that normally applicable when determining whether state action is "necessary in a democratic society" under paragraph 2 of Articles 8 to 11 of the Convention. In particular, the force used must be strictly proportionate to the achievement of one of the legitimate aims set out in the subparagraph.

The Commission found that Abdüllatif İlhan was beaten by one or more soldiers, and that he was struck on the head at least once by a rifle butt. The Commission did not accept the evidence that A. İlhan had pushed Selim Uz and tried to escape. Even if İlhan had been a dangerous PKK terrorist, it would not have justified the infliction of a life-threatening blow to the head, such force being disproportionate to any permitted aim under the second paragraph of Article 2.

The Commission noted that İlhan was admitted to the hospital 36 hours after the incident.

Since he was injured while being apprehended and was detained by the gendarmes throughout this period, the Commission considered that the authorities were responsible for his welfare. This responsibility was not discharged by the apparent fact that a military doctor, called out in the early hours of the morning at Mardin central station, had a brief look at Abdüllatif and decided he was faking. The Commission was not satisfied that there was any reasonable basis on which a doctor could come to that conclusion.

The Commission concluded that the infliction of injury on Abdüllatif İlhan and the delay in sending him to the hospital revealed a failure to respect his right to life.

Also, it recalled that Article 2 requires that in cases involving the use of lethal force, an effective investigation must be undertaken (see *McCann v UK*). This applies also to the present case. The Public Prosecutor was aware of the situation and nevertheless issued a decision not to prosecute on the basis of incomplete evidence, finding that Abdüllatif İlhan had fallen and injured himself.

In these circumstances, the Commission found that there had been a failure to provide an adequate and effective investigation into the circumstances of Abdüllatif's injury. According to the Commission, there had been a violation of Article 2 of the Convention because of the injury inflicted on Abdüllatif İlhan by agents of the State, the delay in sending him to the hospital and the lack of an effective investigation.

**The Court** held that Article 2 is one of the most fundamental provisions in the Convention and enshrines one of the basic values of the democratic societies that constitute the Council of Europe. Accordingly, the Court followed the Commission's reasoning with regard to:

- The scope of Article 2 covers not only intentional killings, but includes those situations where the unintended outcome of State action may result in death. This broad interpretation of Article 2 is particularly appropriate for holding the State responsible for employing excessive and disproportionate force in situations where the use of force is authorised by Article 2.2. This was not the first case considered by the Court where the alleged victim had not died as a result of the impugned conduct;
- The necessity requirement enunciated in Article 2.2; and
- The exceptions listed in Article 2 must be strictly construed, adhering to a strict criterion of proportionality.

However, the Court considered that it is only in exceptional circumstances that physical ill-treatment by State officials that does not result in death may disclose a breach of Article 2 of the Convention. Rather, these cases usually were considered under Article 3 of the Convention. The use of force by the gendarmes and the lack of medical treatment would therefore be examined under Article 3. The Court found it unnecessary to examine under Article 2 of the Convention the allegation that there was a failure on the part of the authorities to protect the right to life or to conduct an effective investigation into the use of force. Thus, the Court found that no breach of Article 2 had occurred.

**Article 3: Prohibition of torture or inhuman and degrading treatment or punishment**

Article 3 of the Convention states:

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

**The applicant** identifies three separate issues arising under Article 3:

- The beating with riffle butts amounts to torture due to the severity of the injuries caused.
- The failure to bring Abdüllatif to hospital.
- The failure to prosecute the infliction of serious ill treatment (see *Assenov v Bulgaria*).

The applicant had originally submitted that his brother had been tortured while in Mardin gendarme station, but he did not substantiate this claim and did not pursue it further. The applicant submits that he is the victim of a practice of torture that exists in Turkey and of a practice of failure to conduct effective investigations into, and to combat the incidence of torture.

**The Government** submits that any bodily injury suffered by Abdüllatif İlhan resulted from a fall on a slippery surface and that therefore the complaints were unfounded. They also alleged that the Public Prosecutor was not obliged to investigate, as İlhan did not submit any complaint to him.

**The Commission** said that strict standards apply in the interpretation of Article 3 of the Convention, according to which ill-treatment must attain a certain minimum level of severity to fall within the provision's scope. The general practice placed the onus on the applicant to demonstrate "beyond a reasonable doubt" that ill-treatment of such severity had occurred (see *Ireland v UK*). As to the injuries sustained by Abdüllatif İlhan, the Commission was not persuaded that his treatment fell under the legal category of "torture," but considered his treatment to be "inhuman and degrading" in the sense of Article 3.

Furthermore, the Commission found that the lack of an investigation constituted a breach of Article 3. Finally, it considered it unnecessary to examine whether there is a practice of torture in Turkey.

Thus the Commission concluded unanimously that there had been a violation of Article 3.

**The Court** held as follows:

Regarding the alleged ill-treatment

After recalling that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3, the Court asserted that all of the circumstances of the case have to be taken into account (see *Tekin v Turkey*).

Furthermore, torture must be distinguished from inhuman and degrading treatment. The 1987 United Nations Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment of Punishment identifies one of the distinguishing characteristics of torture as the intention to inflict severe pain or suffering of a very cruel and serious nature.

The Court accepted the findings of the Commission concerning the injuries inflicted upon the applicant's brother, and on the 36-hour delay in bringing him to a hospital. The Court concluded that both the severity of the ill treatment and the surrounding circumstances, especially "the significant lapse in time before he received proper medical attention," caused such serious and cruel suffering that it qualified as torture.

In this regard, the Court found a breach of Article 3.

Regarding the alleged lack of an effective investigation

In its former jurisprudence, the Court had already ruled that an inadequate investigation by the authorities into the applicant's complaints of being maltreated by the police can amount to a breach of Article 3 (see, for example, *Assenov v Bulgaria*). It had regard to the importance of ensuring that the fundamental prohibition against torture and inhuman and degrading treatment and punishment is effectively secured in the domestic legal system. However, Article 3 is phrased in substantive terms, and the Court considers that a claim under Article 13 will generally provide both redress to the applicant as well as the necessary procedural safeguards against abuses by state officers. Thus, the Court decided to deal with the lack of effective investigation in the context of Article 13.

**Article 13: Right to an effective remedy and Article 6: Right to a fair trial**

The first sentence of Article 6 §1 provides:

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

Article 13 ensures that:

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

**The applicant** complained in his application of both a lack of access to court contrary to Article 6 of the Convention and a lack of effective remedies with respect to the life-threatening attack on, and torture of, Abdüllatif İlhan. In his observations on the merits of the case, the applicant's submissions demanding redress for this treatment solely concern Article 13. He argued that the behaviour of the Public Prosecutor denied him a remedy because there was a complete absence of an effective investigation. Moreover, he stated that the numerous cases before the Convention organs established beyond a reasonable doubt that there are systematic and systemic violations of the right to an effective remedy in Turkey which amount to a practice in violation of the Convention.

**The Government** pointed out that the applicant did not make any complaint to the Public Prosecutor nor did he make use of any other avenues of redress, and referred the Commission to the possibility of instituting civil and administrative proceedings in the domestic legal system.

**The Commission** found it appropriate to examine the applicant's complaints about remedies for the injuries and ill treatment of Abdüllatif İlhan under Article 13 of the Convention alone.

The Commission stated that Article 13 reflects the fact that the rights guaranteed in the Convention have to be safeguarded and secured by the Member States within their respective jurisdictions. Article 13 is of particular importance regarding the prevention of abuse by Member States and requires State Parties to provide mechanisms allowing proper investigation and proper redress.

The Commission disagreed with the Government's allegations, pointing out that Abdüllatif İlhan, when questioned at the village by the commander of the gendarmes, complained to him that he had been beaten up. It observed that, pursuant to the provisions of the Criminal Code, civil servants, which included gendarme officers, were under an obligation to report to the competent authorities any alleged crime that came to their knowledge in the course of their duties. The Commission accepted the evidence of İbrahim Karahan who told its delegates that Abdüllatif İlhan complained to the

commander Şeref Çakmak. Also, the fact that he was injured during his arrest was reported to the Public Prosecutor. Thus, the relevant authorities were aware of the matter and the responsibility of the State to provide effective and adequate redress was engaged.

The Commission recalled that it had investigated over 50 cases concerning allegations of serious human rights violation in Southeast Turkey, all of which had involved complaints that there was a breach of Article 13. During these investigations, the Commission had discovered many defects in legal and administrative practices and procedures, such as the failure of Public Prosecutors to question or take statements from members of the security forces or police, to verify documentary materials, or to seek evidence. Indeed, the prevailing assumption by Public Prosecutors and the authorities is that any unlawful acts must be the responsibility of terrorist groups.

The Commission found that some of those defects applied to the present case. For instance, the Public Prosecutor relied exclusively and unquestioningly on the documents and information submitted by the gendarmes, especially the incident report that the Commission had found to present numerous difficulties (such as uncertainty as to where the report was drawn up and signed, the suspicious way in which the purported signature of Abdüllatif İlhan came to appear on the report and the report's failure to coincide with the individual recollections of eyewitnesses or the oral explanations of Şeref Çakmak). The Public Prosecutor failed to interview Abdüllatif İlhan or İbrahim Karahan. Also, the Public Prosecutor did not investigate the brief and inaccurate medical report issued by Dr Aydogan after Abdüllatif İlhan had been admitted to hospital.

Thus, the Commission found that Abdüllatif İlhan had been denied an effective remedy against the authorities. The Commission found a breach of Article 13 by 29 votes to 3.

**The Court** reiterated that Article 13 of the Convention guarantees the availability of a remedy at the national level to enforce the substantial rights and freedoms guaranteed by the Convention in whatever form they might happen to be secured in the domestic legal order. An "arguable complaint" under the Convention should be dealt with in the domestic legal order by providing in an effective way, in practice as well as in law, a remedy providing restitution.

In the case of alleged torture or serious ill-treatment by the State, this requires payment of compensation where appropriate, and a thorough and effective investigation capable of leading to the identification and punishment of those responsible. Such a procedure would include effective access for the complainant to the investigative procedure (see, for example, *Tekin v Turkey)*.

In the light of a breach of Article 3 of the Convention, the applicant possessed an "arguable claim" in the sense of Article 13, which entailed the duty to carry out an effective investigation into the circumstances in which Abdüllatif İlhan received his injuries. However, the Public Prosecutor, who knew that Abdüllatif had suffered injuries requiring treatment in a hospital (as is apparent from the medical report) and who was

confronted with evidence that was clearly inconsistent and contradictory (including the incident report and the statement of Şeref Çacmak), nonetheless failed to undertake an independent investigation. In particular:

- He did not hear Abdüllatif İlhan's or İbrahim Karahan's version of events.
- He did not obtain clarification from the relevant doctors about the extent and nature of the injuries.
- He did not seek any eyewitness evidence as to how the alleged accident took place.
- He relied on the oral explanations of Çakmak and the incident report that had been signed by Çakmak, Kurt and Uz, who, when asked by the Commission's Delegates, were unable to testify unequivocally that they had seen Abdüllatif İlhan fall.

In addition, the Public Prosecutor failed to carry out an investigation on the basis that the medical report issued by Dr Aydogan on Abdüllatif İlhan's arrival in the emergency ward lacked an explanation of the causes of the injuries and did not refer to all the injuries and marks on his body.

Accordingly, the Court also found that no effective criminal investigation had been conducted and therefore no effective remedy had been provided, whichChild: h amounted to a violation of Article 13.

**Article 14: Prohibition of discrimination**

Article 14 of the Convention states:

> *"The enjoyment of 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 Commission examined the applicant's allegations that he had been discriminated against for belonging to the Kurdish minority, but in the light of the evidence submitted, considered the allegations to be unsubstantiated. The Commission concluded unanimously that there had been no violation of Article 14 of the Convention.

**Alleged practice by the authorities of infringing Articles 2, 3 and 13 of the Convention**

The Court held that it did not find it necessary to determine whether the violations are part of a practice adopted by the authorities.

**Just satisfaction: Compensation under Article 41**

Article 41 of the Convention authorises the Court to award damages to an applicant:

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

**Pecuniary and non-pecuniary damages**

**The applicant** claimed a total of £89,156.59 in pecuniary damages which covered incurred and future medical expenses and loss of earnings.[7] The applicant also claimed £40,000 for the non-pecuniary damages suffered by Abdüllatif İlhan and £2,500 for himself on account of the Article 13 violation that he had suffered.

**The Government** argued that there was no violation that needed to be compensated with regard to pecuniary damages and invoked the principle that any kind of just satisfaction should not exceed reasonable limits of lead to unjust enrichment with regard to non-pecuniary damages.

**The Court** admitted the existence of a "direct causal link" between the injuries inflicted on Abdüllatif İlhan in breach of Article 3 and the past medical expenses and loss of earnings. It refused to award future medical expenses on the grounds of their "largely speculative" character. Thus, the sum awarded for pecuniary damages amounted to £80,600. The Court awarded £25,000 in non-pecuniary damages to Abdüllatif İlhan, referring to the violations of the substantive articles found in the judgment and to the awards made in previous cases from Southeast Turkey concerning those same provisions. Since only Abdüllatif İlhan may be considered as the victim of the violations found, the Court refused to grant any non-pecuniary damage to the applicant.

**Costs, expenses and default interest**

The applicant claimed a total of £31,097.61 for incurred costs and expenses less legal from the Council of Europe.

**The Government** generally contested all of the above costs and expenses claims.

**The Court** awarded the sum of £17,000 together with VAT, less the FRF 11,300 received by way of legal aid from the Council of Europe. The default interest was determined to be 7.5% per annum, as applicable in the United Kingdom.

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[7] The calculation of £70,952.32 for loss of earnings submitted to the Court takes into account: the fact that Abdüllatif İlhan had to sell his livestock to pay his medical treatment; his inability to resume his previous occupation; his age; the average male life expectancy in Turkey; and his previous income as a farmer.

# Appendix A

Salman v Turkey: Decision of European Commission of Human Rights

**EUROPEAN COMMISSION OF HUMAN RIGHTS**

**Application No. 21986/93**

**Behiye Salman**

**against**

**Turkey**



**REPORT OF THE COMMISSION**

(adopted on 1 March 1999)

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# I. INTRODUCTION

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

## A. The application

2. The applicant is a Turkish citizen resident in Adana and born in 1942. She is represented before the Commission by Professor K. Boyle and Professor F. Hampson, both lecturers at the University of Essex.

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

4. The applicant complains that her husband died as a result of torture while in police custody. She invokes Articles 2, 3, 6, 13 and 18 of the Convention. She also complains of intimidation exerted on her in relation to her application, invoking former Article 25 of the Convention.

## B. The proceedings

5. The application was introduced on 20 May 1993 and registered on 7 June 1993.

6. On 30 August 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 31 January 1994, after an extension in the time-limit. The applicant's observations in reply were submitted on 23 March 1994 and further documents on 13 April 1994.

8. On 27 June 1994, the Commission adjourned further examination of the application with a view to examining it at its session commencing on 10 October 1994. It requested that the Government provide information about pending proceedings in the High Court of Appeals.

9. On 11 October 1994, the Commission decided that the adjournment should not be prolonged and invited the Government to submit any further observations on the admissibility and merits which they might wish.

10. By letter dated 11 January 1995, the Government submitted further observations.

11. On 20 February 1995, the Commission declared the application admissible.

12. The text of the Commission's decision on admissibility was sent to the parties on 24 February 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.

13. The Government provided further information on 27 February 1995.

14. By letter of 15 May 1995, the applicant's representatives stated that they had no proposals to make at this stage.

15. 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: MM. Pellonpää, Cabral Barreto and Bratza. It notified the parties by letter of 19 July 1995, proposing certain witnesses. The Government were requested to provide documents from the investigation file.

16. By letter dated 15 September 1995, the applicant made proposals as regards witnesses. By letter dated 14 November 1995, the applicant provided information about various witnesses.

17. By letter dated 26 February 1996, the Delegates requested the Government to provide documents from the investigation file and to identify certain witnesses.

18. By letter dated 30 April 1996, the Secretariat, on behalf of the Delegates, again requested the Government to provide investigation documents and information about witnesses. It also requested further clarification from the applicant concerning witnesses proposed by her.

19. On 2 May 1996, the Government provided documents from the investigation file and identified certain police officers.

20. By letter dated 9 May 1996, the applicant submitted a statement alleging that she had been summoned to the Security Directorate concerning her application.

21. By letter dated 27 June 1996, the Government provided the information that two witnesses proposed by the applicant were not in detention as alleged.

22. Evidence was heard by the Commission's Delegates in Ankara from 1 to 3 July 1996. Before the Delegates, the Government were represented by Mr. A. Gündüz and Mr. S. Alpaslan, Acting Agents, assisted by Mr. A. ™ölen, Mr. A. Kurudal, Ms. N. Erdim, Ms. A. Emüler, Mr. C. Çakir, Mr. O. Sever, Ms. B. Pekgöz, Ms. M. GülΠen and Ms. S. Yüksel. The applicant was represented by Ms. F. Hampson and Mr. O. Baydemir, as counsel, assisted by Ms. A. Reidy and Mr. Mahmut Kaya (interpreter).

23. On 7 September 1996, the Commission decided to call an additional witness to an oral hearing to be held in Strasbourg and to invite the Government to make written submissions concerning allegations that the applicant had been subject to intimidation. By letter dated 13 September 1996, the parties were informed of these decisions.

24. By letter dated 4 November 1996, the Government provided information concerning the absence of the police officer, Ali Sarı, at the hearing in Ankara.

25. By letter dated 22 October 1996, the applicant requested permission to submit further expert medical evidence. By letter dated 6 November 1996, the Delegates agreed to this request. By letter of 7 November 1996, the applicant requested that the Delegates hear evidence from a forensic expert, Professor Pounder. By letter of 18 November 1996, the Secretariat informed the parties that this request was accepted by the Delegates and enclosed the amended timetable for the hearing.

26. On 26 November 1996, the applicant submitted an expert report by Professor Pounder.

27. Evidence was heard by the Commission's Delegates in Strasbourg on 4 December 1996. Before the Delegates the Government were represented by Mr. A. Gündüz and Mr. S. Alpaslan, Acting Agents, assisted by Mr. M. Özmen, Mr. A. Akay, Ms. M. Gülsen and Mr. A. Kaya. The applicant was represented by Ms. F. Hampson and Ms. A. Reidy. The Government Agent made representations concerning the evidence of Professor Pounder and withdrew from the hearing of his evidence.

28. On 10 December 1996, the Delegates invited the Government to make proposals as to further expert evidence which they might wish to adduce.

29. By letter dated 13 December 1996, the Government made submissions concerning the allegations of intimidation.

30. On 9 January 1997, the Government requested that the Delegates hear evidence from a forensic doctor. On 28 February 1997, the parties were informed that the Delegates would hear evidence from the forensic witness in Strasbourg during the Commission's session in July 1997.

31. By letter dated 28 May 1997, the Secretariat reminded the Government that they should provide a curriculum vitae of the forensic expert.

32. By letter dated 30 May 1997, the Government informed the Commission that the forensic expert was unable to attend but proposed a second expert, whose curriculum vitae was enclosed.

33. Evidence was heard by the Commission's Delegates in Strasbourg on 4 July 1997. Before the Delegates the Government were represented by Mr. A. Gündüz and Mr. S. Alpaslan, Acting Agents, assisted by Mr. F. Polat, Ms. A. Emüler, Ms. M. Gülsen, Mr. D. Karaca, Mr M. Bağriaçik and Mr. A. Kaya. The applicant was represented by Ms. F. Hampson and Ms. A. Reidy, assisted by Mr. M. Kaya (interpreter).

34. By letter dated 24 September 1997, the Commission's Secretariat requested, on instructions of the Delegates, that Professor Cordner of the Victoria Institute of Forensic Medicine submit an expert opinion on the medical aspects of the application.

35. On 10 March 1998, Professor Cordner submitted his report to the Delegates.

36. By letter dated 17 April 1998, the parties were provided with a copy of the report and requested to submit their final observations on the merits by 22 June 1998. At the request of the Government and the applicant, the time-limit was extended to 24 August 1998.

37. On 20 August 1998, the Government submitted their final observations.

38. On 17 November 1998, the applicant submitted her final observations, after a further extension of the time-limit for that purpose.

39. On 1 March 1999, the Commission decided that there was no basis on which to apply former Article 29 of the Convention[1].

40. After declaring the case admissible, the Commission, acting in accordance with former 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

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

MM. S. TRECHSEL, President
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
Mrs G.H. THUNE
Mr. F. MARTINEZ
Mrs J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
M.A. NOWICKI

[1] The term "former" refers to the text of the Convention before the entry into force of Protocol No. 11 on 1 November 1998.

I. CABRAL BARRETO
B. CONFORTI
Sir Nicolas BRATZA
MM. I. BÉKÉS
D. ŠVÁBY
G. RESS
A. PERENIĆ
C. BÎRSAN
K. HERNDL
E. BIELIŪNAS
E.A. ALKEMA
M. VILA AMIGÓ
Mrs M. HION
MM. R. NICOLINI
A. ARABADJIEV

42. The text of this Report was adopted on 1 March 1999 by the Commission and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with former Article 31 para. 2 of the Convention.

43. The purpose of the Report, pursuant to former 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.

44. The Commission's decision on the admissibility of the application is annexed as Appendix I and the photographs of the body of Agit Salman as Appendix II hereto.

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



## II. ESTABLISHMENT OF THE FACTS

46. The facts of the case, particularly concerning events on or about 29 April 1992 during the detention of the applicant's husband Agit Salman, aged approximately 45 years, in police custody, are disputed by the parties. For this reason, pursuant to former Article 28 para. 1 (a) of the Convention, the Commission has conducted an investigation, with the assistance of the parties, and has accepted written material, as well as oral testimony, which has been submitted. The Commission first presents a brief outline of the events, as claimed by the parties, and then a summary of the evidence submitted to it.

A. The particular circumstances of the case

1. Facts as presented by the applicant

47. The various accounts of events as submitted in written and oral statements by the applicant and other members of her family are summarised in Section B: "The evidence before the Commission". The version as presented in the applicant's final observations on the merits is summarised briefly here.

48. On 28 April 1992, at about 01.30-2.00 hours, four police officers came to the home of Agit Salman, looking for him. They questioned the applicant about Hıdır Salman, the nephew of Agit Salman. Agit Salman had previously been detained overnight on 26-27 February 1992, at which time he had been questioned about the whereabouts of his nephew. During this time, Agit Salman had been subjected to cold water treatment and caught a chill.

49. Agit Salman, who was out working as a taxi driver, was arrested at the Aksoy taxi rank by a team of three officers, Ahmet Dinçer, ™evki Ta∏çı and Ali Sarı. The applicant and her family were informed by eye witnesses that he did not resist arrest. There was no mention in the arrest report or the incident report after his death that Agit Salman had resisted arrest. The oral evidence of the arresting officers also emphasised that the circumstances of his arrest could not have caused him injury. His arrest therefore had no direct bearing on his subsequent death.

50. Agit Salman was entered into the custody record of Adana Security Directorate by Ömer ∕nceyılmaz at 03.00 hours. A little under 24 hours later, at about 01.30 hours on 29 April 1992, he was taken to Adana State Hospital by the interrogation team headed by ∕brahim Ye∏∞l, where he was declared to have been dead on arrival. Dr Ali Tansı, who was on duty in the emergency unit of the Hospital at the time of Agit Salman's admission, stated that he had been dead for at least 15-20 minutes. The applicant disputes the accounts of the police officers as to what occurred during this intermediate period, in particular, their account that Agit Salman remained in his cell, without being questioned and that he fell ill, calling for help, that after 4-5 minutes he was placed in a mini van and taken to the hospital on a journey lasting 15-17 minutes and that during that journey there was a brief two minute stop while one officer applied mouth to mouth resuscitation and a heart massage.

51. The accounts of the police officers are stated to be unreliable and implausible, particularly as to their claim that there was a resuscitation attempt, since the first time this was mentioned was before the Commission Delegates. Their evidence as regarded Agit Salman's resistance to his arrest and his alleged breathlessness was unsubstantiated and self-serving. It was striking that it was the interrogation team who took Agit Salman to hospital and that it was /brahim Ye∏∞l who took the statement of Behyettin El. Of the three suspects known to have been connected with the operation, it was Agit Salman who was the last to be detained (the others being Behyettin[2] El and Ferhan Tarlak) and there was no reason to delay the interrogation any longer. While Agit Salman was arrested at 01.30 hours, he was not logged into the custody record until 03.00 hours, a gap which is unexplained since it is denied that he was subjected to any preliminary interview. Further, the evidence by the officers as to the interrogation roles of the interrogation team was very evasive. Globally, the version of events is so flawed that the compelling inference to be drawn is that the story was constructed to be compatible with what the police officers believed that the medical evidence would show and provide a cover for the reality of what happened, which was that Agit Salman was tortured to the point that a heart attack was induced.

52. The applicant submits that, during his 24 hours' detention, Agit Salman was subjected to torture which resulted in several wounds being inflicted on his body and which led to a cardiac arrest. The medical evidence shows that his death was rapid and not prolonged, as alleged by police officers. While he had a significant pre-existing natural disease of the heart, this had been fully compensated for and he showed no external signs of the heart condition. The heart condition could give rise to sudden unexpected death however and in this case resulted from being subjected to serious ill-treatment amounting to torture. The presence of bruising on the sole of the left foot indicates the application of at least moderately severe force, and combined with the marks on the left and right ankles, this is consistent with the infliction of "falaka" (the technique of beating the sole of the foot with a solid object to induce intense pain and suffering in a short period of time). The reports of the European Committee for the Prevention of Torture (the "CPT") and the UN Special Rapporteur show that there was widespread use of this technique of torture during or around 1992. The bruising on Agit Salman's chest overlying a fractured sternum has not been shown to have been caused separately. As injuries inflicted together, they could not have resulted from attempted resuscitation but the most likely cause would have been the result of a heavy blow. There were other suspicious marks and possible injuries eg. marks on the back, right little toe and in the armpit. The latter two could possibly have been electrical shock contact marks. It is not possible to resolve the causes of these marks conclusively due to the inadequacies of the autopsy procedures. Attempts to clarify the possible causes of the injuries and provide a full and frank record of the injuries was not undertaken by the forensic personnel in Adana.

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[2] In various documents, his first name is spelt also as Bahyettin , Bahiyettin or Bayettin. For consistency, the spelling Behyettin is used throughout this text.

53. The applicant and her family were not informed of Agit Salman's death until about noon on 29 April 1992, after Mehmet Salman had been summoned to the security directorate. They filed a complaint with the public prosecutor the same day. On 30 April 1992, /brahim Salman, the applicant's brother-in-law, went to the morgue to identify the body. The family were able to collect the body the same day. While they prepared the body for burial, they saw evidence of discolouration and marks. The family arranged for the press to take photographs for evidence. The story was reported in three daily newspapers. The police wanted to bury the body under escort for fear that there would be a demonstration but the family undertook to bury the body that day so that there would be no risk that a demonstration could coincide with the burial on 1 May 1992.

54. On 24 January 1996, at about 14.00 hours, the applicant was taken to the Security Directorate, blindfolded and asked questions about her application to the European Commission of Human Rights. She was told that she should drop her case to the Commission and was hit. She was requested to thumbprint a document while she was there.

55. On 7 February 1996, the applicant was taken to the prosecutor by two police officers and asked about her statement of means. Two days later, she was taken to the Security Directorate where she was brought before the Chief Prosecutor and again asked about her statement of means.

2. Facts as presented by the Government

56. The Government's account of events as based on their observations are summarised as follows.

57. On 30 April 1992, after his arrest, Agit Salman fell ill while detained in the police cells at the Security Directorate. An autopsy was conducted which concluded that the case should be sent to the Istanbul Forensic Institute for clarification of the cause of death. In its report of 15 July 1992, the Forensic Institute found that the superficial traumatic changes on Agit Salman's body could be ascribed to resistance or struggle on arrest and that the breakage of the sternum corpus could have been caused by attempted resuscitation. It was their unanimous and considered decision that death was caused by the stoppage of the heart connected to neurohumeral changes brought about by the pressure of the incident because of his existent heart disease.

58. Following the quashing of the public prosecutor's decision not to prosecute by the High Court of Appeals, an indictment was prepared charging ten officers with homicide. The Adana Aggravated Felony Court acquitted the officers stating that "...there exists no sufficient evidence proving the ill-treatment of Agit Salman by the defendants thus causing his death". This decision, which was not appealed, became final on 3 January 1995.

59. Agit Salman was not interrogated by any police officers between his arrest and his falling ill in his cell. He was showing signs of difficulty of breathing prior to this. When he became ill, he was placed in a van and taken to hospital. They stopped the van when it appeared that Agit Salman's heart had stopped and police officer Mustafa Kayma carried out a heart massage. They were told at the hospital that Agit Salman was dead.

3. Proceedings before the domestic authorities

60. On 29 April 1992, Agit Salman was pronounced dead at Adana State Hospital. His body was transferred from the hospital morgue to the forensic morgue for the purposes of an autopsy. On 30 April 1992, his body was identified by his brother /brahim Salman and the body released for burial.

61. On 14 May 1992, a toxicological analysis of certain organs, blood and urine was submitted which found no trace of toxic, organic or inorganic substances.

62. On 18 May 1992, a histopathological report was submitted in respect of organs and spinal tissue.

63. On 21 May 1992, an autopsy report was issued by Dr Fatih ™en, recommending referral of the case to the Istanbul Forensic Medicine Institute.

64. On 15 July 1992, the Istanbul Forensic Medicine Institute issued a report, stating that the cause of death was heart failure.

65. On 19 October 1992, the Adana public prosecutor issued a decision not to prosecute. The decision stated that Agit Salman had been taken into custody on 28 April 1992 for participating in the Newroz celebrations on 23 March 1992, lighting a fire in the road and chanting PKK slogans, collecting money for the PKK and sending PKK recruits to the rural areas, being involved in attacks on the security forces, during which one person died and four were injured and being involved in the killing of Hüseyin Aslan on 5 February 1991. At about 01.15 hours on 29 April 1992, Agit Salman informed officers that his heart was giving him problems and he was taken to Adana State Hospital where he died. According to the forensic report, Agit Salman had a longstanding heart problem, any superficial signs of trauma could have been received whilst being apprehended and death was the result of stoppage of the heart due to neurohumeral changes brought about by the pressure of the incident as a result of a heart disease. Although the forensic report had stated that Agit Salman had received direct trauma, it had not been possible to obtain evidence justifying the opening of a case.

66. On 13 November 1992, the applicant appealed against the decision not to prosecute, claiming that Agit Salman had been interrogated and died under torture.

67. In a decision dated 25 November 1992, the Tarsus Serious Crimes Court rejected the applicant's appeal.

68. Pursuant to article 343 of the Code of Criminal Procedure, the Minister of Justice referred the case to the High Court of Appeals. It quashed the non-prosecution decision and sent the file to the Adana public prosecutor for the preparation of an indictment.

69. An indictment charged ten police officers (Ömer /nceyılmaz, Ahmet D∞nçer, Ali Sarı, ™evki Ta∏çi, Servet Özyılmaz, Ahmet Bal, Mustafa Kayma, Erol Γelebi, /brahim Ye∏il, Hasan Arinç) with homicide under case number 1994/135. Hearings took place before the Adana Aggravated Felony Court on, inter alia, 27 June, 9 September, 31 October and 1 December 1994. Oral statements were given by six of the ten police officers (Ahmet D∞nçer, ™evki Ta∏çi, Mustafa Kayma, Erol Γelebi, /brahim Ye∏il, Hasan Arinç ), Temir Salman, the father of Agit Salman, the applicant and Dr Ali Tansı, the doctor on duty in the emergency unit at Adana State Hospital. A written statement was obtained from Behyettin El.

70. In its judgment of 26 December 1994, the Adana Aggravated Felony Court found that it could not be established that the defendants had exerted force or violence on Agit Salman or threatened him or tortured him in order to force him to confess. The superficial traumas on his body could have derived from other causes, for example, when he was arrested. The forensic reports indicated that Agit Salman died of his previous heart condition being compounded with superficial traumas. However there was no evidence to prove that the traumas were produced by the accused. It acquitted the defendants on the grounds of inadequate evidence.

B. The evidence before the Commission

1) Documentary evidence

71. The parties submitted various documents to the Commission. These included documents from the investigation and court proceedings and statements from the applicant and witnesses concerning their version of the events in issue in this case. The applicant also submitted reports by the UN Special Rapporteur on Torture (E/CN.4/1994/31, E/CN.4/1995/34 and E/CN.4/1997/7), a 1993 report from the UN Committee Against Torture (A/48/44/Add.1 - 9 September 1993), and a report, "Deaths in detention places or prisons (12 September 1980 to 12 September 1994)" by the Human Rights Foundation of Turkey and four colour photographs taken by journalists of the body of Agit Salman at the cemetery on 30 April 1992.

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

a) Statement by the applicant, undated, submitted with her application on 19 May 1993

73. At about 01.30 to 02.00 hours on 28 April 1992, police officers in plain clothes and special teams came to their house, banging on the door. When she opened, they asked for her husband Agit. She said that he was a taxi driver and worked at the Aksoy taxi stand. The officers opened all the doors in the house to check if anyone else was there.

74. At about 02.30 hours, friends of her husband from the taxi stand brought his car home and said that the police had taken her husband away. On the following day, 29 April, at about 11.30 hours, there was a telephone call to the house. It was said that the police were at the taxi stand and were waiting to see her son Mehmet. Mehmet left. The police at the taxi stand took him to the security headquarters, saying his statement was going to be taken. They asked him if there was anything wrong with his father. Her son said that there was nothing wrong. The police then told him that his father had died of a heart attack and asked him to collect the body.

b) Documents relating to allegations of intimidation of the applicant

Statement dated 24 January 1996 taken by police officers

75. This statement, with a thumbprint by the applicant's name, was taken by officers of the Anti-Terror Department of the Adana Security Directorate. It is headed "In relation with her application for help to the European Human Rights" and begins, "The witness was asked: You are asked to explain whether you applied to the European Human Rights Association, if you asked for help and whether you filled in the application form. Who mediated for your application?"

76. The statement states that three years before her husband died and she was unable to provide for her seven children. During the mourning period for her husband, two people approached her, whom she later learned were members of the PKK terrorist organisation though she did not know their names. They asked her to write a petition letter and sent it to Europe via the Human Rights Association. They said that they were her husband's friends. Upon their instructions, she went to the petition typists next to the Adana Palace of Justice. They typed a petition letter and she sent it by post to the Diyarbakir Human Rights Association. Six months later, she received a letter asking her to go to Diyarbakir and she went. She herself filled in the forms which they <the police officers> had shown her and was asked the questions in the forms. The thumbprint in the application was hers. After posting them, she had not received any financial assistance. Her only reason in applying was to help her children. She did not know that it subsequently went to the authorities abroad.

Report dated 9 February 1996 by police officers

77. This report, signed by a superintendent and another officer, describes an investigation into the income declaration of Behiye Salman, enclosed with correspondence from the Ministry of Justice, General Directorate of International Law and Foreign Relations. It lists items of the applicant's income, expenditure and her dependent children and relatives and appears to indicate that their investigation confirmed her declaration of means.

Statement, undated, submitted by the applicant's representatives on 9 May 1996

78. In this thumbprinted statement, the applicant stated that she had been subject to various forms of pressure exerted many times by the police to induce her to withdraw her application to the European Court of Human Rights. The pressure was increasing. On 24 January 1996, at about 14.00 hours, two cars came to her house. Four people put her in a car and took her to the security directorate. Her eyes were taped. She was taken to a room where she sat down. They asked her who and which organisations had introduced her to the European Court of Human Rights. She told them she applied through her lawyer Niyazi and the Diyarbakir Human Rights Association. She did not answer when they asked who was helping her to pursue her case, since she feared the police. They insulted the people who were helping her and said that her efforts would fail. The interrogation continued until about 16.30 hours. Later, they took the tape off her eyes. They placed a typewritten sheet of paper in front of her and told her to sign. She said that she could not read or write and would not sign it. They said it was compulsory to sign. They said that the document was from the European Court of Human Rights. She was suspicious. They told her that she should voluntarily withdraw her case or they would torture her and send her to join her husband. Though she was scared, she refused to sign. They called her names and insulted her. She could not bear the pressure and signed the document. She did not know the contents of it. After this, she was allowed to go home.

79. On 9 February 1996, at about 12.00 hours, she was fetched in an unmarked car and taken to the second floor of the security directorate. She was told that she was to see the Chief Public Prosecutor. When she entered the room, the Chief Public Prosecutor was there, with five-six other people. There was a file in front of them. They asked her which organisations helped her with her case. She told them that she did it herself. They asked her about her property and belongings and the names of those whom she looked after. They made her sign the document and then said she could go.

c) Statements of the police officers involved in the incident

Apprehension report dated 28 April 1992, 01.30 hours

80. This report, signed by Assistant Superintendent Ahmet Dinçer and officers ™evki Ta∏çi and Ali Sarı, stated that they looked for Agit Salman at Savas taxi stand. Upon being informed that he was waiting for a fare at the Ye∏ilova leisure centre, they apprehended him there.

Statement of 29 April 1992 signed by the police officers who delivered Agit Salman to hospital

81. Agit Salman had been detained by the Security Directorate as a suspect for activities, including carrying out propaganda for the PKK, and attacking the security forces in an incident where one person died and four were injured. He was on a wanted list and was apprehended at about 03.00 hours on 28 April 1992.

82. At about 01.15 hours, the custody officer approached them, saying that Agit Salman had knocked on his cell door and said that he was ill. The custody officer had placed him in the hall. On the suspect's claim that his heart was giving him problems, they (undersigned) had taken him without delay to the state hospital emergency ward. They waited while he was examined and were informed that he was dead. The public prosecutor was informed. The statement was signed at 02.00 hours by Assistant Superintendent Ye∏∞l and officers Mustafa Kayma, Hasan Arinç and Erol ∏eleb∞.

Statement of Ahmet Dinçer dated 22 May 1992 taken by the Adana public prosecutor

83. The witness was an assistant superintendent. On 28 April 1992, his superiors ordered them to carry out an operation at about midnight. Agit Salman was wanted for his enrolment into the PKK, carrying out propaganda and provoking people to attack the security forces. They looked for him first at Savas taxi stand but he was not there. They found him at the leisure centre on the E-5 intercity road, waiting for fares. When they introduced themselves, informing him of his offence and that he was to go to the security directorate, Agit Salman said, "I'm innocent. You can't take me," and resisted arrest. They took him by the arms and forced him into their vehicle without beating him up. There was some pulling and shoving. Some marks on his body may have resulted from this but they did not exceed their authority.

84. Agit Salman was apprehended at about 01.00 hours and delivered to the custody officer Ömer ∧nceyılmaz at about 01.30 hours. When they delivered him, he was taking shallow breaths, rapidly as if he had asthma. He occasionally drew deep breaths. Agit Salman was not interrogated since the operation was still under way and, according to their methods, interrogations only began upon completion of the operation. He was not taken out of the custody area. He became ill and lost his life due to natural causes.

Statement of Ali Sarı dated 22 May 1992 taken by the Adana public prosecutor

85. On 28 April 1992, the witness accompanied Assistant Superintendent Dinçer and officer ™evki Ta∏çı to take Agit Salman into custody for the offence of membership in the PKK. They went first to the Savas taxi stand but he was not there. They found him at the Yeşilova leisure centre. When they told him of his offence, Agit Salman resisted, saying, "I am innocent. You can't take me away." They took him by the arms and forced him into the vehicle. There was some pulling and shoving but they did not act irresponsibly and they did not ill-treat or torture him. At about 01.30 hours, they delivered him to the custody officer Ömer ∧nceyılmaz at the directorate. On apprehension, Agit Salman seemed excited and had difficulty breathing. They thought it was due to anxiety. He was not interrogated or taken to an identity parade. His interrogation was postponed as the operation was not complete. In his opinion, Agit Salman died of natural causes.

Statement of ™evki Ta∏çı dated 22 May 1992 taken by the Adana public prosecutor

86. Pursuant to their orders, he went with Assistant Superintendent Dinçer and officer Sarı, to find Agit Salman who was wanted for PKK membership and running propaganda. They found him at Yeşilova leisure centre. When they told him the charge, he did not want to accompany them, saying, "I am innocent. You can't take me away." Upon his resistance, they took him by the arms, putting him in the vehicle by force. They were in civilian clothes but they had introduced themselves. Despite that, Agit Salman had resisted and insisted on seeing their IDs. Upon that, they put him in the vehicle by force. He was apprehended at about 01.00 hours and delivered to the custody officer Önceyilmaz at 01.30 hours. When apprehended, Agit Salman was breathing rapidly. He did not ill-treat or torture Agit Salman. Due to the fact that the operation was ongoing, he was not interrogated or taken to an identity parade.

Statement dated 22 May 1992 of Ömer Önceyılmaz taken by the Adana public prosecutor

87. This witness was on duty in the custody area from 18.00 hours on 27 April 1992 until 08.00 hours on 28 April 1992, when he was relieved by Servet Özyılmaz. Agit Salman had been arrested and brought to his office by Assistant Superintendent Ahmet Dinçer and officer ™evki Ta∏çı. He carried out a search. He did not observe any mark or injury and placed Agit Salman in a cell. No-one interrogated him during the night, nor was any pressure applied. Agit Salman remained in cell B2. He was taken out by the witness for natural needs (eg. toilet, eating and drinking). The witness did not think that he had been interrogated before being brought to the custody area. Neither Agit Salman nor the arresting officers mentioned anything about his resisting arrest. He was not taken out to an identity parade with Ferhan Tarlak or Behyettin El.

Statement of Servet Özyılmaz dated 22 May 1992 taken by the Adana public prosecutor

88. The witness was on duty as custody officer from 08.00 to 18.00 hours on 28 April 1992. There were three individuals in custody in respect of Superintendent Ye∏∞l's team - Agit Salman, whom he knew before (he had been taken into custody with his brother Remzi on an earlier occasion on suspicion of PKK membership), Behyettin El and Ferhan Tarlak. When he saw Agit Salman, he asked how he was and why he was there and they talked for a while. Salman said nothing about being beaten up or being ill-treated. He did not see any marks on Salman's body. He did not ill-treat him and did not see or hear anyone else ill-treating him.

89. There were 12 single cells in the custody area. No-one wanted to interrogate Salman. During his duty period, Salman went to the toilet normally and ate the food delivered. He made no complaints. He transferred his duty to officer Ahmet Bal.

Statement of Ahmet Bal dated 22 May 1992 taken by the Adana public prosecutor

90. On 28 April 1992, he was on duty as custody officer between from 18.00 hours until 08.00 hours the next day. At about 01.00 hours on 29 April 1992, a man, whom he later learned was Agit Salman, knocked on his cell B1. Salman was saying, "I am suffocating, I am having difficulty breathing. Let me out." He opened the door and took Salman into the custody hall. Salman did not have any wound or graze but his illness was obvious. He informed the others, /brahim Ye∏il, Hasan Arinç, Erol Γeleb∞ and Mustafa Kayma, who took Agit Salman to the hospital in the minibus. During his duty period, no-one took Salman out for interrogation. The superior officer instructed the custody officer who was to interrogate a suspect and the custody officer could only hand the suspect to that person. He did not ill-treat or torture Agit Salman and did not hear or see anyone else do so. There were two other suspects in custody, Ferhan Tarlak and Behyettin El.

Statement of /brahim Ye∏il dated 18 May 1992 taken by the Adana public prosecutor

91. On 28-29 April 1992, he was on duty as an assistant superintendent at the Adana Security Directorate. At about 01.00 hours, on 29 April, he was informed by officer Ahmet Bal that Agit Salman was ill. He was having difficulty breathing and Bal had placed him in the hall. Agit Salman claimed that his heart was troubling him. They put him in a minibus and took him to Adana State Hospital, delivering him to the duty doctor. The doctor came out and told them that Agit Salman had been dead on arrival. The officers who took Salman to the hospital were himself, Hasan Arinç, Mustafa Kayma and Erol Γeleb∞. Murat Pehlivanlı, also on the duty list, was the typist but he was not on night duty. He had not seen any mark or injury on Agit Salman on the way to hospital. He did not ill-treat or torture him. On the same night, they had another operation to carry out related to the same file. They did not have an opportunity to interrogate him or identify any other individual, including Bahyettin El.

Statement of Hasan Arinç dated 18 May 1992 taken by the Adana public prosecutor

92. On the night of the incident, he was on duty at the directorate. At about 01.00 hours, the custody officer Ahmet Bal told him that someone had become ill. Their immediate response was to take Agit Salman to hospital, where the doctor in the emergency ward told them that he was dead. According to Ahmet Bal, Salman had had difficulty breathing. He did not ill-treat or torture Salman, nor did he see or hear any other person do so. That night there had been an ongoing operation concerning Salman's incident. Moreover they were involved in other operations. For that reason, they had not interrogated Salman.

Statement of Mustafa Kayma dated 18 May 1992 taken by the Adana public prosecutor

93. On the night of the incident, he was also on duty at the Adana Security Directorate. The custody officer Bal came to his record office to tell them that someone was ill. He and his colleagues took Salman to the hospital. The doctor told them that Salman was dead. He did not torture or ill-treat Salman, nor see or hear any other person do so. On his way to the hospital, Salman was pale. He did not see any wounds or grazes.

Statement of Erol Γeleb∞ dated 18 May 1992 taken by the Adana public prosecutor

94. On the night of the incident, he was also on duty at the Adana Security Directorate. At around 01.00 hours, the custody officer Bal came to their record office to tell them that someone was ill and was having difficulty breathing. They immediately took Salman to the hospital. The doctor told them that Salman was dead. He did not torture or ill-treat Salman, nor see or hear any other person do so. Salman was not interrogated that night. Since that night they had other external operations, they did not have time.

Statement of Murat Pehlivanlı dated 25 May 1992 taken by the Adana public prosecutor

95. On 28 April 1992, he was on duty at the custody area of the Directorate as a typist. He did not type Salman's statement. He was not subjected to interrogation as there was a continuing operation concerning fugitive suspects. He did not hear or see Salman being subjected to any torture or ill-treatment.

d) Other statements

Statement of Behyettin El dated 8 May 1992 taken by the Adana public prosecutor

96. He had been detained on 25 April 1992 at the Adana Security Directorate for membership of the PKK, murder and running propaganda. He was interrogated and three days later learned that Ferhan Tarlak had been taken into custody for the same offences. He did not stay with or talk to Tarlak. He did not see Agit Salman, whom he knew as a driver in the district. He was in a cell on his own. He did not see or hear Agit Salman being ill-treated or tortured. Ferhan Tarlak was in the cell next door and when Tarlak spoke out loud, he heard him. This was the first time he learned that Agit Salman had died in custody.

Statement of Ferhan Tarlak dated 8 May 1992 taken by the Adana public prosecutor

97. On 28 April 1992, he was detained at the Adana Security Directorate for membership of the PKK and carrying out activities on its behalf. He stayed in cell 4 by himself. Behyettin El, a distant relative, was in the cell next door. He did not know Agit Salman and did not hear or see him being ill-treated. He was confronted with El on the day of his detention but not Agit Salman. There were about 15 persons in the cells. He did not hear Agit Salman calling out for help.

Applicant's statement of 26 May 1992 taken by Adana public prosecutor

98. The applicant stated that before he was taken into custody her husband was healthy. He did not have any heart disease, breathing problems or other illness. She was of the opinion, as she had stated in her petition of 30 April 1992 co-signed by her husband's father, that her husband had been ill-treated or tortured by the police officers. She demanded their punishment.

Statement of Temir Salman dated 29 May 1992 taken by the Adana public prosecutor

99. He was the father of Agit Salman. He used to live in the apartment below his son. Before being taken into custody, his son was healthy. He had no illness and had not been to the doctor recently. He stated that his son must have been ill-treated at the security directorate, even tortured. He wanted those responsible to be punished and named persons who were witnesses from Aksoy taxi stand, including Abdurrahman Bozkurt.

Statement of Hasan Tetin dated 29 June 1992 taken by the Adana public prosecutor

100. He worked at Aksoy taxi stand. He knew Agit Salman. Agit Salman was wearing a polo-necked sweater and a jacket despite the hot weather. Around the time he was taken into custody, he asked why. Agit replied that he had been taken into the Security Directorate a month before and felt ill. He did not explain the nature of his illness. The witness saw no external signs of illness.

Statement of Abdurrahman Bozkurt dated 30 June 1992 taken by the Adana public prosecutor

101. He worked at Savas taxi stand. He had known Agit Salman for two years. Salman did not mention any illness prior to his detention. He did not see Salman being ill. He had heard that Salman had been detained before but was not told about any ill-treatment. He did not remember what the deceased was wearing.

Statement of Dr Ali Tansı dated 30 June 1992 taken by the Adana public prosecutor

102. He remembered the incident. Around midnight on 29 April 1992, police officers in plain clothes brought Agit Salman to the hospital. They said that he had been in custody and become ill. He examined Agit Salman immediately. His heartbeat, breathing and other vital functions had stopped. He was dead on arrival at the hospital. On examination, he saw that the deceased's pupils were dilated and had no reflex to the light and that cyanosis was developed on the face and ears. He concluded that the deceased had died 15-20 minutes prior to the examination. He informed the police officers and due to the suspicious circumstances had the body transferred to the morgue. He did not remember applying any pressure to the chest for resuscitation. He did not see any mark or blow on the body.

Official documents and reports

Extract of the custody record for Adana Security Directorate

103. The extract for February 1992 records that Agit Salman was taken into custody in relation to an investigation at 18.15 hours on 26 February 1992. He was released by team 39.26 at 17.30 hours on 27 February 1992.

Detention request and authorisation

104. By a letter dated 28 April 1992, the Director of the Anti- Terror Department of the Security Directorate requested permission from the Adana public prosecutor for Agit Salman and Ferhan Tarlak to be detained for 14 days, on suspicion of specified activities for the PKK, for the purpose of facilitating the necessary interrogations and investigations. The public prosecutor counter-signed the request the same day, granting the authorisation for 14 days.

Extract of custody record of Adana Security Directorate

105. The extract for April 1992 records that Agit Salman was taken into custody in relation to an investigation at 03.00 hours on 28 April 1992, at which time he was also searched.

Statement of Ahmet Gergin dated 29 April 1992 taken by Assistant Superintendent /brahim Ye∏∞l

106. The suspect gave details of his participation in the Newroz celebrations. He stated that Agit Salman was involved in the preparations, coercing Kurdish people into participating and arranging for banners and slogans.

Statement of Behyettin El dated 29 April 1992 taken by Assistant Superintendent ∕brahim Ye∏∞l

107. This statement, signed by Behyettin El, recounts his activities as a member of the PKK, inter alia, buying them provisions and medicine and giving them shelter in his village. When he moved to Adana, he continued his involvement and listed other active members, including Agit Salman and Tarlak (first name illegible). He was told that Salman had collected TL 5 million for the PKK. On one occasion, Agit Salman came with Hidir Salman and told him to deliver nine people they had trained to the rural area. He saw Agit Salman carrying big weapons.

Letter dated 29 April 1992 from the Director of the Anti-Terror Department to the Adana public prosecutor

108. This explained that Agit Salman had been on the wanted list for activities, including attending the Newroz celebrations on 23 March 1992, starting a fire in the street to protest events in Cizre, participating in an attack on the security forces in which one person died and four were injured. Also according to the declarations of Ahmet Gergin, Agit Salman was involved in propaganda and other activities for the PKK. Behyettin El had also been apprehended and in his statement it was disclosed that Salman had collected TL 5 million for the PKK and recruited members who were taken to the rural areas for training.

109. Agit Salman was detained on 28 April 1992. On 29 April 1992, at about 01.15 hours, he knocked on his cell door saying that he was ill. He was let out into the hall where he declared that his heart was troubling him. He was immediately taken to the state hospital emergency ward in the team vehicle.

110. The letter enclosed, inter alia, statements by Behyettin El and Ahmet Gergin.

Identification report

111. This report, dated 30 April 1992, is signed by ∕brahim Salman who is recorded as identifying the body in the forensic medicine morgue as that of his brother, Agit Salman. He stated that he had been told that his brother had fallen ill in custody and had been transferred to the hospital where he died.

Letter dated May 1992 from the Director of the Anti-Terror Department of the Security Directorate to the Adana public prosecutor

112. This letter, referring to various warrants from the public prosecutor, provided information as to the names of the police officers who arrested Agit Salman and took him to the hospital. It is stated that Agit Salman was not interrogated. Behyettin El and Ferhan Tarlak were also apprehended as being involved in the same incidents. The three suspects were kept in separate cells - Salman in B-1, El in C-2 and Tarlak in D-2 - to prevent communication.

113. Appended to the letter was a duty list for 28-29 April 1992. This listed as Interrogation Team No. 5 (PKK fundamentalist activities), /brahim Ye∏ol as team leader, Hasan Arinç as team driver, Murat Pehlivanlı, Erol Γeleb∞, Mustafa Kayma and Teyfik Firat, as protection officer.

e) Minutes of the court proceedings concerning the prosecution of ten police officers for the murder of Agit Salman

Court sitting of 27 June 1994

114. Six of the accused officers were present. The applicant and Temir Salman were present as complainants.

115. /brahim Ye∏ol submitted a statement. On the date of the event, he was working in the Anti-Terror department. Agit Salman had been apprehended. He had not yet been interrogated as the operations were continuing. When the orderly reported to him that Salman had been taken ill, they took him to hospital immediately. Agit Salman had said that he was having difficulty breathing. There was no question of him being ill-treated since his interrogation had not even started.

116. Erol Γeleb∞ made a statement agreeing with /brahim Ye∏ol's statements. Mustafa Kayma agreed with his colleagues and Hasan Arinç stated that the deceased was in no way ill-treated in their department. ™evki Ta∏çı requested that his statement be read out and confirmed that it was correct. Ahmet Dinçer stated that they found Agit Salman beside his taxi; he was starting the engine. When he and his men informed Agit Salman of his offences, he resisted arrest, claiming that he had not committed these offences. They caught him by the arms and made him get into the car.

117. No questions were put to the officers by the prosecutor.

118. Temir Salman, in reply to a question, stated that his son Agit did not suffer from any heart condition. He was informed two days after Agit's arrest that Agit had died.

119. Behiye Salman stated, in reply to a question, that her husband did not suffer from any health complaint. On the night that he was arrested, she told the police that he was at the taxi rank. She was told that the police went to the taxi rank and asked for Agit. He said, "I am Agit" and went with them without making any trouble.

120. The autopsy record and report were read out. Each individual accused stated that he had no comments to make and that it was possible that the external findings were caused as a result of the resistance shown by the deceased when he was being taken to the police station.

121. The court decided to issue letters rogatory to require the three custody officers /nceyılmaz, Özyılmaz and Bal and Behyettin El to give evidence, to issue a warrant summoning defendant Ali Sarı and witnesses Erhan Parlak (presumably a misspelling of Ferhan Tarlak), Murat Pehlivanlı, Hasan Γetin, Abdurrahman Bozkurt, Adnan Koroğlu and Ali Tansı. It adjourned the proceedings until 26 September 1994.

Court sitting on 26 September 1994

122. The defendants were not present. The applicant and Temir Salman attended. It was noted that the testimonies of officers /nceyılmaz, Özyılmaz, Bal and Sarı had been received. They were read out. No reply had been received from Nusaybin in respect of Behyettin El.

123. Dr Ali Tansı was sworn in to give evidence. He requested his statement to the public prosecutor to be read out. When asked to comment, he confirmed that his statement was correct. His examination established that Agit Salman had been dead for about 15-20 minutes. He did not apply any pressure by way of resuscitation. He did not recall any marks of blows on the body.

124. The court, inter alia, decided to issue summonses for Murat Pehlivanlı, Hasan Γetin and Abdurrahman Bozkurt and to adjourn until 31 October 1994.

Court sitting on 31 October 1994

125. The defendants were not present. The applicant and Temir Salman attended. It was noted that relevant warrants for Abdurrahman Bozkurt and Erkan Parlak (see para. 121 above), and Hasan Γetin had been returned as they had moved to addresses unknown. No reply had been received in respect of Behyettin El. The court decided, inter alia, to send a reminder to Nusaybin concerning El and to adjourn until 1 December 1994.

Court sitting on 1 December 1994

126. The defendants were not present. The applicant attended. The statement of Ferhan Tarlak had been received and was read out, as was the testimony of Behyettin El received from Nusaybin. The court decided, inter alia, to summon Abdurrahman Bozkurt and to adjourn until 26 December 1994.

Court judgment of 26 December 1994

127. The decision named ten police officers (Ömer /nceyılmaz, Ahmet Dinçer, Ali Sarı, ™evki Ta∏çı, Servet Özyılmaz, Ahmet Bal, Mustafa Kayma, Erol Γeleb∞, /brahim Ye∏il and Hasan Arinç) as defendants on the charge of homicide. On the basis of the evidence, the court concluded that it could not be established that the defendants had exerted force or violence on Agit Salman by way of ill-treatment or torture, that the superficial traumas could have derived from other causes when he was arrested and that it

was equitable to acquit. It was concluded that Agit Salman died as a result of his previous heart condition compounded with superficial traumas.

f) Medical and expert reports concerning the death of Agit Salman

Record of the examination of a body dated 28 April 1992

128. This report, signed by the public prosecutor, Teyfik Aydin, and the forensic doctor Fatih ™en, gives a description of the body of Agit Salman when examined in the hospital morgue. It noted that rigor mortis and discoloration had set in, that there were two dried 1 x 3cm graze wounds on the front of the right armpit, a fresh graze on top of a 1 x 1cm graze on front of the left ankle and an old traumatic ecchymosis of 5 x 10cm in the front centre of the breast. There were no injuries from a firearm or pointed instrument. An autopsy was necessary to discover the cause of death.

Toxicology report dated 14 May 1992

129. This certified that the toxicological analysis of parts of internal organs, blood and urine showed no trace of alcohol, organic poisons, soporifics or narcotics or inorganic toxic substances.

Histopathological report dated 18 May 1992

130. The report indicated that samples of lungs, coronary arteries, heart, liver, spleen, kidneys, brain, cerebellum and spinal cord tissue had been submitted.

131. It made, inter alia, the following findings:

| | |
|---|---|
| Lungs: | chronic bronchitis, hyperinflation, liver oedema; |
| Coronary arteries: | arteriosclerotic changes narrowing the lumen by 50%; |
| Heart: | chronic pericarditis, chronic myocarditis, myocardial hyperplasy and hypertrophy vascular fullness. |

132. The final diagnosis was chronic constructive pericarditis, chronic myocarditis, myocardial hyperplasy and hypertrophy.

Autopsy report dated 21 May 1992

133. This report is signed by Dr Fatih ™en, who performed the autopsy in the presence of the public prosecutor.

134. The body was described. Rigor mortis had set in, ecchymosis had set in on the back and unpressurised parts of the body. Under external marks is noted: two superficial angular shaped haemorrhaged traumatic graze wounds 1 x 1cm on the front left ankle; on the front middle chest an old violet coloured traumatic ecchymosis measuring 5 x 10cm; on the front right armpit, 2 parchmented angular shaped traumatic graze wounds 3 x 1cm.

The body was stated as being free of any blows or marks from firearms or sharp instruments.

135. The internal examination disclosed, inter alia, that the lungs weighed 300g each and were oedematic and that the heart, 550g, was larger than normal. Changes in the arteriosclerotic vascules were noted and the parietal layer of the myocard was adhered inseparably to the heart. The brain was also oedematic. The sternum corpus was fractured and the surrounding soft tissues revealed fresh haemorrhage which could have been caused by attempted resuscitation.

136. The report referred to the findings of the toxicology and histopathology examinations and concluded that the actual cause of death would not be established by them. It gave the opinion that the case should be referred to the Istanbul Forensic Medicine Institute.

Report of the Istanbul Forensic Medicine Institute dated 15 July 1992

137. This report, signed by seven members of the 1st Specialist Committee, including Dr Cahit Ozen and Dr Bilge Kirangil, noted that Agit Salman had been arrested, that he had been pushed and shoved during the arrest, that he became unwell before his interrogation or, as was claimed, he died during the interrogation. The witness statements and reports indicated that he had been in his cell until he complained that his heart was giving him problems when he was taken immediately to hospital.

138. It recalled the findings of external marks and internal examination made by the first autopsy report (paras. 134-135 above).

139. The report concluded as follows. Apart from the small fresh traumatic changes on the ankle and the old violet-coloured ecchymosis on the front thorax, no other traumatic changes were found. The fresh haemorrhage around the sternum bone could be attributed to a resuscitation attempt and there was no evidence to suggest that he died as the result of any direct traumatic reason. Those traumas found were not independently fatal in quality. The superficial traumas could be attributed to the resistance and struggle of the person on arrest or his placement in the vehicle. They could also have been inflicted directly. It was not possible to draw any distinctions on this point. However, in view of the relatively large size of the heart, the arteriosclerotic changes in the heart veins and signs of an old infectious disease on the membrane and the muscles of heart, there were indications of a longstanding heart disease. Though the deceased had lived and worked actively prior to his arrest, his death within 24 hours of his arrest could have been caused by cardiac arrest connected to neurohumeral changes brought about by the pressure of the incident in addition to his existing heart disease.

Report of Professor Pounder submitted on 26 November 1996

140. The report was drafted on the basis of the record of examination of the body, the autopsy report of 29 April 1992, the identification report, the autopsy report of

25 May 1992, the histopathological report dated 18 May 1992, the toxicology report dated 14 May 1992 and the Istanbul Forensic Institute opinion of 15 July 1992. Professor Pounder also had available to him the witness statements of Dr Ali Tansı and 12 police officers, and the verbatim records of testimony of, inter alia, Dr Fatih ™en and various police officers. Professor Pounder was Professor of the Department of Forensic Medicine at the University of Dundee, and was, inter alia, a Fellow of the Royal College of Pathologists, Overseas Fellow of the Hong Kong college of Pathologists and a Fellow of the Faculty of Pathology of the Royal College of Physicians of Ireland, and a Fellow of the Royal College of Pathologists of Australasia.

141. The autopsy findings indicated that Agit Salman suffered from pre-existing natural disease of the heart. There was no other significant pre-existing disease. All other pre-existing pathological changes described in the reports were either trivial and inconsequential or minor and incapable of accounting for or contributing to the death.

142. The findings regarding the heart indicated that there was chronic inflammation involving pericardial adhesions, which was old and inactive. This indicated that at some time in the distant past he suffered from rheumatic heart disease, which would have manifested itself at that time as an acute febrile illness but without necessarily any symptoms of heart involvement. The heart was enlarged, weighing 550g, whereas the maximum in an athletic, well-built, middle-aged male would be in the order of 450g. This represented an ongoing disease state in which the heart muscle enlarged to compensate for the malfunction of the mitral valve resultant upon the scarring of the valve which occurred in the distant past due to rheumatic heart disease. The narrowing of the arteries (sclerosis) was a common pathological change in industrialised countries and only produced significant damage to the heart muscle if above 75% (as opposed to 50% in this case).

143. A heart with a weight greater than 500g might give rise to sudden unexpected death at any time as a consequence of an abnormality of heart rhythm. This might be precipitated by physical or emotional stress or occur apparently spontaneously without any precipitating event. Where the precipitating event is emotional such events may be characterised as "cardiac arrest connected to neurohumoral changes brought about by the pressure of the incident in addition to his existing disease". While this was a possible cause of the death in this case, it needed to be evaluated critically in light of the totality of the information, which includes not only medical examination of the body but the precise circumstances surrounding the death.

144. In addition to the disease of the heart, there were four injuries:

- at the front of right armpit there were two abrasions each 3cm by 1cm described as dried and parchmented. It was not apparent that they were dissected to discover if there was any associated bruising but given the description it was reasonable to accept they were post mortem changes;
- two grazes 1cm by 1cm on the front of the left ankle, described as fresh and bloody. It appeared that these must have been caused during the period of police

detention but their location and size did not indicate any specific causation - they were not consistent with electrical torture;
- a bruise 5cm by 10cm in the centre of the front of the chest, described as old and as violet-coloured (this is considered below);
- fracture of the sternum, with fresh bleeding in the surrounding soft tissues (considered below).

145. The bruise to the chest directly overlay the fracture to the sternum. The haemorrhage into the tissues producing this bruise lay between the skin surface and the outer surface of the sternal bone. In a middle-aged male of Agit Salman's build and weight, this distance would be 3-4mm. Since in his case, the pericardial sac was obliterated by adhesions, his heart was adherent to the undersurface of the sternal bone, at a distance of less than 5mm. The haemorrhage around the fracture suggested that the fracture was produced during life and not after death. The production of such a fracture would be sufficient to induce an abnormality in the rhythm of the underlying heart and thus cause a sudden death. Consequently, the fracture of the sternum represented a possible cause of death which had to be evaluated.

146. Theoretically, a fracture could be produced by a fall, a blow or pressure. It would be unusual as a consequence of a fall, requiring impact onto a raised object or edge and it would be associated with injuries to other parts of the body (hands or arms etc). Cardiac massage could produce a fracture. It could reasonably be excluded that massage was performed at the hospital since Dr Tansı's evidence was that he was already dead and in those circumstances any competent medical practitioner was aware that it would serve no purpose. To fracture a sternum by external cardiac massage requires the application of very considerable force. A relatively unskilled or inexperienced person would be more liable inadvertently to use excessive force. It would be difficult to apply such pressure within the confines of a vehicle, though the force would be more easily applied if the seats were solid rather than padded. The fracture could also have been produced by a blow. In that case, bruising of the skin would be expected, even if the death which followed was rapid. There was bruising here but Dr Fatih ™en characterised it as old and as by implication resulting from a different event. His own view was that given the bruise directly overlay the fracture it would require compelling medical evidence to conclude that they were unrelated. Dr ™en based his opinion on the age of the bruise on the subjective, naked eye assessment of the colour. However, the bruise was described as violet-coloured which is entirely consistent with a fresh bruise. A bruise 2-3 days old would have been expected to have developed a yellowish tinge. A simple histopathological test would have clearly established whether it was a fresh bruise or an old bruise. Such a bruise would not have occurred as a result of the hand pressure applied during cardiac massage. His opinion was that, given the contiguity of the bruise and fracture and the absence of any clear evidence that the bruise occurred at a separate occasion, the bruise and fracture occurred at the same time as a result of a blow, which precipitated an abnormality of heart rhythm.

147. The autopsy findings indicated that the death was very rapid rather than prolonged. The lungs, although described as oedematous, weighed only 300g, close to the minimum

weight of 250g. In individuals dying slowly with gradual heart failure, a lung weight of 500-600g is common and up to 1000g may occur. This is the result of accumulation of fluid in the lungs consequent on the failure of the pumping action of the heart and is expressed clinically by breathlessness and difficulty in breathing. Deaths associated with instantaneous collapse are associated with low lung weight as in this case. A relatively slow death would be associated also with a congested liver. Thus the autopsy findings and histopathological examination weighed heavily against the possibility of a prolonged dying period with symptoms of breathlessness and pointed rather towards a rapid death.

148. As regarded the investigation around the autopsy examination, this was seriously deficient. Though the only two theoretical possibilities for the fracture were external heart massage or a blow, no steps were taken to establish conclusively whether or not massage had been performed. The statement in the autopsy that it could have been caused by massage did not represent a full and frank statement and may be misread to imply that Dr ™en had knowledge that such resuscitation was attempted whereas he did not. He should have distinguished fact from speculation. There was also a need to include as much descriptive detail concerning the bruise, the fracture and heart disease and in this respect the detail was manifestly inadequate.

Additional report of Professor Pounder submitted on 26 November 1996

149. This report had regard to the four colour photographs. The photographs were of poor quality, not all elements being in focus and at least one has a colour cast. However, taking into account these limitations, the photograph of the undersurfaces of the feet showed a distinctive purple-red discolouration of the sole of the left foot. In comparison with the right foot, there appeared to be mild swelling of the sole of the left foot. There was discolouration of the heels of both feet but this was not the same as the purple colouration of the left foot instep and sole. There was no dirt soiling of the feet. The right little toe had a white glistening band at its base. The discolouration of the instep and sole of the left foot was strongly suggestive of bruising with associated minor swelling. This appearance was not consistent with post mortem gravitational pooling of blood. Bruising of this extent could not be produced as a result of post mortem injury and injury of such location was unlikely to be caused by a fall sustained in life. Therefore the injury was strongly suggestive of one or more blows to the foot. The mark to the right toe was strongly suggestive of a ligature mark, though there was no congestion of the toe to suggest tight application of a ligature in life nor was the appearance suggestive of the passage of electricity. Neither possibility could be excluded and the mark was unusual.

150. The red injuries to the front of the left ankle accorded with the autopsy description. Taken with the injuries to the sole of the left foot, this suggested that the ankles were restrained by a mechanism across the front of both ankles and that, so restrained, he was struck on the sole of his left foot. The injury to the left ankle would represent counter pressure consequent on a blow or blows to the sole of the left foot. In the absence of bruising to the sole of the right foot, a lesser degree of counter pressure would be expected on the front of the right ankle.

151. The marks in the right armpit were poorly seen in the photograph. As far as could be seen, their position, alignment and colouration were not what would normally be expected of post mortem artefactual injury. They raised the possibility of an electrical contact mark produced in life. Combined with the unusual marking to the right little toe, it raised the suspicion of the use of electricity with one terminal tied round the little toe and the other terminal applied to the right armpit. Whether or not the marks were electrical burns could have been established by histopathological examination.

152. The photograph of the back shows post mortem artefactual staining, with white areas of contact pallor. There were distinct marks - inter alia, a bright red abrasion at the spine at the level of the waist line and above this two dark reddish marks. Above these two marks, was a horizontal line of pink bruising or abrasion. All these may be post mortem, resulting from the manipulation of the body over a rough or edged surface. They could also have been ante mortem injuries. To distinguish the two would have required dissection.

153. The photographs indicated that the autopsy dissection was inadequate in that the back was not dissected, nor were the sole of the left foot or the injuries to the ankle. It was not clear whether the injury to the armpit was dissected. They also indicated that the description of the body in the autopsy was incomplete.

Report of Professor Cordner dated 12 March 1998

154. This report was drawn up by Professor Cordner, instructed by the Commission's Delegates, on the basis of the medical evidence produced in the domestic investigation, the witness testimonies, the reports of Professor Pounder and the photographs supplied by the applicant. Professor Cordner was Professor of Forensic Medicine at Monash University, Victoria (Australia) and Director of the Victorian Institute of Forensic Medicine.

155. As regarded the photographs, the variation in colours or mottling on the foot was against the proposition that there was shadow and in his opinion was a real discolouration. He discounted that this was attributable to post mortem lividity since it was at odds with the colour of lividity elsewhere on the body. The one sided nature of the discolouration also was a significant factor in favour of bruising. He did not regard it as a reasonable possibility that it was an isolated area of putrefactive change. In his view, it represented bruising. He considered that the photograph was too blurred to conclude that the white glistening band on the little right toe was associated with a ligature. He considered that the area was too small to conclude that it was an abnormality. He could not reach any conclusion that the appearance of the marks in the right arm pit were the result of the application of electrical devices. On the legs, he noted in addition to the marks which could correspond to the abrasions on the left ankle, small areas of reddening on the front and inner aspect of the right ankle. He agreed with Professor Pounder's findings on the back and noted in addition other areas of redness. But, without the benefit of a dissection and/or histology of the dissection, the nature of the marks was uncertain. They could represent post mortem phenomena. Bruising of the soles of the feet was

relatively unusual. Such bruising represented at least moderately severe force. Beating on the sole of the foot could cause such bruising. A person with such an injury would not be able to walk without at least an obvious limp.

156. Concerning the bruising on the chest, recent authors in forensic medicine agreed that caution should be exercised in ageing bruises. He cited and agreed with one author who stated that it was not practicable to construct an accurate calendar of colour changes as was done in earlier textbooks as there were too many variables. If the violet colour of the chest bruise was relied on to distinguish its age from the "fresh" haemorrhage around the sternal fracture, this was an invalid conclusion. The materials and observations did not permit a distinction in age to be drawn between the two. A recent study issued to show the level of disagreement amongst authors concluded that the only point of agreement was that a bruise with identifiable yellowing was more than 18 hours old. His opinion was that the violet coloured bruise could be fresh (i.e. less than 24 hours old) but could be older. He noted that there was no reference to Agit Salman being injured in the day or so before his arrest but that it did not appear that anyone had been asked.

157. Concerning the fractured sternum, there had been no complaint of chest pain so one could infer that it occurred shortly before or around the time of death. His view was that there was a coincidence of two injuries (the bruise and the fracture) which could not be distinguished in age or there was one injury. If there was no chest bruise when Agit Salman was taken into custody the issue was relatively easily resolved. Most pathologists, himself included, would tend to regard them, prima facie, as one injury. Another way would be to state that it was a rebuttable presumption that they were one injury. As regarded the possibility of the bruising and fractured sternum being caused by resuscitation, significant chest bruising was rare in this context. He referred to a study at his institute, showing that only one out of 24 cases of fractured sternums showed any external bruising. This one case showed certain unusual features, in that the deceased was an obese woman with congestive cardiomyopathy, indicating there was more sternal fat less well supported. It also resulted from 25 minutes of cardiopulmonary resuscitation (CPR). Out of 57 cases, 24 had sternal fractures, of which all but 5 were associated with rib fractures. Sternal fractures were thus common in CPR but usually associated with fractured ribs and not associated with surrounding haemorrhage or overlying bruising. In summary, if the chest bruise and fracture with associated haemorrhage were the result of one trauma, it was not a resuscitation associated trauma. A fracture from a fall onto a flat surface would be unusual. A heavy direct fall onto a relatively smooth broad protrusion could cause such an injury but he had no recollection of having seen this as an isolated accidental injury. A blow from a fist, knee or foot could also cause such an injury.

158. As regarded the history of an alleged 20-30 minutes breathlessness prior to arrival at hospital, lungs with oedema sufficient to be regarded as a sign of heart failure and to cause breathlessness weighed more than 300g. He found it hard to reconcile the lung weights as given with the description of them macroscopically (and apparently microscopically) as oedematous. Those conditions which would involve breathlessness and low lung weights would be easily detected at the autopsy (e.g. pulmonary thromboembolism). The lung weights fitted with a substantially more rapid death. From

a table of randomly selected cases of adult deaths where the lungs together weighed less than 650g the preponderance of trauma deaths was striking. There was no indication from the brain weight of oedema, the average brain weight for the man of his age being slightly more than his. The accounts of the police officers however appeared compatible with Agit Salman dying before the arrival of the van to take him to hospital.

159. There was no dispute about the finding of underlying heart disease in this case. In his view the best explanation for the death was as follows. In life, Agit Salman sustained significant trauma to the sole of his left foot and to the front of his chest, causing bruising and prima facie fracturing the sternum associated with surrounding haemorrhage. Fear and pain associated with these events resulted in a surge of adrenalin causing an increased heart rate and a raised blood pressure. This put a severe strain on an already compromised or diseased heart which caused cardiac arrest. This arrest resulted in a rapid death rather than one protracted over 20-30 minutes. Alternatively, the compression of the chest associated with the fracturing of the sternum fatally disturbed the rhythm of the heart without leaving observable damage. The weakness in this opinion lay in the conclusion that the chest injuries represented one rather than two trauma, which depended partly on circumstantial factors and could not be completely resolved. However, even allowing for the possibility that they were separate injuries, the chest bruise could still be regarded as fresh and as having occurred while in custody, in which circumstances the formal cause of death would not differ - cardiac arrest in a man with heart disease following the occurrence of injuries to the left foot and chest. If the fractured sternum was regarded as resuscitation injury, the cause of death would only change if it was concluded that the bruise occurred prior to being taken into custody.

160. The critical task of an autopsy in this case was to evaluate the circumstances in which it was proposed that this man died, in particular, whether it was a natural death in custody or not. In this evaluation, the age of the chest bruise was critical. Even allowing for Dr ™en's view of the age based on colour, the autopsy should have been conducted in a way which allowed another pathologist at another time to come to his or her own view. Important observations must be justified objectively. In the absence of photographs, histology was the obvious way for Dr ™en to establish the truth of his view. Since forensic pathology is essentially a visual enterprise, the absence of proper photography had seriously impeded and prolonged the investigation and evaluation of this case. Having regard to the proper aims of forensic autopsy, the deficiencies appeared in the insufficient subcutaneous dissection to seek out bruises not visible externally, a failure to take histology of lesions critical to the proper evaluation of the circumstances of the death and a failure to take photographs.

161. Professor Cordner informed the Commission that he had met Professor Pounder at various scientific meetings and when he was working in Canada. He had not met either Dr Kirangil or Dr ™en.

2) Oral evidence

162. The evidence of the 16 witnesses heard by the Commission's Delegates may be summarised as follows:

(1) The applicant

163. The applicant was born in 1942 and was resident in Adana. She had been married to her husband for 30 years. Between 01.30 and 02.00 hours on 28 April 1992, the doorbell rang. She opened the door. The police asked her where her husband Agit Salman was. She said he was innocent and that he was at the Aksoy taxi rank. They entered and searched her house. They woke her father-in-law and asked about his elder brother's son. They also asked her where he was but she did not know. They said that they had heard that he had gone abroad.

164. The police went to the taxi rank and called out, "Agit Salman". He said, "That's me". He gave his car keys to someone else and they took him away. One hour later, someone brought his taxi home. She was sent news the next day and told to come and get his body. Her young son was serving tea at the taxi rank when the police came. He rang home, warning his elder brother not to come as they were looking for him. Her elder son went anyway. The police took him to the Security Directorate. They asked him if his father had been ill. He said that his father had been healthy. They told him that his father had died of heart failure. They gave him his father's clothes. The people at the taxi rank brought him home and he told her that his father was dead. This was about the evening. She said that he had never had a heart condition. A person with a heart condition could not work at a taxi rank. He had no other illness either. The next day, his brother identified him at the morgue and they handed the body over to him, at about 16.00 or 17.00 hours, after they finished the paperwork.

165. She saw her husband's body when it was taken to the cemetery. They saw the places where he had been hit from the knees down to the feet, under his arms and on the back. His body was black from the knees down. There were wounds in the middle of his back which looked like they had been made by a screwdriver. The armpits were all purple and black.

166. After his death, she applied to Diyarbakır. She and her children were poor, without property. The public prosecutor sent for her a few times. He told her it was heart disease. They said that it was not the result of torture. After the documents were sent to Europe, Diyarbakır sent for her and said, "You've made a statement." They asked her the same questions again, and about her property and belongings. She did not remember when this was. She remembered going to court. There were six policemen who gave their testimony and then she gave her testimony. She went back several times. Finally, when she went on the 26th of the month, she was told it was over. So she went to Diyarbakır to make a statement and went home. When asked by the Government Agent why she did not appeal against the acquittal, she said that on the last occasion the public prosecutor told her not to come back again.

167. When asked if she had been contacted by the police or prosecutor after the criminal proceedings, she stated that the police summoned her. They took her from her house, blindfolded her and took her inside the Security Directorate. Two of her children waited for her outside. She was beaten. They hit her head with their hands and fists and kicked her knees and head. There may have been two or three of them. One of them asked her why she had given that statement. She said that she was poor. They told her to drop the court case. She said, "No way!" They said that she should have complained to Turkey. She said that she had. They asked her about her property. She signed a paper three or four hours later, putting her fingerprint on it as she was scared. She was blindfolded so she did not know what it was. Then she went home.

168. Two weeks later, the police came on a Wednesday and took her to the public prosecutor. He asked her, "Is this your statement?", as well as the names of her children and if she had any property. She said that she had nothing, that she had to pay 3 million lira per month for the special bus that took her deaf and dumb daughters to school and that she had 10 million lira debts. He referred to documents coming from Europe. He took her statement and she fingerprinted it. She told the prosecutor that the police had ill-treated her and he said that he would warn them not to interfere with her. On the Friday, they came back again and took her to a different prosecutor. He took her statement. He asked her what had happened, if she was working and if she had a car, lorry or land. She said that she could not work as she was ill and that she had nothing. He put her fingerprint on the document. Altogether, she was taken three times during the month of fasting in this year. Only on the first occasion was she asked to give up her case.

169. Her husband had not had a recent medical examination. But when he had become a taxi driver three or four, maybe five years before, he had to see a doctor to get his licence. He had never complained of pains in the chest or difficulties breathing. During their marriage, he had never been ill. He had worked in Libya for six-seven years and in Arabia for one year, as a craftsman. He only had the occasional cold. Before he started as a driver in someone else's taxi, he had a shop. He always wore warm clothes for fear of catching a chill and getting sick.

170. Her husband had been arrested previously a month before, when they raided the house. They were asking for Hıdır Salman, the son of her husband's brother. He was detained overnight. He had said that he had been beaten and was immersed in water all night. He was released in the morning. She saw no marks on him. But there was something wrong with his neck. He went back to work on the third day. She did not know if he got a medical certificate. She said that it was impossible that there was a struggle or fight when her husband was arrested.

(2) Mehmet Salman

171. Mehmet Salman was born in 1965. On 28 April 1992, at about 01.30 to 02.00 hours, there was a raid on their house by security forces from the Anti-Terror Department. When he and his mother opened the door, the security forces crowded into the yard. They asked for his father, Agit Salman. They did not search the house, but

opened all the doors. They asked who else was in the house. He told them that his father was working in the car registered in his name at one of two taxi stands - Savas Taxis or Aksoy Taxis. Colleagues came with the car at about 02.30-2.45 hours. According to what they said, the security forces arrived at the taxi rank and asked which of them was Agit Salman. His father was sitting in the common room drinking tea and stood up, saying that he was. They said, "You're coming with us to security headquarters." He gave his car keys to the colleagues and went voluntarily, without any resistance.

172. On 29 April, two police officers came to the Savas taxi rank, asking for him. At about 12.00 hours, his brother, the teaboy there, phoned him to tell him this. His mother cried and tried to dissuade him from going but since he had done nothing he went. From the taxi rank, the two officers drove him to the security directorate. On the way upstairs, he was asked if his father had had health problems. He said that his father had no problems. While he was waiting at the directorate, there were people coming in and out looking at him, with agitation and nervousness. When he was taken upstairs, another officer asked him if his father had had health problems. He said there was nothing wrong with him. He was taken into an office where he was informed that his father had passed away and that they had done everything they could for him. This was at about 13.00 hours. He was not told that an attempt had been made to resuscitate him or given details about how his father had been taken ill.

173. It was his paternal uncle who went to identify the body at the forensic department on 30 September. He signed a document and his uncle told him afterwards that the body had gone purple in the armpits from hanging, that the body had been kicked on the feet and that the ankles were all purple with rope marks. He did not see his father's body himself. He fainted when they were washing it at the cemetery. In answer to other questions, he was not sure if his uncle's description of the body related to the identification at the morgue or from the washing of the body at the cemetery. The body was picked up between 14.00 and 14.30 hours on 30 April. They were warned that the body should not be buried on May Day as it would be undesirable to attract crowds. His uncle undertook to bury the body that day.

174. He did not recall that his father had had cause to go for any medical examination or doctor. His father had been taken into custody a month and a half before, and detained overnight at the Security Directorate. When he came back, he said that he had caught a chill. He said that he had been kept under cold water and that his fingers had been beginning to get painful. He had said that he had been hosed with water. He did not think it necessary to go to a doctor. From what his father said, he had been arrested and questioned about his paternal uncle's son, Hıdır, who had allegedly joined the organisation. When they came to the house a second time, they asked about Hıdır.

175. In Ramadan, possibly on a Wednesday, about the 27th of the month, officers came to the house and took away his mother, accompanied by his sister and his 10 year old deaf and dumb sister. They were taken to the Security Directorate. His sisters were left outside while his mother was blindfolded and taken inside. They asked her why she had started legal proceedings and told her to drop the case. They kicked her on the feet a

couple of times. On a second occasion, she was summoned by the Adana chief prosecutor and another statement was taken from her on the second floor, by a sort of committee of six or seven people. He had not come under pressure himself.

176. From his own knowledge as a taxi driver, it took 5-7 minutes to drive from the Security Directorate to the hospital. It was about 3.5-4 km. Even at midday, with headlights on and horn blowing, he could make the trip in 10-12 minutes. He and his father alternated shifts in the taxi. At the time his father was working the nightshift from 17.30-18.00 hours until 06.00-7.00 hours. Since it could get cold until June, he always had a pullover with him in the car and his father had his jacket etc. However, he agreed with the Government Agent who said that Adana was a very hot place and that their car, a Sahin 89, warmed up fairly well. He and his father had begun taxi-driving together in 1989-90. Before, from 1983, they had a shop. His father came back about then from Libya where he had been a construction worker for seven years. At the end of 1984, his father went as a construction worker to Arabia for seven months. His father came back as he was going to do his military service. His father applied for his licence about then, since he had it when the witness returned from the army in February 1987. The family had come to Adana from Mardin in 1973.

(3) Tevfik Aydın

177. The witness was born in 1945. He was the Adana public prosecutor in April 1992 until present. When Agit Salman died, he was called to the incident. It was treated as a suspicious rather than a natural death. He was present at the autopsy. Since the cause of death was not absolutely clear, it was the joint decision of himself and the doctor that an autopsy be conducted. As he died in police custody, it was his duty as public prosecutor to clarify if there had been any outside influence or interference. He did not recall anything unusual about the state of the body - no signs of heavy blows, burning, wounds etc. Whatever minor things they saw were noted down. It was the first time he had personally come across the case of someone who had died in custody. The prosecutor was responsible for instructing the police to inform the next of kin of a death in custody. When asked why it took ten hours to inform the family, he thought that there was no-one at the hospital who knew Agit Salman. No identification document had been issued. While his ID card was on his body, this did not have the address of his family. He agreed that it was not acceptable if the police knew of the address of the family but did not inform the family or give the address to the prosecutor. He agreed with the Government Agent that another possible cause of the delay was a change in the police teams on duty.

178. He was not sure exactly when suspects were taken for a medical examination on being detained. The police had a general power at law to take people into custody but after 24 hours they had to bring the person to the public prosecutor who could authorise detention up to 15 days. When the person was brought to the prosecutor, the police presented the medical report. He was not sure that there was a medical examination when the person was first detained, as well as before being taken before the prosecutor.

179. He probably transferred the case to his colleague Mehmet Ali Tuncay or Ethem Ekim who dealt with terrorist offences. At that time, one prosecutor dealt with terrorism offences. After Ekim was killed by an organisation known as the THKPC, they changed the system as the people associated the prosecutor in charge of the Anti-Terror Department as someone appointed specifically to harm them and he became a target. He noted down on the record of examination of the body that Agit Salman had died in the hospital because that was what he had been told, probably by the morgue attendant. He did not speak to the doctor. When asked about the black marks on the sole of the left foot in the photographs, he said it was impossible to see what they were. As regards the blood-filled hole in the back, if he had seen it during the autopsy, it would have been noted in the report.

(4) *Ibrahim Salman*

180. The witness was born in 1957. In 1992, he worked as a driver for a newspaper. When he came back from work, his sister-in-law and her son told him that his brother Agit Salman had been taken away. When he came back from work on 29 April, in the evening, there was a terrible commotion. He was told that his brother had died and that the police had told his nephew that it was heart failure. He was bewildered since Agit had never had any health problems. He was robust.

181. He went to collect the body the next day. He identified it at the forensic department at about 14.30-15.00 hours on 30 April. He only saw the face at that time. The police said that they would bury the body under police escort. They were reluctant to release the body since the family might not bury the body until May Day and hold a demonstration. He undertook to bury his brother that day, signing a paper. He told the police that his brother was popular in the district, that there was a big crowd outside the house and that if the police came, there might be an incident as the death was suspicious. The police escorted them halfway. They took the body directly to the cemetery. Journalists came. They took the photographs. Some photographs were published in the newspaper.

182. When the body was being washed, there were bruises, visible marks in the armpits, on the feet, on the back. There were marks of blows on the foot, as if he had been kicked on the feet, like he had seen done in the army. The foot was swollen. The holes on the back looked like they had been made by a screwdriver. There were also purple bruises on the back. The purple bruising in the armpits had even gone green. He could think of no other explanation for the death except that he had died under torture.

183. His brother had been detained one and a half months before. They had held him under cold water for quite a while. When he came out he had a chill and sore throat and stayed at home for two days. When asked why his brother had been detained, he supposed that the first time it was to ask him about the witness's stepbrother's son. He had been given no explanation for the second occasion. It took five or six minutes to go from the Security Directorate to the hospital. At night, it could be done in five minutes, seven at the most.

(5) Dr Ali Tansı

184. The witness was born in 1958. In April 1992, he was emergency unit physician at Adana State Hospital. He remembered the death of Agit Salman as he had been asked to provide information by the court. Agit Salman had been admitted to the emergency unit with no vital signs. The pupils were fixed and dilated and he was cyanosed, so he could say that he had died 15-20 minutes earlier. He could not be more exact. He did not recall anything abnormal about the body. The body would have been lying on its back on the examination table. At most they would have opened the shirt. He did not perform a resuscitation operation because he was dead. He did not ask if anyone else had done so on the way to the hospital. While the unit was crowded, there would have been no time loss between the arrival of the body and his examination. Urgent cases are always seen first and persons with no vital signs as a matter of priority.

185. When shown the autopsy and other reports, he noted that there was 50% narrowing of the arteries to the heart which was a significant ratio and was a major cause of the heart attack. The findings of chronic pericarditis, chronic myocarditis, myocardial hyperplasia and hypertrophy, indicated that the heart muscles and the membrane enclosing them were inflamed. There was indication that the lungs, coronary arteries, the heart, the liver and kidneys were afflicted with advanced disease originating from the past. Persons with these conditions would have certain complaints, even if they did not consider themselves ill. Narrowing of the arteries by itself could cause a heart attack. It could also be caused by emotion, distress or joy. His opinion was that it would have done more harm than good for the police to have attempted resuscitation. Bruising or grazes could be inflicted on a dead body during transport shortly after death, possibly within minutes or half an hour. In his view, great force was not required to break the sternum corpus.

186. When shown the photographs, he thought it difficult to tell anything. The darkness on the foot could be a shadow or dirt or an ecchymosis. There seemed to be an ecchymosis on the left ankle but he could not be sure.

(6) Dr Fatih ™en

187. The witness said that he had been born in 1953. In April 1992, he had been the director of the Adana Forensic Medicine Section, as he still was. He recalled that several years ago he had been questioned about this case by two doctors from Switzerland. They were members of the CPT (see para. 257).

188. He confirmed that in the record of examination of the body the injury on the chest was described as a blunt traumatic ecchymosis. The ecchymoses were caused by blunt trauma but whether caused by a fall or another person he could not say. An autopsy was ordered since it was not possible to tell from an external examination what was the cause of death.

189. When shown the photographs, he stated that the spots on the back were purplish death spots. As regarded the marks on the feet, they were not caused by trauma since trauma did not cause such dark black marks. When directed to a particular area in the back, he noted that there was a wound in the form of a graze wound. Since, however, it was not in the record of examination of the body, it must have occurred afterwards. There could be many reasons, for example, during the transportation of the body or its transfer onto a stretcher. From the photograph alone, it would not be possible to deduce whether it was caused before or after death. In answer to the Government Agent's questions, he agreed that if after death a screwdriver had pierced the body it would have left a slot, without bleeding. The discolourations and purple marks on the back, right knee, lower right arm were death marks, caused by accumulation of the blood due to the way in which the body lay. People without training frequently assumed such marks to have resulted from trauma.

190. As regarded the injury to the chest and sternum, this was frequently seen in autopsies. They presumed them to be attempts at resuscitation. This was the most likely cause of a broken sternum. A strong trauma might also cause such an injury. The ecchymosis on the chest dated from before the death, at a rough estimate 2 or 3 days. Medically, it could not be dated but it definitely was not fresh, and did not occur just before death. The bruise was in the position on the thorax where a resuscitation attempt would be carried out. Bruising did not occur after death, since it required a functioning heart and circulating blood. Similarly, the fresh bleeding in the chest indicated that it occurred shortly before death since it had not yet been absorbed. The bruise occurred before this.

191. If a dead body is being carried, a graze can occur but there would be no bruise under the graze. Since corpses are subject to rapid desiccation, the grazed spot would change colour due to drying. The surface hardens, with the feeling to the touch of parchment paper. Then the wound is described as having "eschar" and this is an entirely post mortem phenomenon. The graze under the armpit with eschar occurred after death. After a trauma, there is a reddening stage, with bleeding under the skin within three or five hours. Much depends on the intensity of the blow and the location of the injury. An electric shock would not leave traces, unless there was a burn due to resistance on the skin.

192. As regarded the findings of various heart conditions, he explained that constrictive pericarditis (where the pericardium which should enclose the heart loosely was closely stuck to the heart) was the result of recovery from past inflammation in that region. Myocarditis refers to an inflammatory condition of the heart muscle (myocardium). Hyperplasia and hypertrophy referred to the enlargement of the left ventricle (lower left chamber of the heart). This was due to the fact that the heart, as a result of the pressure from the membrane surrounding it, grew larger and stronger to overcome that restraint. In his opinion, the condition might have resulted from an acute articular rheumatism at the age of 11-13. It might also have resulted from a previous myocardial infarction (at another point the witness stated that there were no medical findings to support the hypothesis that he had suffered a previous infarctus). The person with this condition

would have felt indications when he walked, climbed stairs, got angry. He also would had a chronic coughing condition from the chronic bronchitis. He did not agree that a person with all these conditions would necessarily have died if subjected to cold water treatment.

193. When referred to the Istanbul Forensic Institute's report, he explained the finding of "stoppage of the heart connected to neurohumeral changes brought about by pressure", as changes brought about by neural stimuli, for example, an immediate, high rise in adrenalin, as when a person quarrels. That can cause a heart attack where some-one has an existing cardiac problem. He agreed that ill-treatment could have triggered the heart failure.

(7) Ahmet Dinçer

194. The witness was born in 1951. In April 1992, he was an investigating officer in the Anti-Terror Department of Adana Security Directorate. He was on duty with the arresting team in operations planned against the PKK. His only role in the investigation was to arrest Agit Salman, who was wanted. They found him since they had the licence number of his taxi. They did not go to his home. When they went to the taxi rank at about 01.00 hours on 28 April, they found him in a hut close to the car, where he was sitting with his friends. First, they asked for the owner of the vehicle. Agit Salman said that it was his. They asked for his identification. They told him that they were police officers and that he had to come to the Anti-Terror Department. He said "Why are you taking me?" They introduced themselves again, taking out their IDs. He said, "No. You cannot take me. I did not do anything wrong." They took him by the arms and led him to the car normally, not in a rough way. No more force was necessary. He did not hit himself anywhere and did not receive any marks from the arrest. However, his resistance was a little more than passive. At first, he leaned against the car with his hands. When the witness turned round in the car and looked at Agit Salman, he saw him breathe deeply once or twice. He asked Salman if anything was wrong. He answered, "No. I don't have anything wrong. I'm nervous. That must be it." When asked, he said that he did not wish to go to the hospital. They took him to the Department and handed him over to the custody officer. He sighed deeply once or twice in the presence of the custody officer and said that it was caused by his nervousness. He remembered that they had reported about the apprehension of Salman to the Department supervisor.

195. When asked if he had told Agit Salman why he was being taken, he said that they told him that there was an investigation about him and that they had instructions to take him to the department. Since the year before <1995>, suspects were taken for a medical examination at the time they were taken in as well as at the end of the investigation.

196. Interrogations were never conducted until the arrest operation was completed. Suspects were kept separately. When a suspect was wanted for interrogation, the officer would inform the custody officer who would bring the person and hand him over. When asked if there was a register or entry indicating at what time detainees were interrogated, he stated that officers had their own notes. It was a busy time, with detainees

apprehended before the operation and arrests continuing during the operation. ∧brahim Ye∏∞l was in charge of the team dealing with PKK suspects.

(8) ™evki Ta∏çı

197. The witness said that he had been born in 1963. In April 1992, he was an officer in Adana Security Directorate. On 28 April 1992, his team was given Agit Salman's name and told to arrest him. They were given the taxi rank address, and told that if he was not there, he might be at a second place, "Ye∏ilova". After they checked Salman's identity, they introduced themselves as police officers and told him that he had to go to the Department. He reacted, saying things like "You cannot take me. I am innocent." They repeated that they were police officers and that they had to go. He resisted in that he had to be forced to go. They took his arms and put him in the car. But there were definitely no injuries and no forcing of any kind. He got in the car normally. In the car, he started breathing deeply and rapidly. The team supervisor asked if he was ill. Salman said that he was nervous. After several kilometres, the supervisor asked again why he was breathing like that. He offered to take him to a doctor. Salman said that he was nervous. He did not say he had a condition. The witness thought it was normal for people who felt guilty to act like that. He rarely came across calm people in that situation.

198. He had not been told Salman's home address. They had been given their instructions by their department supervisor and did not know if the supervisor's information had come from police officers who had visited Salman's house. He had been driving the car. When asked if Salman had been handcuffed, he could not exclude that his colleague in the back seat had done so while he was driving. He agreed that the custody officer who took the suspect's details on arrival would have information about his address. When he was referred to his statement where it was recorded that he had said that Agit Salman was not taken to an identity parade or interrogated, he thought that such a thing should not have appeared in his statement. He had not been involved after handing the suspect to the custody officer and did not remember mentioning such things in his statement. His supervisor had told the custody officer that he had been breathing deeply. He could not explain why there was no mention of heavy breathing in the statement that the custody officer made.

(9) Ömer ∧nceyılmaz

199. The witness was born in 1963. In April 1992, he was a police officer in Adana. On 28 April, he was the custody officer. After the arrest team brought in Agit Salman, he conducted the body search. Everything on him would have been taken and put in a search record. The practice was to take a suspect's identification, and record his name, last name, father's name, mother's name, date and place of birth in the book. After that, he saw to his needs for toilet, water or food. Salman was excited, nervous, so they took him to the sink to wash his face and hands and gave him water. His breathing was not normal. He was breathing rapidly. He did not remember being told by the arrest team that Salman had a health problem or that he had resisted arrest but doubted he could remember after such a long time. He did not consider sending Salman to a doctor as, after a while, his

excitement passed. He had no further contact with him while on duty. They checked the detainees every 15-20 minutes however, looking through the windows in the doors.

200. There was no interrogation. It was not possible for Salman to be taken for interrogation without his knowledge. It was not his duty to take steps to inform the suspect's family of his arrest. It was for the superior officer to inform the family if a suspect was taken ill. He did not remember how many cells there were at Adana, more than ten, maybe 12 or 13. There was no record of which cell people were placed in, though they had charts with room numbers on which they made notes as suspects were brought in. The witness drew a sketch of the cells, which indicated that there were small corridors of three or so cells branching off a main corridor. The custody officer had his desk at the entrance to the main corridor. The cell doors were not locked but secured from a bolt on the outside.

(10) Servet Özyılmaz

201. The witness was born in 1961. In April 1992, he was a police officer at Adana Security Directorate Anti-Terror Department. On 29 April, he was on duty as custody officer from 08.00 hours until 18.00 hours. He would have seen Agit Salman when he took over his duties. He had seen Agit Salman when he was detained a month or two before and chatted to him, asking why he was back. Agit Salman did not complain of any health problems. He did not remember being told by the officer whom he relieved about any problems but it was a long time ago. He remembered taking Salman out to the toilet. Otherwise he remained in his cell. There was no interrogation. No-one could have taken him without his knowledge. There were no particular times for interrogations, which could take place during the night. It was not unusual for a person to be detained for 24 hours without being interrogated. People were not questioned in or near their cells but taken to the appropriate interrogation room.

202. Agit Salman was not tortured during his first period of detention either. There was no way that he could have been kept in cold water as alleged. When a person had to be taken to hospital, there was no particular rule about who should do it; in an emergency, whoever was available would do it. /brahim Ye∏ol was part of the interrogation team at that time.

(11) Ahmet Bal

203. The witness was born in 1960. In April 1992, he was custody officer at Adana Security Directorate. On 29 April, he was on duty from 18.00 hours until 08.00 hours the next day. The incident took place at about midnight. Agit Salman banged on his door for attention. He went immediately. Agit Salman said that he was unwell. The witness had seen him before for regular checks but he had made no previous complaints. From time to time, he had said that he was sweating and he wanted frequently to go out for toilet and water needs, to refresh himself. It was very hot and humid in Adana. It was particularly hot that night, uncomfortably hot. The previous custody officer had not told him of any

problems. People had frequently fallen ill during his time there, as the heat inside the custody area used to be suffocating. They were taken to the hospital if they wished.

204. He could see that Agit Salman was ill. He was not upright, short of breath. He was sweating excessively and did not look healthy. When the door was opened, he asked for help saying that he was feeling choked, having difficulties breathing. He helped Agit Salman to a spot under a window nearby, holding him under the arms or by the arm. He left him sitting, leaning against the wall so that he would not fall and shouted through the outer door for help. His colleagues were in another room outside the corridor. They arrived and took him away. This took altogether about 3 or 4 minutes. When asked if Agit Salman was still alive when he was taken away, he said that he could not say but that he had talked to him as he was taken from his cell. He had to be carried out entirely, unable to walk on his own. But he was taken vertically, supported, to the exit of the custody area. He did not remember any talking at that point.

205. He made no attempt to resuscitate him. Nobody was taken for interrogation that night. He would have known if they were. He did not think that Behyettin El was taken either.

206. It would take not less than 15 minutes, maybe 15-17 minutes even at night, to drive to the State Hospital, which was across the river where the bridge was narrow, and where there were a lot of junctions. He did not remember who told him that Agit Salman had died or whether his colleagues returned. When shown the report signed at 02.00 hours, he recognised his signature but did not remember the report. They must have drawn it up jointly.

207. The interrogation officers had their rooms very close to the custody area, which was on the ground floor. Nothing happened however to Agit Salman which could have caused him injury. He had a plan of the cells which showed him where everyone was. When the stage of interrogation began, the chief gave out assignments as to who would interrogate whom and instructed the custody officers, who would then hand over the suspects to the appropriate officers. The previous custody officer informed the person on duty of who these were. Such instructions were usually verbal. The interrogation room was about 25-30 metres away on the same floor.

(12) Erol Çelebi

208. The witness was born in 1962. In 1992, he was a police officer at Adana Security Directorate. He was on duty at the Directorate when Agit Salman was taken ill. He had gone on duty at about 19.00-20.00 hours the previous day. His team had been out on external duties but had returned as the Department director had told them that there was to be an operation and they should be present after midnight. They accordingly arrived back at about midnight-01.00 hours. They sat and rested in a room. It was the last room on the right, commonly used by officers resting. He was not an interrogation officer. He carried out team duties, patrolling the city and took part in operations when their director assigned them. He stated that his team definitely did not do interrogations. Interrogation

experts were more senior, superior officials. As newcomers and policemen, they were definitely not asked to take part in interrogations. During his time, his team leader did not take part in any interrogations either. While the team was called officially an "interrogation team" on paper, in assignment records, it never took part in interrogations. They were conducted by officers from the Directorate, appointed by the Department director. They were not told who they were. He did not know if they were on a list. When referred to his statement, he did not recall saying that they had not had time to interrogate Agit Salman. Nor would he have known whether or not Agit Salman had been interrogated or not. He did not know whether it was normal to keep detainees from one operation waiting for a long time before they were interrogated.

209. An official shouted for help, that someone had been taken ill. They immediately went into the corridor. They went to the custody officer who told them that someone was ill. When he saw Agit Salman, he was sitting leaning against the door in the corridor, with his legs stretched out. He had no colour in his face. He said nothing. They realised that he was ill and the driver rushed to bring the vehicle to the entrance door. He could just about sense that Agit Salman was breathing. He and Mustafa Kayma carried him by the armpits and legs, in a sitting position to the car. It would have taken about 4-5 minutes. Agit Salman said nothing during this process.

210. The minibus could not go fast while crossing the bridge over the river. It might have taken fifteen minutes but he could not say exactly. Ye∏∞l, the team leader, was sitting in the front next to the driver. The witness was in the row immediately behind. Agit Salman was in the seat behind his, with Mustafa Kayma next to him. He could not say if Salman was still breathing in the car. After a hundred metres, Mustafa Kayma, who had medical knowledge, said to Hasan Arinç, the driver, "Stop. His heart's stopped. I'll apply cardiac massage." The driver stopped. He saw Mustafa applying massage several times on Salman lying on the seat of the car. After one or two minutes, Mustafa told the driver to go on. It took them 12-15 minutes to reach the hospital after that. When asked why his statement did not mention the resuscitation attempt, he said perhaps they were not asked. He did not think that Salman was injured when they put him in the car. When asked by the Government Agent, he agreed that part of Salman's body might have touched the doors when being placed inside.

211. At the hospital, they handed Agit Salman over to the emergency unit people outside, who placed him on a stretcher. They were told to wait outside. After about 15-20 minutes, someone in a white overall came and told them that Agit Salman was dead. They reported to their department director, Hasan Özden, who contacted the public prosecutor. Ye∏∞l typed up the report which they all signed.

(13) Mustafa Kayma

212. The witness was born in 1959. In April 1992, he was a police officer at Adana Security Directorate. His team had the function of seizing or bringing before the court suspects and taking them out for fingerprints or medical reports. They returned to the headquarters at about midnight, as it was said that there was to be an operation. They

were waiting in an office for common use. The custody officer called for help. He knew of Agit Salman as someone wanted in their files. He and Erol Γelebi rushed to see him. He was leaning against the wall, very pale. He did not talk, did not appear able to talk. He informed their team leader, /brahim YeΠ∞l, who told them Agit Salman would have to go to hospital. When asked if he was still alive at this point, the witness stated that he was not sure, that Agit Salman was motionless. He and Erol Γeleb∞ carried him to the car when the driver said it was ready. This was no more than five minutes later.

213. Agit Salman was lying with his head in his lap. He suddenly noticed that he did not seem to be breathing. He asked the driver to stop. He performed mouth-to-mouth resuscitation once or twice, while applying a heart massage. He lay Salman down on the seat and placed his left hand on his chest, pushing down several times with his right. He had been a medical orderly during his military service for 20 months. Also police schools offer first aid training. He had used the mouth-to-mouth technique once before. After that, it took about 15 minutes to get to the hospital. When they arrived, Salman was taken into the emergency unit on a stretcher. They were not allowed in. They told the hospital staff that he had perhaps had a heart attack. He said nothing about the resuscitation attempt, perhaps because of the excitement.

214. There were five persons in their team, /brahim YeΠ∞l, Hasan Arinç, Erol Γeleb∞, himself and Murat, the typist. The team was separate from ordinary security duty. They had their own political work, seizing people at addresses. They helped their colleagues who carried out the interrogations by completing formalities (eg. fingerprinting, taking suspects to prison). In April 1992, they had not done any interrogations themselves as a team. They were continuously out on operations. During 1992, the superintendent and the typist might have taken statements but that was not interrogation. He did not know that anyone in his team was familiar with interrogation. He himself later took part in interrogations and statement taking. He stated that Behyettin El was seized along with Agit Salman, as part of that operation. He agreed, when /brahim YeΠ∞l's statement was read to him, that this implied that their team was to be responsible for the interrogation of Agit Salman but stated that he did not know anything save that the department director would assign the person to be responsible for the interrogation. To his knowledge however, Agit Salman was not interrogated.

(14) /brahim YeΠ∞l

215. The witness was born in 1955. In April 1992, he was the interrogating officer for matters related to the PKK organisation and other associated organisations at Adana Security Directorate. He roughly remembered Agit Salman but not events connected with him. He had been on duty on 28 April 1992. They had been out on operation the night before, had rested during the day and were preparing to go out on another operation that night. They carried out no interrogations that night. He knew Salman had been wanted as a deserter and as someone who aided the PKK and that he had been arrested the day before. He had not met him yet.

216. On the night of the incident, he was preparing the operation in his room, accompanied by three or four of his officers. At some point, the custody officer asked for help, saying that someone was ill. He had taken the person to his own room as he was complaining that he was having difficulty breathing and the room was a little larger, airier. When the witness went there, Salman was sitting down, leaning against the wall, between two corners. He asked what was wrong. "My heart hurts a lot. I mean I don't feel well."[3] he answered. He spoke very slowly, in a kind of whisper. His eyes were not quite open. The witness unbuttoned his shirt to free his chest and rubbed eau de cologne on him. He gave instructions to the driver to bring the car immediately. It was a minibus for 12 persons.

217. They placed him in the car, laying him on a seat for two persons. Salman was in no condition to sit up. After 100-200 metres, his colleague in the back seat, Mustafa Kayma, asked the driver to stop. Kayma gave Salman mouth-to-mouth resuscitation and massaged him, pressing his chest in the centre with both hands, not punching or thumbing. Kayma said that Salman was not doing well, that it could be his heart and that he could not hear him breathing. The witness told him to leave it, that they should find a doctor at once and that they might do something wrong. They continued. At the hospital, Salman was taken inside immediately. After about 15-20 minutes, a doctor came out and told them that Salman had been dead on arrival and that nothing could be done. They returned to the Security Directorate and he informed his station manager, who contacted the public prosecutor. He went back to his office and prepared the record of the incident. This was to account to the public prosecutor for a person who had been in custody. He typed it himself as the clerk was not on duty. It had not been important for the purpose of the record to mention the attempted resuscitation or perhaps it did not occur to them.

218. The seats in the minibus were made of sponge 3-4cm thick on top of metal rods and elastic bands. The sponge flattened with use to 1-2cm. The seats were not comfortable but hard, the sponge pressing onto the metal rods They took about 15-20 minutes to get to the state hospital. It would have taken longer during the day with traffic.

219. His code number was 36.26 while the code of his team was 39.27. He agreed that he had issued the instructions to release Agit Salman after his arrest in February 1992 but was unable to recall if he had interrogated him prior to this. Either he would have or a colleague working for him. He then stated that he personally carried out the interrogations and that none of the people working for him had the authority or knew how to do so. Only officials doing the same job in other departments were usually present with him. He asked questions alone or together with these others. On further questioning, he stated that in February Agit Salman's file was assigned to him and he carried out the investigation. On the night of the incident in April, no interrogations had been begun by anyone. His room was on the ground floor (where a briefing room was marked currently on the plan).

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[3] At another point, he described Salman as saying that his heart felt squeezed, that he could not breathe, that he felt terrible.

220. As regarded the role of his team members, they were only present in the interrogation if needed to assist him. They carried out duties such as bringing or taking away the person, taking notes etc. The head of the Department at that time, Hasan Özden, assigned the person who was to be in charge of a particular file for interrogation purposes. No-one else would have the authority to interrogate. The person assigned may give instructions to the custody officer concerning the suspect. There was no written record of when and where suspects were taken out for interrogation. The custody officer had rough notes which were thrown away afterwards.

221. Agit Salman was not an important person to them. He was not a renowned terrorist but helped and harboured the PKK. He was an ordinary man, whose statement they would take and send to court. He was not a person who could deliver PKK members or guns to the authorities. The interrogation could only start after the operation was finalised ie. the instruction given to complete the file. He remembered Behyettin El as a terrorist, whose sister was a known terrorist. After writing the incident report, he must have rested for the day. He could not remember if he was on duty that night again. He probably interrogated El 13-14 days later, at the end of his detention period. Because of the incident, he thought that they did not carry out the operation intended and it was cancelled as the organisation would by that time have been alerted. They may have carried it out much later.

(15) Dr Derek Pounder

222. The witness was born in 1949 in the United Kingdom. He detailed his academic and professional qualifications as a specialist in pathology and forensic pathology. He had qualified partly in Ireland and partly in Australia, where he had spent eight years. He had dealt with dozens of cases of deaths in custody in varying jurisdictions (Australia, Canada and the United Kingdom, and countries within the European Union). He had not been involved in the clinical examination of victims of alleged torture but had seen physical abuse at later stages. He confirmed his written reports.

223. In respect of his conclusion that the evidence weighed heavily against a prolonged dying period, he stated that the autopsy findings suggested a death which was rapid, within a few minutes, and were incompatible with a longer time period with pronounced symptoms of breathlessness. Half an hour would be a long period in that context.

224. While he did not exclude that the fractured sternum could have resulted from an attempted resuscitation, he found that Dr ™en's statement was misleading in only offering one of several possibilities.

225. His opinion was that the bruise on the sternum was linked with the fracture, resulting from the same physical event. It covered the area of the fracture. He noted that Dr ™en's view that the two were unrelated was based on his finding that the bruise was old. However, his description of a violet-coloured bruise was consistent with a recent bruise. He agreed with Dr ™en that at two-three days a bruise started to yellow. A violet coloured bruise was reasonably fresh and one could not say how old it was precisely.

The colouration of a bruise depended on where it was in the skin. A bruise in the superficial layer (eg. a love bite) is bright red whereas a bruise deeper in the fatty tissue never appeared red as it was in the deeper layers and would appear violet at the beginning. A bruise which was violet could appear in a couple of hours. He considered that it would need something compelling to say that the bruise and fracture were separate. A histopathological examination could have dated the bruise more precisely. If the breaking of the sternum and the bruise were related - which was his view - the sternum could not have been broken by heart massage as that would not have caused a bruise of 5cm by 10cm. The pressure in the blood vessels would not be sufficient to produce one of that size.

226. In his view, Agit Salman had a heart disease which was fully compensated for by his body. But he was not having heart problems as he had no prior symptoms. His disease could not be discounted in looking at the cause of death however since the large size of the heart had to be regarded as a contributory factor. A blow to the sternum could cause the death of some-one young and healthy but was not an inevitably lethal event. To some extent, it depended on chance whether such a blow would cause death and having a heart disease would increase the risk.

227. The witness had stated in his report that the haemorrhaging round the fracture suggested that it occurred while Agit Salman was alive, since though some bleedings and bruising might occur in a resuscitation procedure, this was minimal. The autopsy report suggested that the haemorrhaging was more than minimal but the extent is not specified. The more extensive the haemorrhaging the more probable that it was produced during life. Some circulation and therefore some haemorrhaging may occur during the resuscitation if it is partly successful in making the heart beat. While it was true that the sternum was not as strong as some bones, it was misleading to state that it was made of cartilage. The fracture was in the substance of the bone and the cartilage on either side had nothing to do with the fracturing process. To produce such a fracture required more force than was normally required in resuscitation - in other words a considerable degree of force. Such sternum fractures occurred in a small percentage of patients, particularly the elderly who had brittle bones. It would be quite unusual in a male in his forties.

228. His opinion that the marks in the armpit were post mortem was based on the autopsy report's description of them as being parchmented. His later opinion was given in light of the photographs, in particular, showing the location and alignment of the marks and in the context of the mark on the right little toe. Though the photos were of poor quality, his previous presumption was displaced and the marks raised concerns (eg. of the possibility of electrical contact marks) which were neither proven or provable at this stage.

229. The bruises to the foot and ankle and the injury to the armpit (if it was not post mortem) would have required those parts of the body to be unclothed. The bruise to the sternum could have occurred while he was clothed. The swelling of the feet (though the photograph was poor and it was always difficult to assess swelling from a photograph)

would have occurred during life. It would not have occurred naturally (eg. from tightfitting shoes), the sole of the foot having to be damaged quite badly in order to swell.

230. The low lung weight was not consistent with a period of 20-30 minutes' breathlessness. However breathlessness was a subjective phenomenon and one had to be careful in assessment. If a person was truly breathless over a prolonged period of time then the lungs would be much heavier. Agit Salman had no signs of lung disease.

231. As a general rule, deaths in custody were treated as homicide attracting investigative techniques, with full documentation and photography. A glaring deficiency in this case was a lack of official photographs. He also noted that the Istanbul Forensic Institute made no requests for information clarifying whether there had been a resuscitation. A histological examination at that stage would have been useful. He had been in contact with Turkish forensic specialists, being associated with the Bulletin of Legal Medicine in Turkey. He had been informed that some public prosecutors complain when pathologists document unpalatable facts and this is seen by the pathologists as some pressure not to report facts accurately.

232. It was his opinion that Agit Salman died of unnatural causes, on a standard of proof beyond reasonable medical doubt.

(16) Dr Bilge Kirangil

233. The witness stated that she was born in 1949. Since 1983, she had been a specialist in forensic medicine. She became a member of the Istanbul Institute of Forensic Medicine in 1987 and, from 1996, she had been chairperson of the First Specialist Committee of the Istanbul Institute of Forensic Medicine. There were five specialist committees, the first dealing in general with causes of death and their subsidiary issues. She was also currently chairperson of the Training Commission set up in the Institute in 1996. She had devoted her entire professional career to the Institute.

234. The First Specialist Committee dealt with around 1500 to 1800 cases per year, about 5 to 6 each working day. If, on arrival of the file from the courts, there were not enough documents or data in the file, they had extensive powers to request further materials or information, including the exhumation of bodies. The rapporteur appointed to the file would then draw up preliminary conclusions which would be examined extensively by the Committee and a joint decision reached on the basis of their joint expertise. The file was open to all members and examined when considered necessary. It could be sufficient to reach a decision on the basis of the report alone. They came across allegations of torture in custody from time to time. They evaluated findings however, not allegations, it being the role of the courts to evaluate allegations and intent. They drew up scientific reports as to the cause of death and did not do so on the basis of hypotheses. The members of the committee included a specialist in forensic medicine and experts in cardiology, pathology, internal medicine, general surgery, neural surgery, gynaecology and obstetrics.

235. As regards Dr Pounder's report, while she agreed with some of his views, she was surprised at some of his interpretations, particularly as regarded bruising. She disagreed strongly with his assertion that bruises started to yellow at 2-3 days. According to herself and other authors, a bruise which had started to go yellow had been forming for 7 days, and according to others, for 10-12 or even 21 days. She had never seen a bruise turning yellow in 2 days. The dating of bruises from colour was one of the problems of forensic science. A distinction had to be drawn between a bruise forming and becoming visible. The latter depended on its location, how it had been formed, the instrument used, the severity, the sex of the person, the individual characteristics of the person. The one constant feature was that when the ecchymosis occurs it will be red (crimson, cyclamen), or sometimes blue. It changes gradually, presenting purple, purple/violet, green, yellow and pale yellow. That can take from 12 to 21 days according to her own teacher, 7 to 10 days according to another author. Her own view was three weeks on average, but it depended on all the factors referred to previously. An ecchymosis was the condition where the blood seeped into the interstitial tissue as the result of the tearing of little capillary blood vessels when the body suffers a trauma. The changing of colour was a purely physiological phenomenon, caused by the haemoglobin separating from the cells as the red corpuscles broke down. This formed a green colour. As the green mixed with the red, the result is first purple/violet and as the products from the breaking down increase, the green colour increases - this fades and yellow appears as the products are carried away through the healthy arteries. The yellow forms after 7 days.

236. The witness agreed that colouration was affected by the depth of the bruise in the skin. This related to when the bruise became visible. If the ecchymosis formed in deep tissues (eg. the hip), it would take time to migrate to the upper layers of the skin and become visible. But the bruise would no longer be the same colour as when it originally formed - if a bruise became visible three days after formation it would have changed to purple/violet in colour. She agreed that a histopathological examination of bruises was sometimes helpful, allowing the dating of a bruise as having occurred 2-3 days previously from the presence of iron for example. But such an examination did not permit distinguishing between bruises 1, 2, 2½ days old, 6 hours before, at or immediately prior to or following death. So it was not always used. The colour of the bruise was interpreted instead and she did not think this was a very great shortcoming. A forensic medical expert could tell the difference between old and fresh ecchymoses. It might have been good if the forensic doctor in this case has produced other findings in addition to his visual assessment but the fact that he did not should not be regarded as indicating a possible misinterpretation. She would not herself have carried out such a test if she had been confident about ageing the bruise from its colour. Her colleague in this case must also have thought it unnecessary.

237. The witness differed from Dr Pounder as regarded his views on the significance of the low lung weight contrasted with the reported period of breathlessness. She did not consider that 20-30 minutes was a prolonged period for what were termed sudden deaths. Instantaneous deaths, occurring on the spot, can occur but generally forensic medical experts defined such deaths as occurring within the period of up to an hour. Rapid death was used to refer to where the person died within several hours to several days after

complaining of being unwell. She considered that the testimonies in this case indicated that it took 20 minutes from Agit Salman complaining of breathing difficulties to his arrival in hospital. She had come across lung weights of 300 g occurring in that time. It was said that there were certain problems of asphyxia and circulatory problems in the other organs. She also noted the considerable increase in the cerebrum and cerebellum related to oedema.

238. Cases where heart massage was given prior to death were usually hospital deaths. Fractures of the sternum or ribs were fairly common occurrences, with which anaesthesiologists and resuscitation experts are very familiar. She referred to a 1983 study from the Hamburg Army hospital in which 45.9% of 140 autopsies disclosed such fractures. Only one of those was severe enough to cause death. Bruises could be caused during massage but it depended on the severity of the force used and the time intervening before death. She disagreed with Dr Pounder that the fresh bleeding indicated that the injury occurred shortly before the death. According to one author, ecchymosis could form in a period up to several hours after death. She considered that bruises could form in the first half hour after death before the separation post mortem phase began to take effect. She recalled from her research and experience that the sternum could be fractured by a heavy fall on the knees, when the knees were excessively bent and the jawbone fractured the sternum. She agreed with Dr Pounder that the sternum was weaker because of the cartilaginous joints. Cartilage gave children's bones resistance. In a 45 year old male, the sternum would be completely ossified. A double laminated, old bone can break quite easily if direct pressure is applied.

239. There was no information before the Committee to the effect that cardiac massage had been attempted. She considered it was useful of the doctor who completed the autopsy to have pointed to the possibility of cardiac massage causing the fracture. She pointed out that cardiac massage was usually performed on a hard surface which enabled the amount of force being used to be assessed. If performed on a soft surface, the active force is absorbed by the surface and the person applying the force is unable to judge how much force is being applied and is more likely to injure the person. She considered that the bruise and the fracture on Agit Salman were separate traumatic transformations, and could not have been reported in any other way. The description of the bruise as purple/violet indicated that the haemoglobin had disintegrated, that decomposition had started and the colour had started to turn green. That only takes place in the course of 2 or 3 days. The possibility could not be excluded that it took place before that time but she had never seen it. It was also in the superficial tissues over the sternum and would have appeared red soon after it formed.

240. As to the cause of death, there had been no findings of ill-treatment as there was no evidence of such. External modifications may operate so as to trigger cardiac arrest in a person suffering with heart disease. For example, there are deaths which occur suddenly when the person with a heart disease rests after exercise, which has produced exhilaration hormones. Modifications can also occur because of hot and cold weather. She also considered that if a direct blow had inflicted the bruise and fractured the sternum she would expect to see contusion and ecchymosis on the back surface of the sternum, an

ecchymosis on the front surface of the right ventricle of the heart, as well as bruising, contusion, on the back surface of the right ventricle facing the vertebrae. There would also be serious damage to the arteriosclerotic blood vessels. Where there was no lesion caused to the heart, a blow fracturing the sternum would not cause death where there was no heart disease. Agit Salman was not suffering from any respiratory disease or problems as such, though his lungs were not absolutely sound. He would not have been suffering from respiratory difficulties. While the lungs of someone who had been breathless for 30 minutes could be expected to increase to 500-600g, this was not necessarily the case. Cases vary with the individual. However such an increase can be expected.

241. There was no legal requirement to produce photographs from a classic autopsy. The unavailability of photographs in addition to a detailed report was not a very major deficiency. She commented that in general the Committee would not be provided with photographs if the case came from a remote area but could not specify what percentage of cases included photographs. As regarded the photographs provided by the applicant, she noted that they were of bad quality. She saw nothing in the right armpit which she would call a mark. Nor could she make any interpretation about the slight difference in colour on the right little toe. She pointed out that colour changes occurred after death and that it was not possible to tell that the swelling on the foot was not simply the finger of the witness who was holding the person's foot. She was aware of the United Nations Model Autopsy Protocol which they already followed at the Committee as regarded photographs and she was sure that if her colleague had had a camera at his disposal he would have done so also. It would have been an offence for her colleague not to have noted down all that he had seen.

Witnesses who did not appear

242. The Commission's Delegates had also called as witnesses: Behyettin El and police officers Ali Sarı and Hasan Arinç and public prosecutors Ali Tancay and Tekin Özer.

243. The applicant's representatives informed the Commission that Behyettin El had been detained in prison. By letter dated 27 June 1996, the Government informed the Commission that El was not under detention.

244. The Government provided the Commission with a doctor's note excusing Hasan Arinç from work advising seven days' bed rest. They forwarded letters dated 17 and 18 October 1996 respectively, from Ali Sarı and his superior officer, explaining that he had not attended the hearing in Ankara due to his involvement in duties in ™ırnak. No explanation has been forthcoming with relation to the failure of the public prosecutors Ali Tancay and Tekin Özer to attend. In this respect, referring to its previous findings in the case of Cakıcı v. Turkey (No. 23657/94 Comm. Rep. 12.3.98, para. 245, pending before the Court) and Tanrıkulu v. Turkey (No. 23763/94, Comm. Rep. 15.4.98, para. 237, pending before the Court), the Commission considers that the failure of the public prosecutors to appear has affected detrimentally its possibilities of establishing the facts, in particular with regard to the domestic investigations and proceedings. For these reasons, the Commission finds that in the present case the Government have fallen short

of their obligations under former Article 28 para. 1(a) of the Convention to furnish all necessary facilities to the Commission in its task of establishing the facts of this case.

C. Relevant domestic law and practice

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

1. State of Emergency

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

247. 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.

248. The second, Decree No. 430 (16 December 1990), reinforced the powers of the Regional Governor, for example to order transfers out of the region of public officials and employees, including judges and prosecutors, and provided in Article 8:

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

2. Criminal law and procedure

249. The Turkish Criminal Code contains provisions dealing with unintentional homicide (Articles 452, 459), intentional homicide (Article 448) and murder (section 450). It is a criminal offence to subject someone to torture or ill-treatment (Articles 243 and 245) and to issue threats (Article 191).

250. For all these offences complaints may be lodged, pursuant to Articles 151 and 153 of the Code of Criminal Procedure, with the public prosecutor or the local administrative authorities. The public prosecutor and the police have a duty to investigate crimes

reported to them, the former deciding whether a prosecution should be initiated, pursuant to Article 148 of the Code of Criminal Procedure. A complainant may appeal against the decision of the public prosecutor not to institute criminal proceedings.

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

251. 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.

252. 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 para. 1, provides that all security forces under the command of the Regional Governor (see para. 247 above) shall be subject, in respect of acts performed in the course of their duties, to the Law on the Prosecutor of Civil Servants. Thus, any prosecutor who receives a complaint alleging a criminal act by a member of the security forces must make a decision of non-jurisdiction and transfer the file to the Administrative Council. These councils are made up of civil servants and have been criticised for their lack of legal knowledge, as well as for being easily influenced by the Regional Governor or Provincial Governors, who also head the security forces. A decision by the Council not to prosecute is subject to an automatic appeal to the Council of State.

4. Constitutional provisions on administrative liability

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

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

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

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

5. Civil law provisions

256. Any illegal act by civil servants, be it a crime or a tort, which causes material or moral damage may be the subject of a claim for compensation before the ordinary civil courts. Pursuant to Article 41 of the Civil Code, an injured person may file a claim for

compensation against an alleged perpetrator who has caused damage in an unlawful manner whether wilfully, negligently or imprudently. Pecuniary loss may be compensated by the civil courts pursuant to Article 46 of the Civil Code and non-pecuniary or moral damages awarded under Article 47.

D. Relevant international material

257. The European Committee for the Prevention of Torture (CPT) has carried out seven visits to Turkey. The two first visits in 1990 and 1991 were *ad hoc* visits considered necessary in light of the considerable number of reports received from a variety of sources, containing allegations of torture or other forms of ill-treatment of persons deprived of their custody, in particular, relating to those held in police custody. A third periodic visit took place at the end of 1992, involving a visit to Adana Police Headquarters. Further visits took place in October 1994, August and September 1996 and October 1997 (the latter two of which involved a visit to police establishments in Adana). The CPT's reports on these visits were not made public, such publication requiring the consent of the State concerned, which has not been forthcoming.[4]

258. The CPT has issued two public statements.

259. In its public statement adopted on 15 December 1992, the CPT reported that on its first visit to Turkey in 1990 it reached the conclusion that torture and other forms of severe ill-treatment were important characteristics of police custody. It noted that the following types of ill-treatment were alleged time and time again - inter alia, palestinian hanging, electric shocks, beating of the soles of the feet ("falaka"), hosing with pressurised cold water and incarceration in very small, dark, unventilated cells. It emphasised that its medical examinations disclosed clear medical signs consistent with very recent torture and other severe ill-treatment of both a physical and psychological nature. The on-site observations in police establishments revealed extremely poor material conditions of detention. It stated that on its second visit in 1991 it found no progress had been made in eliminating torture and ill-treatment by the police. Many persons made complaint of similar types of ill-treatment - an increasing number of allegations were heard of forcible penetration of bodily orifices with a stick or truncheon. Once again, a number of the persons making such claims were found on examination to display marks or conditions consistent with their allegations. It stated that on its third visit (a periodic visit) from 22 November to 3 December 1992 its delegation was inundated with allegations of torture and ill-treatment. Numerous persons examined by its doctors displayed marks or conditions consistent with their allegations. It listed a number of these cases. On this visit, the CPT had visited Adana. It recounted that a prisoner at Adana prison displayed haematomas on the soles of his feet and a series of vertical violet stripes (10cm long, 2cm wide) across the upper part of his back, consistent with his allegation that he had recently been subjected to falaka and beaten on the back with a truncheon while in police custody. In Ankara police headquarters and Diyarbakır police headquarters, it found equipment consistent with use in torture and the presence of which

[4] Shortly before the adoption of this report the CPT's report on its visit in October 1997 (CPT/Inf (99)2) was made public on 23 February 1999 with the authorisation of the Turkish Government.

had no other credible explanation. The CPT concluded in its statement that "the practice of torture and other forms of severe ill-treatment of persons in police custody remains widespread in Turkey".

260. In its second public statement issued on 6 December 1996, the CPT noted that some progress had been made over the intervening four years. However, its findings after its visit in 1994 demonstrated that torture and other forms of ill-treatment were still important characteristics of police custody. In the course of visits in 1996, CPT delegations once again found clear evidence of the practice of torture and other forms of severe ill-treatment by police. It referred to its most recent visit in September 1996 to police establishments in Adana, Bursa and Istanbul, when it also went to three prisons in order to interview certain persons who had very recently been in police custody in Adana and Istanbul. A considerable number of persons examined by the delegations' forensic doctors displayed marks or conditions consistent with their allegations of recent ill-treatment by the police, and in particular of beating of the soles of the feet, blows to the palms of the hands and suspension by the arms. It noted the cases of seven persons who had been very recently detained at the Anti-Terror Department at Istanbul Police Headquarters which ranked among the most flagrant examples of torture encountered by CPT delegations in Turkey. They showed signs of prolonged suspension by the arms, with impairments in motor function and sensation which, in two persons, who had lost the use of both arms, threatened to be irreversible. It concluded that resort to torture and other forms of severe ill-treatment remained a common occurrence in police establishments in Turkey.

## III. OPINION OF THE COMMISSION

A. Complaints declared admissible

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

- that her husband, Agit Salman, has been deprived of his life while in police custody;

- that her husband was tortured and subjected to inhuman and degrading treatment while in police custody;

- that there is no access to court or remedy available in respect of these claims;

- that these matters disclose restrictions on Convention rights imposed for ulterior purposes.

B. Points at issue

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

- whether there has been a violation of Article 2 of the Convention in respect of the death in custody of the applicant's husband, Agit Salman;

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

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

- whether there has been a violation of Article 18 of the Convention.

263. Additionally, there is the issue whether there has been a failure of the Turkish Government to comply with their obligations under former Article 25 of the Convention.

C. The evaluation of the evidence

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

i. The Commission has based its findings on the evidence given orally before its Delegates or submitted in writing in the course of the proceedings; in the assessment 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.

Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact and, in addition, the conduct of the parties when evidence is being obtained may be taken into account (mutatis mutandis, Eur. Court HR, Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 65, para. 161).

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

iii. In a case where there are contradictory and conflicting factual accounts of events, the Commission is acutely aware of its own shortcomings as a first instance tribunal of fact. The problems of language are adverted to above; there is also an inevitable lack of detailed and direct familiarity with the conditions pertaining in the region. In addition, the Commission has no powers of compulsion as regards the attendance of witnesses. In the present case, while 20 witnesses were summoned to appear, only 16 in fact gave evidence before the Commission's Delegates. The Commission has therefore been faced with the difficult task of determining events in the absence of potentially significant testimony. It acknowledges the unsatisfactory nature of these elements which highlights forcefully the importance of Contracting States' primary undertaking in Article 1 to secure the rights guaranteed under the Convention, including the provision of effective remedies as under Article 13.

1) Background to events in February 1992

265. Agit Salman, the applicant's husband, worked as a taxi driver in Adana. On 26 February 1992, he was taken into custody by police officers. He was released the next day at 17.30 hours. The custody record indicates that he was detained in relation to an investigation and that he was released by team 39-26. Assistant Superintendant /brahim Ye∏∞l stated in testimony that this was his code number and accepted that he must have been in charge of Agit Salman's file. Though he stated that he had no recollection of meeting or interrogating Agit Salman, it would appear from his own description of the allocation of responsibilities in his own team and within his department that he must have been present during any interrogation that took place. The Commission finds that his evidence on this issue is less than full and frank. Servet Özyılmaz, who remembered Agit Salman from this earlier period, recalled that /brahim Ye∏∞l was part of the interrogation team at that time. The Commission is satisfied that /brahim Ye∏∞l as the officer assigned to Agit Salman's file would have met him in the context of questioning or interrogating him during his period of detention.

266. The applicant gave evidence before the Delegates that her husband had stated that he had been beaten and immersed in cold water during the night he was detained. While he did not visit a doctor, he did not go back to work for two days. Mehmet Salman also

said that his father had stated that he had been kept under cold water and hosed during his detention. He caught a chill as a result. /brahim Salman, Agit Salman's brother, confirmed that he also had been told that Agit had been kept under cold water and had a sore throat and chill when he was released and that he took two days off work. The Commission notes that their accounts are consistent. The Delegates found all three witnesses to be credible and honest in the way in which they gave their evidence. That Agit Salman felt ill after being taken into custody was also corroborated by the taxi driver Hasan Γetin in a written statement to the public prosecutor. While the Commission notes that this period of detention is not in issue in the present application, it considers that this evidence is highly persuasive that Agit Salman was subjected to ill-treatment during his period of detention on 25-26 February 1992 when he was under the responsibility of /brahim Ye∏∞l as investigating officer.

2) Arrest of Agit Salman on 28 April 1992

267. During an operation during which a number of persons suspected of involvement with the PKK were arrested, the police came to Agit Salman's house looking for him in the early hours of 28 April 1992. While two of the arresting officers (Ahmet Dinçer and ™evki Ta∏çi) denied to the Delegates that they had gone to Agit Salman's house to arrest him, the Commission accepts the oral evidence of the applicant and Mehmet Salman that police officers came to the house. This is not necessarily in contradiction with the oral evidence of the arresting officers since there were other police teams working that night who could been instructed to visit Agit Salman's house. According to a letter dated 29 April 1992 from the Director of the Anti-Terror Department to the Adana public prosecutor, Agit Salman was on the wanted list for activities which included attending the Newroz celebrations on 23 March 1992 and involvement in starting a fire and an attack on the security forces in which one person died and four were injured.

268. At about 01.00 hours on 28 April 1992, according to the officers concerned, the police found Agit Salman at the taxi rank at Ye∏ilova. In their oral testimony to the Delegates, Assistant Superintendent Ahmet Dinçer and officer ™evki Ta∏çı stated that Agit Salman showed a certain reluctance to accompany them to the Anti-Terror Department and they had to take him by the arms and lead him to the car. They were however clear that this did not involve the use of force and that he did not hit himself or receive any marks in the process. They both however commented that when in the car Agit Salman showed signs of breathlessness, such that Ahmet Dinçer suggested that they take him to see a doctor. This is to be contrasted with the written statements taken by the public prosecutor from the arresting officers on 22 May 1992. In his statement , Ahmet Dinçer described that there was some pulling and shoving required to force Agit Salman into the car and some marks might have resulted from this. The statement of officer Ali Sarı agrees with this, as essentially does the statement of ™evki Ta∏çi. While the written statements make reference to Agit Salman breathing rapidly or deeply, there is no reference to this causing any concern at the time. Ali Sarı said that they thought that it was due to anxiety. In his oral evidence, Ahmet Dinçer stated that he asked Agit Salman if he wanted to see a doctor, which would appear to indicate a certain level of concern

about his health. The oral and written accounts are therefore strikingly contradictory and appear to the Commission to have been made with a view to presenting a particular story at a particular time to a particular audience. There is accordingly a question mark as to the trustworthiness of these officers' evidence, which makes it difficult to assess what in fact occurred. Nonetheless, it is important, in light of later events, to establish as far as possible the physical condition of Agit Salman at the time of his arrest. It is to be regretted that there was no immediate medical examination of Agit Salman on his arrival in custody which would have afforded a written, contemporaneous record of his condition.

269. As regards whether or not force was used in the arrest of Agit Salman, the Commission notes that Mehmet Salman was told by the drivers at the taxi rank that there was no struggle or force used at the arrest. Statements taken by the public prosecutor from drivers Hasan Γetin and Abdurrahman Bozkurt also make no mention of any struggle taking place on arrest. In particular, the apprehension report signed by Ahmet Dinçer at 01.30 hours, shortly after the arrest of Agit Salman, makes no reference to any resistance or application of force which would account for injuries having been received. The Commission considers that it cannot be regarded as established that Agit Salman suffered any injury on arrest and that the circumstances of his arrest cannot be regarded as providing a satisfactory explanation for any marks later found on his body.

270. As regards the alleged breathlessness suffered by Agit Salman after his arrest, this was described by Ahmet Dinçer in his oral evidence as sufficiently worrying for him to suggest that he be seen by a doctor whereas ™evki Ta∏çı seemed to consider that it was a normal condition for suspects to be in, few people being calm in such a situation. In his oral testimony, Ömer Λnceyılmaz, the custody officer who placed Agit Salman in a cell on his arrival, also maintained in his oral evidence that Agit Salman was nervous, breathing rapidly and that he took him to the toilet to wash his face and hands. Nonetheless since the nervousness seemed to pass, Ömer Λnceyılmaz did not consider it necessary to call a doctor. These details did not figure in his written statement to the public prosecutor. The Commission is not persuaded that any particular significance can be drawn from this testimony. It does not doubt that on his arrest Agit Salman felt and showed a certain amount of nervousness. However, his medical condition was not such, according to the evidence before the Commission, that this would have had any tangible effects on his breathing, short of the later stages of cardiac arrest and it has not been suggested that from the moment of his arrest until his death 24 hours later he was in a state of prolonged cardiac failure, which would in any event have been noticeable. The Commission therefore finds that the officers have exaggerated events in light of hindsight.

3) Detention period 28-29 April 1992

271. There is no record of any occurrence relative to Agit Salman during his detention period until he allegedly asked for assistance from the custody officer at about or after midnight on 29 April 1992. There were three custody officers on duty over this period - Ömer Λnceyılmaz, Servet Özyılmaz and Ahmet Bal. According to their written statements and the oral testimony of Λnceyılmaz and Bal, nothing of significance occurred during this

time. They all state that no interrogation took place. The evidence of all the officers in the teams which had anything to do with Agit Salman during this time were insistent on this point (see the officers in the arrest team, Ahmet Dinçer, para. 84, Ali Sarı, para. 85, ™evki Ta∏çı, para. 86; officers in the team which took him to hospital, /brahim Ye∏∞l, para. 91, Hasan Arinç, para. 92, Mustafa Kayma, para. 93, Erol Γeleb∞, para. 94; Murat Pehlivanli, the typist, para. 95; the custody officers, Ömer /nceyilmaz, para. 87, Servet Özyılmaz, para. 88, Ahmet Bal, para. 90; see also the oral evidence, Ahmet Dinçer, para. 196; Ömer /nceyılmaz, para. 200, Servet Özyılmaz, para. 201, Ahmet Bal, para. 202; /brahim Ye∏∞l, paras. 219 and 221). The reason given in many of these accounts was that the operation had not yet terminated and that interrogations did not commence until the operations had done so. The written statements show in this respect and others a tendency to repeat the same, stereotyped phrasing.

272. The Commission notes with concern however that there was no procedure whereby a formal record of date and time was made by custody officers when suspects were removed from their cells for interrogation. Nor were any formal notes or procès-verbaux drawn up by interrogators by way of a record of the time or length of interrogations. Insofar as there are written records of the overall detention period, there is a period of one and a half hours unaccounted for. The Commission observes that the arrest report signed by Ahmet Dinçer gave the time of apprehension as 01.30 hours, whereas the custody record indicates Agit Salman's time of arrival as 03.00 hours.

273. Several of the police officers became less adamant concerning the impossibility of an interrogation having taken place when they gave oral evidence to the Delegates. ™evki Ta∏çı, an arresting officer, thought no such denial should have been in his statement since he had not been involved with Agit Salman after the arrest and knew nothing of what had occurred afterwards. There was also a reluctance on the part of the officers in Ye∏∞l's team to claim any knowledge as to what might have occurred. Erol Γeleb∞ insisted that he had no interrogating role and claimed that his team leader did not take part in any interrogations either, nor did his team. He would not have known therefore if Agit Salman had been interrogated or not. This contrasts with his written statement where he allegedly stated that his team had not yet had time to interrogate Agit Salman, clearly implying that this was their role. Mustafa Kayma also stated that he and his team had no interrogation role and that he was not involved in any interrogations until a later date. He claimed to have no knowledge as to who was responsible for interrogating Agit Salman.

274. The Commission finds that the evidence of the police officers on this point is hard to reconcile with what was contained in their written statements and with the other evidence. The reluctance of Erol Γeleb∞ and Mustafa Kayma to admit to any involvement in an interrogation at that time, or even to the possibility that the responsibility for interrogating Agit Salman had been allocated to their team, contrasts with Ahmet Dinçer's identification of /brahim Ye∏∞l, their team leader, as the officer in charge of the team dealing with PKK suspects; it also contrasts with /brahim Ye∏∞l's written statement which indicates that an interrogation would have taken place when the operation was concluded and with his oral evidence to the effect that he carried out

interrogations, with the practical and administrative assistance of his team. There are also the duty rosters for 28 and 29 April 1992, which under the heading "Interrogation Team No. 5" list /brahim Ye∏∞l, as team leader, with Hasan Arinç, Murat Pehlinvanli, Erol Γeleb∞, Mustafa Kayma and Teyfik Firat as team members (see para. 113).

275. The Commission finds that there is no doubt that /brahim Ye∏∞l was assigned Agit Salman's file and that it was his responsibility to carry out any questioning of Agit Salman , whether this was to be called an interrogation, a statement-taking or interview. It finds that the evidence of Erol Γeleb∞ and Mustafa Kayma is riddled, at best, with evasions and inconsistencies, which severely undermines their credibility. It has already noted that /brahim Ye∏∞l's account concerning Agit Salman appeared less than frank as regarded earlier contact with him in February 1992. It finds also that his evidence that no interrogation took place due to the ongoing operation raises certain difficulties.

276. Firstly, /brahim Ye∏∞l and all the members of his team on duty[5] happened to be present in a room close to the custody area when Agit Salman reportedly fell sick. They were, according to his oral evidence, waiting in his room while he prepared for the next operation which they were to carry out that night. Erol Γelebi said they were waiting and resting in the room commonly used by officers about to go out on operation. Mustafa Kayma also stated that they waited in a room for common use. The plan provided by the Government in response to a request by the Delegates for a plan of the Anti-Terror Department in April 1992 indicates a large briefing room next to two interrogation rooms across the corridor from the custody area. When asked to point out where his office was on the plan, Ye∏∞l indicated the briefing room stating that this description was a mistake and at this time this was his office. In their written statements, Mustafa Kayma and Erol Γeleb∞ stated that they had been waiting in the record office. The exact nature of the room in which they were assembled is therefore subject to confusion and doubt.

277. Secondly, /brahim Ye∏∞l denied to the Delegates that he undertook any other interrogations at this time, which was consistent with his explanation as to why he did not interrogate Agit Salman - namely, that the operation was not yet concluded. There were at least two other suspects in custody in connection with the operation - Behyettin El, taken into custody on 25 April 1992 and Ferhan Tarlak, detained on 28 April 1992 (see the letter from the Director of the Anti-Terror Department, para. 112). There was also a third suspect, Ahmet Gergin, whose statement reveals that he was questioned about associated events. When asked by the Delegates, /brahim Ye∏∞l thought that he must have interrogated Behyettin El one-two weeks later but subsequently agreed that the initials at the bottom of El's statement taken on 29 April 1992 were his and that he must have interrogated him. El's statement to the public prosecutor of 8 May 1992 also gives the impression that he was interrogated on or shortly after his detention on 25 April 1992. The Commission further notes that /brahim Ye∏∞l signed the statement of Ahmet Gergin of 29 April 1992. It therefore appears that he commenced or continued with the interrogation of two of the suspects connected with the operation on the same day Agit

[5] While the Interrogation Team list included also Teyfik Firat, it appears from the documentary and oral evidence that he was absent that day.

Salman died. When the applicant's representative questioned whether the operation in respect of which Agit Salman's interrogation was allegedly suspended had ever taken place, /brahim Ye∏∞l stated that it had not, though perhaps it might have much later. The Commission is unconvinced therefore by the alleged reason for not interrogating Agit Salman. It is particularly striking that two of the other suspects connected with the same incidents in respect of which Agit Salman was apprehended were interrogated shortly after his arrest and detention. It also notes that in his statement of 8 May 1992 Ferhan Tarlak told the public prosecutor that on the day of his detention - 28 April 1992 - he had been confronted with Behyettin El. This also is inconsistent with the assertions that no steps were taken to question or interrogate the suspects at this stage.

278. Thirdly, /brahim Ye∏∞l also stated, in answer to questions as to why there was a delay in questioning Agit Salman, that Agit Salman was not important to them. His testimony downplayed Salman's significance. This does not appear to correspond with the list of suspicions against him contained in the letter of 29 April 1992 from the Director of the Anti-Terror Department, alleging his involvement in an attack on the security forces which resulted in a death and four casualties.

279. /brahim Ye∏∞l's evidence is consequently not convincing or reliable. The Commission considers that the plausibility of his denial that an interrogation took place must also be considered in light of the evidence given on another crucial area, namely, the circumstances in which Agit Salman allegedly fell ill and was transported to hospital, examined below.

4) Circumstances surrounding the death of Agit Salman

280. According to the written and oral statements of the duty officer Ahmet Bal, and the officers who took Agit Salman to hospital (/brahim Ye∏∞l, Mustafa Kayma, Erol Γeleb∞ and Hasan Arinç), Agit Salman called for assistance after midnight, showing signs of difficulties in breathing and was so weak that he could not stand, sit or walk. He was able to talk, faintly, with Ahmet Bal and /brahim Ye∏∞l and was carried to a van within about 4-5 minutes. After arrival at the hospital, which was 15-20 minutes away, the doctor informed them that he was dead.

281. A number of details about their account are in dispute.

- According to Mehmet Salman, a taxi driver, it was 3.5-4 km from the Security Directorate to the hospital which would take only five to seven minutes at night. /brahim Salman thought that it would only take five minutes, seven at the most. The doctor at the hospital, Dr Tansı, was clear that Agit Salman was dead when he arrived, beyond any possibility of resuscitation and estimated that he had been dead about 15-20 minutes. If it indeed took only seven minutes to drive to the hospital, this casts doubts on the police officers' version of events as Agit Salman would appear to have died while still inside the Anti-Terror Department. This makes it less credible that he called for help and was rendered speedy assistance by officers as alleged. The Commission notes that travelling 3.5 to 4 km at the

relatively sedate pace of 50 km per hour would render the time of travel at a little under 5 minutes. Ahmet Bal stated that there was a narrow bridge to cross and a lot of junctions. However, the Commission would doubt that at 01.00 hours that these would have posed time-consuming obstacles, particularly if the police officers were concerned to reach the hospital as soon as possible. This aspect of the case therefore raises significant doubts.

- The autopsy included the finding that Agit Salman's lungs weighed 300g each. This indicated a low level of oedema and was consistent with a rapid death, in the view of both Professor Pounder and Professor Cordner. It was not consistent in their opinion with a period of 20-30 minutes' breathlessness. Professor Cordner noted that low lung weights were a preponderant feature in deaths resulting from trauma but observed that the accounts of the police officers were compatible with death having occurred even before the van arrived. Dr Bilge Kirangil differed in general about descriptions concerning instantaneous or rapid deaths, disputing Dr Pounder's conclusion that death was rapid in this case and stated that she had seen lung weights of 300g occurring over a 20 minute period. However, since Dr Ali Tansı was of the view that death had occurred 15-20 minutes before arrival at hospital, the Commission considers that her opinion that death was not particularly rapid does not find support from the surrounding circumstances.

- In their oral testimony to the Delegates, Erol Γeleb∞, Mustafa Kayma and ⁄brahim Ye∏∞l stated that en route to the hospital, the van stopped and Mustafa Kayma tried briefly to resuscitate Agit Salman. According to Γeleb∞, he saw Kayma applying external heart massage several times. Kayma said that he tried mouth-to-mouth resuscitation and applied pressure to his chest several times with his hands. ⁄brahim Ye∏∞l stated that Kayma briefly used both mouth-to-mouth and cardiac massage, pressing his chest, without thumbing or punching. None of the written statements of the officers in the van (Hasan Arinç, the driver was requested to give oral evidence but did not do so) makes any mention of this attempt. The incident report drawn up and signed by all the officers states that they took him to the hospital without delay. When this omission was pointed out to the officers in the proceedings before the Delegates, Kayma stated that he might have forgotten to mention it due to excitement; Γeleb∞ said that perhaps they were not asked about it; and Ye∏∞l who drew up the incident report considered that either it was not relevant to the purpose of the record or it did not occur to them. The Commission considers that this is a significant omission. In view of the fact that a detained person held at their Directorate had died, it would appear to have been of great relevance to give details of the steps which they took to assist him and prevent his death. The incident report was compiled within an hour of the return of the officers to their department. The written statements were taken by the public prosecutor on 18 May 1992. The first written mention of a possible cardiac resuscitation attempt was the autopsy report of 21 May 1992 where Dr ™en offered this hypothesis as a possible explanation for the finding of fracture of the sternum, with fresh bleeding. It is not apparent that any further questioning of the officers was carried out to verify this hypothesis, either by the

public prosecutor or forensic authorities, or in the course of the criminal proceedings. It therefore appears that the first time that evidence was given about the alleged resuscitation attempt was in July 1996 before the Commission's Delegates. Having regard to the failure to mention the resuscitation attempt earlier and the previous doubts arising as to the evidence given by these police officers, the Commission finds the oral evidence concerning this aspect to be of dubious reliability. It must also be assessed in light of the medical evidence in this case, see below.

5) Medical evidence relating to the cause of death of Agit Salman

282. The medical evidence before the Commission consists of the forensic reports of the domestic forensic authorities, the reports and oral evidence of Professor Pounder, instructed by the applicant, the oral evidence of Dr. Fatih ™en who conducted the autopsy and Dr Bilge Kirangil who reviewed his findings at the Istanbul Forensic Institute and the written report of Professor Cordner, instructed by the Commission's Delegates as regards the contradictions in the various opinions given.

283. The Commission notes that the Government in their final observations submit that no weight should be given to the opinion of Professor Cordner, who was instructed by the Commission Delegates. They point out that Professor Pounder, the applicant's expert, studied and worked for eight years in Australia where Professor Cordner is based and that they are both Fellows of the Royal College of Pathologists of Australasia. They regret that the Delegates did not find a forensic scientist among the member states and state that they are disturbed that the Commission may have been "influenced". The Commission observes that Professor Cordner informed the Delegates that he had met the applicant's expert, Professor Pounder, at scientific meetings and in Canada. Given the extent of Professor Pounder's professional experience in a number of countries, and his membership of associations and colleges in numerous countries, it does not find any striking or disqualifying coincidence from the facts adverted to by the Government. It does not consider that these professional contacts, or the fact that they were apparently over a period of eight years living in the same country are such as to cast any doubt on Professor Cordner's integrity or objectivity.

i) the cause of death

284. The forensic report issued by the Istanbul Forensic Institute stated that the cause of death of Agit Salman may have been cardiac arrest connected to neurohumeral changes brought about by the pressure of the incident in addition to his existing heart disease. There was no disagreement amongst the various doctors and experts that Agit Salman had an underlying heart disease. This was likely to have been caused by an illness some time in the past, such as rheumatic heart disease which could have manifested itself as an acute febrile illness without necessarily disclosing any heart symptoms. There was also no disagreement that Agit Salman, as testified by the members of his family, would have been able to live and work normally without suffering any disabling or visible symptoms.

285. The effect of the heart disease had been to enlarge the heart to an abnormal size (550g) as a result of compensation for the malfunction of the mitral valve. There was also a narrowing of the arteries of 50%. Professor Pounder considered that this was not an abnormal finding in itself in industrialised countries. However, there would appear to be agreement that this aspect would also have contributed to Agit Salman's vulnerability to cardiac malfunction when under stress.

286. The crucial question remains as to what triggered the cardiac arrest. The Istanbul Forensic Institute referred to neurohumeral changes and the pressure of the incident. Dr Bilge Kirangil in her oral evidence to the Delegates elaborated that external modifications could act as a trigger, such as hot or cold weather, or hormonal variations arising after exercise. She dismissed the possibility that there were any signs of physical trauma which could have done so. It is in this area that the medical opinions are in clear contradiction.

287. The autopsy conducted by Dr Fatih ™en revealed a number of findings:

- a fracture in the sternum, with fresh bleeding in the tissues;
- a violet bruise on the front middle chest 5 x 10 cm;
- two superficial grazes 1x1cm on the front left ankle;
- two parchmented angular shaped traumatic graze wounds 3x1cm on the front right armpit.

288. In addition, the applicant has provided four photographs of amateur quality. Professor Pounder gave his opinion that these disclosed further possible signs of injury:

- purple-red discolouration on the sole of the left foot, with some indication of swelling;
- a white glistening band on the right little toe;
- a bright red abrasion on the spine at waist level, with two reddish marks above and a horizontal line above them of pink bruising or abrasion.

289. Professor Cordner on the basis of the photographs considered that there could be discerned;

- mottling and discolouration on the sole of the left foot;
- small areas of reddening on the front and inner aspect of the right ankle;
- abrasions and areas of redness and discolouration on the back.

The Commission has considered each of these indications below.

ii) fractured sternum and
iii) bruise on the front middle chest

290. The Istanbul Forensic Institute report, based on Dr Fatih ™en's report, and Dr Bilge Kirangil gave the opinion that the fractured sternum could have been caused by attempted resuscitation. Dr Kirangil disagreed that the presence of fresh bleeding in the tissues

indicated that the injury occurred shortly before death, since bruises could occur up to half an hour after death. Relying on Dr Fatih ™en's dating of the bruise as old due to its colour, she was of the firm opinion that the bruise was unconnected with fracture. Her opinion as to when the large bruise (5 x 10cm) would have been inflicted is not readily apparent since she emphasised that the timing of the progression of the colours of the bruises varied according to particular authors and with the location and circumstances in which the bruise occurred. Since, however, it had not started to go yellow, it would seem that her view was that the bruise could have occurred up to seven days previously and accordingly prior to Agit Salman's detention. But in any event, she emphasised that Dr ™en's professional opinion on his visual examination had to be accepted.

291. Professor Pounder's opinion was to the effect that there was a strong presumption that, as the bruise directly overlay the fracture, the two injuries were connected. He considered that a violet coloured bruise could be a recent or fresh bruise and that the presence of fresh bleeding indicated that the fracture occurred shortly before death. Since cardiac massage did not generally cause a bruise of this type, and it would be an unusual fall which fractured the sternum, the most likely cause of both bruise and fracture was a blow or kick of considerable force.

292. Professor Cordner's opinion emphasised that the dating of bruising by colour was subject to widely differing views. and that an accurate calendar was not practicable due to the many variables. He identified the only point of agreement in experts as being that a bruise with identifiable yellowing was more than 18 hours old. On this view, a violet coloured bruise could be fresh ie. less than a day old. The only method of accurately determining the bruise's age would have been to carry out a histopathological analysis. As it was not possible to distinguish between the bruise and fracture by age in this case, they had to be regarded as one injury. On his experience, it was very rare for cardio-pulmonary resuscitation (CPR) to cause a bruise and he referred to a survey which indicated that commonly a fractured sternum caused by CPR was also accompanied by broken ribs. The best explanation for the death was that in life Agit Salman had experienced trauma, to the chest and to the foot (see below) and the fear and pain associated with these events raised his blood pressure and increased heart rate putting a severe strain on his heart causing cardiac arrest.

293. The Commission observes that the dating of the bruise appears crucial to finding that the bruise was separate from the fracture and thus to the probability of the fracture being caused by CPR rather than an unexplained violent trauma. It is satisfied however from its reading of all the medical expert opinions in this case that the dating of a bruise from its colour is an unreliable method. While Dr Kirangil was emphatic that an experienced forensic pathologist would be able to tell an old bruise from a fresh one and that Dr ™en's judgment had to be trusted on this point, the Commission notes that her own explanations indicated widely varying expert views and the importance of individual features in each case. The lack of photographs and a histopathological analysis is a significant omission and impacts on the reliability, for the purpose of making findings of fact, of Dr ™en's report and assessment.

294. The Commission finds therefore that there is no strong evidential basis in the medical context for finding that the bruise was unconnected with the fractured sternum. It considers that the location of the bruise and the absence of other indications such as broken ribs supports the view that it was caused at the same time as the fracture and thus by an unexplained application of force.

iv) marks under the armpit and right little toe

295. The marks on the right armpit were described in Dr ™en's report as traumatic graze wounds 3 x 1cm but qualified as being parchmented. In his oral evidence, he explained that these marks were caused after death, the crucial feature being the desiccated appearance and texture of the skin occurring after death. Professor Pounder had initially agreed with his assessment from the description though noted that they had not been dissected to verify if there had been any associated bruising. When he saw the photographs, he had doubts that they were post mortem artefactual injury due to their apparent position, alignment and colouration and suggested the possibility that they were consistent with the application of electrical current. He also suggested that the white glistening mark which he had noted on the right little toe was consistent with a ligature mark, also deriving from the application of electrical current. Professor Cordner was unable to draw any such conclusions. He found that it was not possible to assess the significance of the apparent white mark on the toe from the poor quality photograph nor to conclude that the marks on the armpit resulted from the application of electricity. The Commission considers that there is insufficient basis to attribute the marks under the armpit or the colouration of the right little toe to injuries occurring during Agit Salman's detention.

v) marks on left ankle

296. These marks, abrasions, on the left ankle were recorded by Dr ™en and are visible on the photographs. No explanation has been established for their presence. While reference was made in the Istanbul Forensic Institute report that superficial traumas could be attributed to his resistance on arrest or placement in the vehicle, the Commission has not found it established that any force was necessary to carry out the arrest or that any injury occurred at that time (see para. 269).

vi) other findings

297. The Commission has summarised above the various marks and abrasions indicated by Professor Pounder and Cordner (paras. 288-9). It recalls that these photographs were shown also to Dr Bilge Kirangil and Dr Fatih ™en. Dr ™en attributed the marks on the back to death marks, post mortem discolouration and considered that the darkness on the foot was not related to trauma as this would not have left black marks. He was certain that he noted in his autopsy report all relevant marks and injuries. Dr Kirangil pointed to the bad quality of the photographs and stated that she saw nothing that she could interpret as connected to marks or swellings or discolouration .

298. The Commission finds that the photographs are of poor quality. It notes that they were taken after Dr ™en's autopsy examination, which makes it possible that certain marks on the body could have conceivably been the result of handling afterwards. It regrets, once more, that there were no professional, forensic photographs obtained immediately at the time of the autopsy. The difference in opinions between three experts as to what can be deduced from the photographs indicates the importance of that omission.

299. There can be observed on the back of the body discolouration which corresponds with what had been described of the effects of the blood pooling and settling after death. There are however identifiably marks which look different - a small round mark, filled with blood, two smaller round red marks, and a bruise-like red mark above those. The Commission can understand why the applicant's family regarded these as signs of ill-treatment. As stated above, it is not possible to deduce with any certainty whether Dr ™en omitted to mention these marks or whether they occurred from clumsy handling of the body afterwards. It recalls however that according to Dr Kirangil, bruising as such would not occur more than a half hour after death and according to Dr ™en wounds piercing the skin after death would not bleed or leave the kind of mark shown. No conclusions can be drawn from these marks however, save to underline the importance of photographs and for dissection and analysis of any mark the origin of which may be disputed.

300. In the Commission's view, there may also be observed on the photograph dark discolouration on the sole of the left foot. Due to the lack of clarity of the photograph, it is possible that what may appear to be swelling is confused with the hand of the person holding the foot. There is however no overlap between the person's hand and the colouration over a large area of the sole of the foot. The Commission is not convinced by Dr Fatih ™en's assertion that the area appears black, which is not consistent with bruising. The photograph shows the area as visibly dark red, purple shading into black where there appears to be shadow. The explanation that it might be dirt is also not convincing, when compared with the state of the body generally. The Commission notes Professor Cordner's view that it does not present the appearance of post mortem discolouration. The Commission considers therefore that the photograph very strongly suggests bruising. It recalls Professor Cordner's opinion that bruising on the sole of the foot is relatively unusual, representing the application of moderately severe force, which was consistent with beating. In particular, it notes that a person with such bruising would not be able to walk without pain or a limp. There is no evidence that Agit Salman was impaired in his ability to walk before or at the time of his arrest. The presence of such bruising is therefore substantial evidence of another unexplained injury having occurred during his detention.

301. The Commission recalls that Professor Cordner found that marks could be seen on Agit Salman's right ankle. These are very small and faint. It does not consider that any conclusions can be drawn from these. It may be observed however that when placed in context with the undisputed and unexplained marks which were recorded as found on the

left ankle these marks would accord with Professor Pounder's description of how injuries could have occurred in the process of falaka (see para. 150).

Overall evaluation

302. The Commission finds that the medical evidence - the bruise overlying the fractured sternum, the size of the lungs, the discolouration on the sole of the left foot, abrasions on the left ankle - very strongly suggests that Agit Salman died rapidly from cardiac arrest after the occurrence of physical trauma during his detention which has not been satisfactorily accounted for. It considers that the autopsy examination conducted by Dr Fatih ™en was incomplete, due to the lack of photographs and histopathological analysis of marks, and therefore an unreliable basis on which to draw conclusions as to the cause of death of Agit Salman.

303. Taken together with the grave difficulties arising from the evidence of the police officers in this case, which the Commission has found to be lacking in reliability, the Commission is satisfied, beyond a reasonable doubt, that Agit Salman was questioned during the period of his detention and suffered physical ill-treatment of a serious degree prior to his death.

5) Aftermath of the death of Agit Salman

304. The Commission notes that Agit Salman was declared to be dead at Adana State hospital. According to the statements of the police officers who took him there, this would have been shortly between 01.00 and 02.00 hours on 29 April 1992. There was an examination of the body at the hospital morgue by Dr Fatih ™en in the presence of the public prosecutor on that day, the exact time not being recorded.

305. According to the testimony of the applicant, she did not receive the news that her husband had died until the evening when her son, Mehmet Salman, returned from the Security Directorate. Mehmet Salman stated that it was at 12.00 hours that his younger brother rang from the taxi stand stating that police officers were looking for him. When he was taken to the Directorate, he was informed at about 13.00 hours that his father had died of a heart attack. The public prosecutor, when asked why it took so long to contact the family, suggested that no-one at the hospital was aware of his address (it was not on his identification card) and accepted the suggestion of the Government Agent that delay might have arisen from the change over of the police officers on duty. He agreed however that it was the responsibility of the public prosecutor to instruct the police to inform the family and that it was unacceptable for the police, if they knew the address, not to inform the family or give the address to the public prosecutor. When the custody officer Ömer Önceyılmaz was questioned, he stated that the address of the suspects was not taken on arrival at the custody area. The Commission notes however that the police called at Agit Salman's house prior to his arrest at the taxi stand. His address must therefore have been

known to the police. The Commission does not consider therefore that any acceptable explanation for the delay has been forthcoming.

306. On the basis of its findings above, 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

307. Article 2 of the Convention provides:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
>
> a. in defence of any person from unlawful violence;
>
> b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> c. in action lawfully taken for the purpose of quelling a riot or insurrection."

308. The applicant submits that the death of Agit Salman was attributable to the treatment to which he was subjected in detention, which included a blow and beatings. This discloses an unlawful deprivation of life through the use of unlawful force for an unlawful purpose contrary to Article 2. She submits that Article 2 not only prohibits the arbitrary taking of life but requires the protection of the right to life. The special dependency of a detained person places an increased duty on the authorities to protect from potentially lethal treatment. Where a person is in custody, there is also a duty on the State to account for any deaths which occur. Without a plausible explanation for death of a person in custody, that death must be considered attributable to the authorities (*mutatis mutandis*, Eur. Court HR, Tomasi v. France judgment of 27 August 1992, Series A no. 241). In the present case, the Government have failed not only to provide a plausible account for how Agit Salman died (they attribute it to over-excitement and overheating during the night in the cell) but also for the serious injuries sustained by him in custody (the chest bruise, fractured sternum, bruising to the left foot, grazes on the left foot, the wounds to the armpit). The protection of the right to life additionally requires a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the death of a person in custody, which includes effective access by the complainant to the investigatory procedure. The applicant submits that in this case the necessary investigation has not been carried out.

309. Finally, the applicant submits that there is substantial, cumulative evidence to establish that the failure to investigate violations of the right to life, in particular where suspicion falls upon the security forces and law enforcement officers, is both a systemic and systematic failure in Turkey. This failure arises from a combination of inadequate procedures, the attitudes of the prosecuting authorities, failure to gather and test basic evidence, assumptions that the authorities are not responsible and a failure to call into

question official claims of events (see e.g., No. 21549/93, Oğur v. Turkey, Comm. Rep. 30.10.97, pending before the Court, and Tanrıkulu v. Turkey, op. cit., where there were violations of Article 2 for failure to investigate deaths, and the many cases declared admissible, in which there were no effective remedies to exhaust). This discloses an administrative practice with respect to failures effectively to investigate violations of the right to life.

310. The Government submit that Agit Salman fell ill while in custody and died as a result of heart failure connected to neurohumeral changes brought about by the pressure of the incident. Any superficial traumas disclosed by the autopsy could be ascribed to his resistance or struggle on arrest. The fractured sternum was the result of a resuscitation attempt on the way to the hospital. Accordingly, the Government submit that there is no ground for finding a violation of the right to life contrary to Article 2 of the Convention. As regards the procedural aspects of Article 2, they submit that there was no inadequacy in either the forensic or investigative procedures into the death, referring to the prosecution which occurred.

As to responsibility for the death of Agit Salman

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

312. Article 2 not only protects the right to life but sets out, in its second paragraph, the limited circumstances in which the deprivation of life may be justified. These exceptions are to be strictly construed and cover not only intentional killing, but also those situations where it is permitted to use force which may result, as an unintended outcome, in the deprivation of life. The use of force must be no more than "absolutely necessary" for the achievement of one of the permitted purposes set out in sub-paragraphs (a), (b) or (c) and this term indicates that a stricter and more compelling test of necessity must be employed than that normally applicable when determining whether State action is "necessary in a democratic society" under paragraph 2 of Articles 8 to 11 of the Convention. In particular, the force used must be strictly proportionate to the achievement of the aims set out in the sub-paragraphs of Article 2 para. 2 (McCann and others v. the United Kingdom judgment, op. cit., p. 46, paras. 148-149).

313. In the present case, the Commission notes that the Government contend that Agit Salman might have suffered minor trauma (grazes etc) when he was arrested on 28 April 1992. The Istanbul Forensic Institute report stated that these minor trauma might have combined with neurohumeral changes and the stress of the situation to trigger an already existing heart disease and cause heart failure. The Commission has found however that there is no convincing evidence that Agit Salman resisted arrest or that he suffered injury in

the process (see para. 269). It has also found that the evidence of the police officers as regarded what happened to Agit Salman in custody was evasive, implausible and unreliable. The Commission has drawn very strong inferences from this. It has found that the evidence relating to his physical condition after he died is strongly consistent with the infliction of injury to his foot by way of "falaka" and with the infliction of a bruise and fracture of the sternum during his period of detention.

314. The Commission notes that, even though it considers that the accounts of the police officers are fundamentally discredited, there is no conclusive evidence as to what occurred during Agit Salman's period of detention. It recalls also that Professor Cordner acknowledged that there was a weakness in his opinion as regarded the chest injuries, since the conclusion that they represented one injury was based on partly circumstantial evidence. Nonetheless, the Commission's assessment of the evidence as a whole, medical and oral and written testimony, is such that it is satisfied that it can reach findings to the necessary standard of proof, beyond reasonable doubt, that Agit Salman's death was caused, to a significant degree, by physical and mental stress resulting from ill-treatment of a serious degree (para. 302).

315. The Commission would emphasise, as in other cases, that a person in custody, in the power of the authorities, is in a vulnerable position and that the way in which he is treated must be subjected to strict scrutiny under the Convention (see eg. Eur. Court HR, Tomasi v. France judgment of 27 August 1992, Series A no. 241-A, p. 40-41, paras. 108-115 and Comm. Rep. 11.12.90, p. 52, paras. 99-105; Ribitsch v. Austria judgment of 4 December 1995, Series A no. 336, pp. 23-26, paras. 27-40 and Comm. Rep. 4.7.94, pp. 35-38, paras. 104-115 and Aksoy v. Turkey judgment of 18 December 1996, Reports 1996-VI, p. 2278, para. 61). The authorities must be able to account for injuries which occur during that period of detention. Where death occurs in custody in connection with even minor injuries, there is a heightened burden on the Government to provide a satisfactory explanation. In this context, the authorities bear the responsibility to ensure that they keep detailed and accurate records concerning the person's detention and place themselves in the position that they can account convincingly for any injuries. The Commission recalls that there was no medical examination of Agit Salman when he was apprehended, which would have enabled his state of health at that time to be established and that there was no procedure whereby the date and time of interrogations were noted.

316. The Commission accordingly concludes that Agit Salman was deprived of his life as a result of ill-treatment occurring during his detention for which no justification has been established within the meaning of the second paragraph of Article 2.

Concerning the investigation into Agit Salman's death

317. The case-law of the Convention organs has established that to ensure the effective protection of the right guaranteed under Article 2 the authorities must provide a mechanism whereby the circumstances of a deprivation of life receive adequate, public scrutiny:

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

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

319. The Commission has already noted the defects in the forensic examination and report of Dr Fatih ™en (para. 302). It has found that there were no steps taken to substantiate the crucial dating of the bruise by way of histopathological analysis or to dissect and analyse other marks. There were no photographs which allowed verification of the external state of the body. Dr ™en also proposed the possibility that a cardiac resuscitation attempt had taken place without asking for verification that such had occurred. While Dr ™en referred the case to the Istanbul Forensic Institute, the 1st Specialist Committee did not look beyond his report. Dr Bilge Kirangil confirmed that they had the power to ask for further evidence or analyses. No such measures were requested. The Commission notes in particular that they sought no clarification of any possible resuscitation attempts before relying on this hypothesis in their report.

320. As regards other aspects of the investigation, the Commission recalls that the public prosecutor took statements from the arresting officers, the custody officers on duty over the period of Agit Salman's detention, and the officers who took Agit Salman to hospital. He took statements also from the applicant and her husband's father, two other persons, Behyettin El and Ferhan Tarlak, who were detained at the same time and from two taxi-drivers who witnessed the arrest. Most of the statements were taken in May-June 1992, within two months of the death. On 19 October 1992 however, the Adana public prosecutor issued a decision not to prosecute. It stated, relying heavily on the Istanbul Forensic Institute report, that Agit Salman had a longstanding heart problem and that the superficial signs of trauma could have resulted from his arrest. Death resulted from the stoppage of the heart due to neurohumeral changes brought about by the pressure of the incident. Although he noted that Agit Salman had received direct trauma, there was insufficient evidence to justify the opening of a case.

321. While the applicant's appeal against this decision was rejected by the Tarsus Serious Crimes Court, the High Court of Appeals quashed it on referral by the Minister of Justice. A case commenced, on indictment, in 1994 in the Adana Aggravated Felony Court, listing ten officers as defendants. From the materials submitted the court sat on five days between 27 June and 26 December 1994, during which time evidence was heard orally from the applicant, her husband's father, a number of the police officers and Dr Ali Tansı, while written statements from Ferhan Tarlak and Behyettin El were read out. While summonses were also issued in respect of the taxi drivers, Hasan Tetin and Abdurrahman Bozkurt, and the officer, Murat Pehlivanlı, they were not heard. The Court acquitted the ten officers on the basis that there was inadequate evidence. It referred to the forensic reports as indicating that Agit Salman had died of his previous heart condition compounded with superficial traumas, which could have derived from the arrest.

322. The Commission considers that the investigation and subsequent criminal proceedings were flawed fundamentally by the defects in the forensic evidence and their apparent reliance on the opinion of the forensic authorities that a major injury resulted from a cardiac resuscitation attempt, such opinion in fact constituting an unsubstantiated hypothesis.

323. In these circumstances, the Commission finds that there has been a failure to provide an adequate and effective investigation into the circumstances of the death of Agit Salman.

Overall assessment

324. The Commission finds that there has been a violation of Article 2 in that Agit Salman was deprived of his life while in custody and in that there was a failure to provide a proper investigation into his death. The Commission finds it unnecessary in light of those findings to examine whether there has been any more general systemic or systematic failure to protect the right to life in this case.

**CONCLUSION**

325. The Commission concludes, unanimously, that there has been a violation of Article 2 of the Convention in respect of Agit Salman.

E. As regards Article 3 of the Convention

326. Article 3 of the Convention provides as follows:

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

327. The applicant submits that the medical evidence establishes that Agit Salman was subjected to ill-treatment amounting to torture whilst in the custody of Adana Security

Directorate, in particular that he was subjected to "falaka" which consists of the repeated beating of the soles of the feet with a strong instrument and is known for its ability to cause severe pain and agony. In addition, he suffered a strong blow to the chest, with force sufficient to fracture his sternum and there is the possibility that he suffered electric shock treatment, though the latter cannot be conclusively proven due to the inadequacies of the post mortem examination and autopsy.

328. The Government submit that the applicant's allegations are unfounded and that the evidence of Professors Pounder and Cordner cannot be relied upon.

329. The Commission has had regard to the strict standards applied in the interpretation of Article 3 of the Convention, according to which ill-treatment must attain a certain minimum level of severity to fall within the provision's scope (Ireland v. the United Kingdom judgment, op. cit., p. 65, para. 162). The practice of the Convention organs has been to require compliance with a standard of proof "beyond reasonable doubt" that ill-treatment of such severity has occurred (see para. 264(i) *in fine*).

330. The Commission recalls that it has found very strong evidence that there was bruising on Agit Salman's foot, consistent with beating, and that he suffered an injury to his chest while in custody which was not the result of an attempted resuscitation. In light of its evaluation of the evidence, oral and written, it is satisfied, beyond reasonable doubt, that Agit Salman suffered serious ill-treatment during custody which is unaccounted for and which led in the circumstances to his death. Having regard to its findings in respect of the evidence of the police officers, the Commission draws very strong inferences that this ill-treatment resulted from the deliberate infliction of injuries in the course of interrogation. It has no doubt that the physical and mental anguish inflicted on Agit Salman as a result can be described as very serious and cruel suffering, falling within the special stigma of "torture" under Article 3 of the Convention (Ireland v. the United Kingdom judgment, op. cit. p. 66, para. 167).

**CONCLUSION**

331. The Commission concludes, unanimously, that there has been a violation of Article 3 of the Convention in respect of Agit Salman.

F. As regards Articles 6 and 13 of the Convention

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

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

333. 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."

334. The applicant complains of both a lack of access to court contrary to Article 6 of the Convention and a lack of effective remedies in respect of her complaints under Article 13 of the Convention. She complains that her right to a civil remedy has been denied by the failure of the judicial authorities to conduct the prosecution in such a way as even to establish that her husband was the victim of torture, or unlawful killing, without which minimum determination the applicant is unable to claim with any prospect of success a civil remedy in respect of what happened. In addition, due to its fundamental flaws, the investigation into the death of her husband did not provide a thorough and effective investigation of the kind required by Article 13, nor effective access for the complainant to the investigatory procedure and the payment of compensation where appropriate. She further submits that the other cases before the Commission and Court establish beyond reasonable doubt that there are systematic and systemic violations of the right to an effective remedy which amount to a practice in violation of the Convention.[6]

335. The Government rely on the proceedings which culminated in the acquittal of the police officers. They point out that the acquittal was pronounced within two years and eight months of the death and that the applicant did not appeal against the acquittal to the appeal court, which had previously quashed the decision not to prosecute.

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

337. The Commission notes that Article 13 of the Convention requires the provision of a domestic remedy allowing the "competent national authority" both to deal with the substance of the relevant Convention complaint and to grant the appropriate relief. The Commission recalls that, in concluding that there was a violation of Article 2 of the Convention, it found that the investigation and criminal proceedings concerning the death of Agit Salman were fundamentally flawed. It notes however that the Court has held that the requirements of Article 13 are broader than the procedural requirements of Article 2 to conduct an effective investigation (Kaya v. Turkey judgment, op. cit., para. 107). Where relatives have an arguable claim that the victim has been unlawfully killed in circumstances engaging the responsibility of the State, the notion of a remedy in Article 13 entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure (see also Ergi v. Turkey judgment, op. cit., paras. 96-98).

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[6] The applicant refers to eleven cases in which the Court found a violation of Article 13 and a further six cases in which the Commission found a violation of Article 13.

338. The Commission recalls its findings above on the inadequacies of the investigation, in particular, the defects in the forensic procedure, involving the failure to take photographs, and to carry out tests to aid in the establishment of the cause of marks on the body (para. 302). It observes that the forensic reports of Dr ™en and the Istanbul Forensic Institute were relied on by the public prosecutor in his initial decision not to prosecute on the basis of lack of evidence of causation. Though this decision was overturned following referral to the High Court of Appeals, the Adana Aggravated Felony Court having considered the available evidence provided by the prosecution, acquitted the police officers, also on the basis of a lack of evidence that he had been tortured or that he died from anything but a heart attack compounded with superficial traumas when arrested. The Commission observes that the applicant was a complainant in these proceedings, where she was represented and which she attended in person. In view however of the inadequate evidence before the courts, and the fact that the applicant had already appealed unsuccessfully against the decision not to prosecute, the Commission is not persuaded that the possibility of a further appeal against the acquittal constitutes an effective remedy within the meaning of Article 13 of the Convention. The Commission finds therefore that the applicant has been denied an effective remedy in respect of the death of her husband, and thereby access to any other available remedies at her disposal, including a claim for compensation.

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

**CONCLUSION**

340. The Commission concludes, unanimously, that there has been a violation of Article 13 of the Convention.

G. <u>As regards Article 18 of the Convention</u>

341. 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."

342. The applicant maintains that Article 18 imposes a requirement of good faith on the State Party. In this case, the evidence discloses a concerted attempt by the police officers involved in the arrest and detention of Agit Salman to create a fabricated account of what happened to bring about his cardiac arrest, which conduct is calculated, inter alia, to frustrate the ability of the Convention to secure the protection of the rights contained therein. This is the ultimate abnegation of effective accountability, the rule of law and democratic values and represents a violation of Article 18 of the Convention.

343. The Government deny that there is any factual or juridical basis for these complaints.

344. The Commission has examined the applicant's allegations, and recalls that it has made findings concerning the evidence of the police officers, which substantiates to some extent her complaints. However, it does not find that this discloses any basis for the finding of a violation of Article 18 of the Convention.

**CONCLUSION**

345. The Commission concludes, unanimously, that there has been no violation of Article 18 of the Convention.

H. As regards former Article 25 of the Convention

346. Former Article 25 para. 1 of the Convention provides:

> "The Commission may receive petitions addressed to the Secretary General of the Council of Europe from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognises the competence of the Commission to receive such petitions. Those of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right."

347. The applicant states that she was called before the domestic authorities three times, on which occasions she was, *inter alia*, blindfolded, beaten, questioned about her application and explicitly told to drop her case before the Commission. This discloses an interference with the free exercise of her right of individual petition.

348. In their submissions of 13 December 1996, the Government denied the allegations that the applicant had been subjected to intimidation. They referred to their earlier communication of 4 July 1996, which concerned the applicant's legal aid application. They state that the authorities contacted the applicant to obtain verification of information included in her declaration of means submitted to the Commission in her legal aid and that this was necessitated by the absence of certification of the declaration of means required by Rule 3 of the Legal Aid Addendum to the Commission's Rules of Procedure. It was in that context that the Anti-Terror Department and Directorate of Security in Adana considered it necessary to contact the applicant.

349. The Commission recalls that former Article 25 para. 1 imposes an obligation on a Contracting State not to hinder the right of the individual effectively to present and pursue a complaint with the Commission. While the obligation imposed is of a procedural nature distinguishable from the substantive rights set out in the Convention and Protocols, it flows from the very essence of this procedural right that it is open to individuals to complain of

alleged infringements of it in Convention proceedings. In this respect, as in others, the Convention must be interpreted as guaranteeing rights which are practical and effective as opposed to theoretical and illusory (see Eur. Court HR, Cruz Varas and others judgment of 20 March 1991, Series A no. 201, p. 36, para. 99).

350. The Commission would further emphasise that the right of individual petition guaranteed under former Article 25 of the Convention is of fundamental importance to the effective protection of the substantive rights and freedoms provided for in the Convention and its Protocols. Deliberate or repeated interferences with the free exercise of that right must be regarded, in the Commission's view, with the gravest concern. Interference may also result from indirect pressure on applicants from State authorities. In particular, approaches by domestic authorities to applicants to question them about their applications in circumstances which may be construed as attempts to discourage or penalise the pursuit of complaints may lead to a finding that a Contracting State has failed to comply with its obligations under former Article 25 para. 1 of the Convention. In this context, the Court, having regard to the vulnerable position of applicant villagers and the reality that in south-east Turkey complaints against the authorities might well give rise to a legitimate fear of reprisals, has found that the questioning of applicants about their applications to the Commission amounts to a form of illicit and unacceptable pressure, which hinders the exercise of the right of individual petition in breach of former Article 25 of the Convention (see Eur. Court HR, Akdivar and others v. Turkey judgment of 16 September 1996, Reports 1996-IV, p. 1192 at pp. 1217-1219).

351. The Commission recalls that it found the applicant to be a credible and reliable witness. It accepts her evidence that she was summoned by the authorities on at least two occasions concerning her application. The written statement provided by her representatives referred to two occasions, as did the oral evidence of Mehmet Salman. Her oral testimony indicated three occasions but was consistent in asserting that it was only on the first occasion, when she was taken by the police, that she was ill-treated and told to give up her application. The documents provided by the Government substantiate that she was questioned by police officers at the Anti-Terror Department and on a second occasion by other police officers at the Security Directorate. While the Government contend that this questioning related to her request for legal aid and verification of her declaration of means, the Commission notes that the statement of 24 January 1996 drawn up the officers at the Anti-Terror Department is framed in far wider terms, including questions as to whether she had applied to the European Commission and who was involved in helping her.

352. The Commission considers questioning of an applicant by the police about any aspect of an application to the Commission to be unacceptable, save in exceptional circumstances which have not been shown to exist here and in any event such questioning should only take place where the applicant is accompanied by her own lawyer (see also Ergi v. Turkey judgment, op. cit., para. 105, Comm. Rep. 20.5.97, para. 180).

353. Such questioning may reasonably be regarded as intimidatory by applicants and thus, at the very least, discourage the exercise of the right of individual petition. The Commission also finds no explanation of why it was necessary to question the applicant

more than once about her declaration of means, and considers it remarkable that this task was, on the first occasion, carried out by the officers from the Anti-Terror Department.

354. The Commission recalls that the applicant alleged before the Delegates that she was blindfolded, struck and kicked when she was taken to the Anti-Terror Department and also told to drop her case. It notes that the applicant's son, Mehmet Salman, confirmed that his mother had told him that she had been blindfolded, kicked and told to give up her statement. Further, the applicant stated that she informed the public prosecutor about the ill-treatment. The Commission considers that her account is credible and not without substantiation. However, in light of its findings above, it considers it unnecessary to make any specific findings as to the extent of the pressure exerted on the applicant. Indeed it is for the purpose of preventing the risk of such abuse that any contact by the authorities with an applicant be strictly limited and attended by safeguards, such as the presence of a lawyer.

355. The Commission concludes that the applicant has been subject to pressure from authorities which constitutes a hindrance on her right of individual petition guaranteed under former Article 25 para. 1 of the Convention.

**CONCLUSION**

356. The Commission concludes, unanimously, that Turkey has failed to comply with their obligations under former Article 25 para. 1 of the Convention.

I. Recapitulation

357. The Commission concludes, unanimously, that there has been a violation of Article 2 of the Convention in respect of Agit Salman (see para. 325 above).

358. The Commission concludes, unanimously, that there has been a violation of Article 3 of the Convention in respect of Agit Salman (see para. 331 above).

359. The Commission concludes, unanimously, that there has been a violation of Article 13 of the Convention (see para. 340 above).

360. The Commission concludes, unanimously, that there has been no violation of Article 18 of the Convention (see para. 345 above).

361. The Commission concludes, unanimously, that Turkey has failed to comply with their obligations under former Article 25 para. 1 of the Convention (see para. 356 above).

M.-T. SCHOEPFER S. TRECHSEL

Secretary
to the Commission

President
of the Commission

(Or. English)

## CONCURRING OPINION OF Mr. E. A. ALKEMA

I have voted for finding a violation of Article 2, the right to life, but only with respect to the manner in which the investigation into Mr. Salman's death has been conducted. My reasons are the following.

As to the responsibility for Mr. Salman's death, the conditions for applicability of Article 2 set out in para. 312 of the report (intentional killing or the outcome of permitted use of force) have – in my opinion – not been met. To quote from para 284: "There was no disagreement amongst the various doctors and experts that Agit Salman had an underlying heart disease". This heart condition – denied by the applicant was apparently not known to those responsible for Mr. Salman's arrest and detention.

I readily accept that the circumstances as described in the report caused or could have caused the heart failure and consequently Mr. Salman's death. There is, however, no proof of an intentional killing. Neither is there sufficient evidence that those involved in arresting and detaining Mr. Salman were using permitted force (para. 329). To the contrary, the force exercised amounted, as is rightly concluded in paras. 326-331, to a clear violation of Article 3. That force consisted of at least subjecting Mr. Salman to "falaka" and a strong blow to the chest which possible fractured his sternum (para. 327). There is, however, no evidence that the officers in charge could and ought to have foreseen that their maltreatment would be lethal in effect.

Thus, the conditions for applying Article 2 exclusively to this maltreatment, however serious, are not fulfilled.

# Appendix B

Salman v Turkey: Judgment of the European Court of Human Rights



CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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



**CASE OF SALMAN v. TURKEY**

(Application no. 21986/93)

JUDGMENT

STRASBOURG

27 June 2000

This judgment is subject to editorial revision before its reproduction in final form in the official reports of selected judgments and decisions of the Court.

**In the case of Salman v. Turkey,**

The European Court of Human Rights, sitting, in accordance with Article 27 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), as amended by Protocol No. 11[1], and the relevant provisions of the Rules of Court[2], as a Grand Chamber composed of the following judges:

Mr L. WILDHABER, *President*,
Mr J.-P. COSTA,
Mr A. PASTOR RIDRUEJO,
Mr L. FERRARI BRAVO,
Mr G. BONELLO,
Mr J. MAKARCZYK,
Mr P. KŪRIS,
Mrs F. TULKENS,
Mr V. BUTKEVYCH,
Mr J. CASADEVALL,
Mrs N. VAJIĆ,
Mrs H.S. GREVE,
Mr A.B. BAKA,
Mr R. MARUSTE,
Mrs S. BOTOUCHAROVA,
Mr M. UGREKHELIDZE, *judges*
Mr F. GÖLCÜKLÜ, ad hoc *judge*,

and also of Mr M. DE SALVIA, *Registrar*,

Having deliberated in private on 2 February 2000 and on 31 May 2000,

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

## PROCEDURE

1. The case was referred to the Court, as established under former Article 19 of the Convention[3], by the European Commission of Human Rights ("the Commission") on 7 June 1999, within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention. It originated in an application (no. 21986/93) against the Republic of Turkey lodged with

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*Notes by the Registry*

1-2. Protocol No. 11 and the Rules of Court came into force on 1 November 1998.

3. Since the entry into force of Protocol No. 11, which amended Article 19, the Court has functioned on a permanent basis.

the Commission under former Article 25 by a Turkish national, Mrs Behiye Salman, on 20 May 1993.

The Commission's request referred to former Articles 44 and 48 and to Rule 32 § 2 of former Rules of Court A[1]. 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, 13, 18 and former Article 25 of the Convention.

2. On 20 September 1999, a Panel of the Grand Chamber decided that the case would be examined by the Grand Chamber of the Court (Article 5 § 4 of Protocol No. 11 and Rules 100 § 1 and 24 § 6 of the Rules of Court. The Grand Chamber included *ex officio* Mr R. Türmen, the judge elected in respect of Turkey (Article 27 § 2 of the Convention and Rule 24 § 4), Mr L. Wildhaber, the President of the Court, Mrs E. Palm, Vice-President of the Court, together with Mr J.-P. Costa and Mr M. Fischbach, Vice-Presidents of Sections (Article 27 § 3 of the Convention and Rule 24 §§ 3 and 5 (a)). The other members appointed to complete the Grand Chamber were Mr A. Pastor Ridruejo, Mr G. Bonello, Mr J. Makarczyk, Mr P. Kūris, Mrs F. Tulkens, Mrs V. Strážnická, Mr P. Lorenzen, Mr J. Casadevall, Mr V. Butkevych, Mr A.B. Baka, Mr R. Maruste and Mrs S. Botoucharova (Rules 24 § 3 and 100 § 4).

Subsequently, Mr R. Türmen, who had taken part in the Commission's examination of the case, withdrew from sitting in the Grand Chamber (Rule 28). On 22 October 1999, the Government appointed Mr Gölcüklü to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1). Mr Fischbach and Mrs Strážnická who were unable to attend the hearing were replaced by Mrs N. Vajić and Mr M. Ugrekhelidze, substitute judges (Rule 24 § 5 (b)).

3. The Registrar received the memorial of the applicant on 2 December 1999 and the memorial of the Government on 4 January 2000.

4. A hearing took place in public in the Human Rights Building, Strasbourg, on 2 February 2000.

1. *Note by the Registry*. Rules of Court A applied to all cases referred to the Court before the entry into force of Protocol No. 9 (1 October 1994) and from then until 31 October 1998 only to cases concerning States not bound by that Protocol.

There appeared before the Court:

(a) *for the Government*
Mr M. ÖZMEN, *Agent*,
Mrs Y. KAYAALP,
Mr O. ZEYREK,
Ms M. GÜLSEN,
Mr H. ÇETINKAYA, *Advisers*;

(b) *for the applicant*
Ms A. REIDY, *Counsel*,
Ms F. HAMPSON,
Mr O. BAYDEMIR,
Ms R. YALÇINDAĞ,
Mr M. KILAVUZ, *Advisers*.

The Court heard addresses by Ms Reidy and Mr Özmen.

5. On 31 May 2000, Mrs Palm, who was unable to take part in further consideration of the case, was replaced by Mr Ferrari Bravo (Rules 24 § 5 (b) and 28).

# AS TO THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

6. The facts of the case, particularly concerning events on 28 and 29 April 1992 when Agit Salman, the applicant's husband, was detained by police and subsequently died, were disputed by the parties. The Commission, pursuant to former Article 28 § 1(a) of the Convention, conducted an investigation with the assistance of the parties.

The Commission heard witnesses in Ankara from 1 to 3 July 1996 and in Strasbourg on 4 December 1996 and 4 July 1997. These included the applicant; her son Mehmet Salman; her brother-in law İbrahim Salman; Ahmet Dinçer and Şevki Taşçi, police officers who apprehended Agit Salman; Ömer İnceyılmaz, Servet Ozyılmaz and Ahmet Bal, custody officers on duty over the period of Agit Salman's detention; İbrahim Yeşil, Erol Çelebi and Mustafa Kayma, interrogation team officers who took Agit Salman to the hospital; Tevfik Aydın, the Adana public prosecutor who attended the autopsy; Dr Ali Tansı, the doctor at the Adana State Hospital who declared that Agit Salman was dead; Dr Fatih Şen, who conducted the autopsy on the body; Dr Derek Pounder, Professor at Aberdeen University,

a forensic pathologist expert called by the applicant and Dr Bilge Kirangil, a member of the İstanbul Institute of Forensic Medicine which had reviewed the autopsy carried out by Dr Fatih Şen.

The Commission also requested an expert opinion on the medical issues in the case from Professor Cordner, Professor of Forensic Medicine at Monash University, Victoria (Australia) and Director of the Victorian Institute of Forensic Medicine.

7. The Commission's findings of fact, which are accepted by the applicant, are set out in its report of 1 March 1999 and summarised below (Section A). The Government's submissions concerning the facts and the expert medical reports are summarised below (Sections B and C respectively).

## A. The Commission's findings of fact

8. Agit Salman, the applicant's husband, worked as a taxi driver in Adana. At the time of events in this case he was aged 45 years' old. He had no history of ill-health or heart problems.

9. On 26 February 1992, Agit Salman was taken into custody by police officers from the Anti-Terror Branch of the Adana Security Directorate. İbrahim Yeşil was the officer in charge of interrogating him. Agit Salman was released at 17.30 hours on 27 February 1992. He told the applicant and their son Mehmet that he had been beaten and immersed in cold water during the night of his detention. He remained off work for two days with a chill.

10. During an operation to apprehend a number of persons suspected of involvement with the PKK (Kurdish Workers' Party), police officers came to the applicant's house in the early hours of 28 April 1992, looking for Agit Salman. Agit Salman was on a wanted list for activities which included attending the Newroz celebrations on 23 March 1992 and involvement in starting a fire and in an attack on the security forces in which one person died and four were injured. Agit Salman was however out working in his taxi.

11. Police officers located Agit Salman at a taxi rank at Yeşilova at about 01.00 hours on 28 April 1992. Assistant Superintendent Ahmet Dinçer and officers Şevki Taşçı and Ali Şarı took him into custody. The apprehension report of the officers made no mention of any struggle or the necessity to use force to place Agit Salman in the police car. There was an inconsistency between their written statements later given to the public prosecutor on 22 May 1992 when they stated that some pushing and pulling might have occurred and their evidence to the Commission. In their oral

evidence to the Commission Delegates, Ahmet Dinçer and Şevki Taşçı were adamant that they had to lead Agit Salman by the arms to the car but this did not involve the use of force and he did not receive any knocks or marks in the process. Mehmet Salman heard from the taxi drivers at the taxi rank that his father had not resisted arrest, nor had two taxi drivers who were asked to give statements by the public prosecutor heard that Agit Salman had resisted arrest.

12. Agit Salman was not taken to a doctor before being placed in a cell in the custody area. The Commission found that it was not established that he had suffered any injury on arrest or that he showed any signs of ill-health or respiratory difficulty.

13. The custody officer on duty, Ömer İnceyılmaz, entered Agit Salman's arrival in the custody area as occurring at 03.00 hours on 28 April 1992. There was no information recorded or evidence accounting from the time which elapsed between his apprehension which took place according to the arresting officers' report at 01.30 hours and his registration in the custody area at 03.00 hours.

14. Assistant Superintendent İbrahim Yeşil was the leader of the interrogation team assigned to Agit Salman. His team included officers Erol Çelebi, Mustafa Kayma and Hasan Arinç.

15. Two others suspects were known to have been apprehended in respect of the same operation, Behyettin El detained on 25 April 1992 and Ferhan Tarlak detained also on 28 April 1992. A third suspect Ahmet Gergin was also detained in the custody area in relation to the offences under investigation. İbrahim Yeşil took a statement from Behyettin El and Ahmet Gergin on 29 April 1992. Behyettin El stated that he had been interrogated before the arrival of Ferhan Tarlak, which would have been on or before 28 April 1992.

16. No documentary records existed to record the movements of detainees from their cells, for example, noting times of interrogations. The police officers concerned in events denied in their statements to the public prosecutor taken between 18 and 25 May 1992 that Agit Salman had been interrogated during his detention, in particular, as no interrogations would take place before the operation was completed. İbrahim Yeşil, Mustafa Kayma and Hasan Arinç gave oral evidence to the same effect to the Commission's Delegates. The Commission found that their assertion that Agit Salman had not been questioned during the twenty four hours following his apprehension to be implausible, inconsistent and lacking in credibility (see the Commission's analysis of the evidence, Commission Report 1 March 1999, paras. 271-278). Taking into account also the other evidence, it found that Agit Salman had been questioned by the interrogation team during his period of detention.

17. In the early hours of 29 April 1992, İbrahim Yeşil, Mustafa Kayma, Hasan Arinç and Erol Çelebi brought Agit Salman to the Adana State Hospital. Dr Ali Tansı examined him immediately. His heartbeat, breathing and other vital functions had stopped, cyanosis was developed on the face and ears and the pupils were dilated. He declared that Agit Salman was dead on arrival and concluded that he had died 15 to 20 minutes previously.

18. In a statement, signed by the police officers who had brought Agit Salman to hospital, at the indicated time of 02.00 hours on 29 April 1992, it was stated that at 01.15 hours, the custody officer had informed them that Agit Salman was ill. The suspect told them that his heart was giving him problems and they took him without delay to the state hospital emergency ward.

19. On 29 April 1992, Dr Fatih Şen, the forensic doctor at Adana, examined the body in the presence of the public prosecutor. The record of examination noted that there were two dried 1 x 3 cm graze wounds on the front of the right arm pit, a fresh graze on top of 1 x 1 cm graze on the front of the left ankle and an old traumatic ecchymosis measuring 5 x 10 cm in the front of the chest. There were no injuries from a pointed instrument or firearm. He concluded that an autopsy was necessary to discover the cause of death. The documents indicated that the autopsy was carried out the same day. Samples of organs were sent for analysis.

20. At about 13.00 hours on 29 April 1992, Mehmet Salman was brought by the police to the Security Directorate, where the public prosecutor informed him that his father had died of a heart attack. İbrahim Salman went to the forensic department on 30 April 1992 to identify the body. The body was released to the family who undertook to bury it the day before May Day. The family washed the body at the cemetery. İbrahim Salman saw bruises and visible marks in the armpits. There were marks in the back resembling holes. There were marks on the foot which was swollen. Four colour photographs were taken of the body on behalf of the family.

21. On 21 May 1992, Dr Fatih Şen issued the autopsy report. It repeated the physical findings of the record of examination, this time describing the ecchymosis on the front of the chest as violet-coloured. The internal examination disclosed that the lungs weighed 300g each and were oedematic and that the heart, 550g, was larger than usual. The brain was oedematic. Changes in the arteriosclerotic vascules were noted and that the parietal layer of the myocard was adhered inseparably to the heart. The sternum was fractured and the surrounding soft tissues revealed fresh haemorrhage which could have been caused by attempted resuscitation.

Reference was made also to the histopathological report dated 18 May 1992, which found chronic bronchitis in the lungs, arteriosclerotic changes narrowing the lumen in the coronary arteries and chronic constructive pericarditis, chronic myocarditis, myocardial hyperplasy and hypertrophy in the heart. The toxicology report of 14 May 1992 found no abnormalities. The report concluded that the actual cause of death could not be established and gave the opinion that the case should be referred to the İstanbul Forensic Medicine Institute.

22. On 22 May 1992, the photographs taken by the family were delivered to the public prosecutor.

23. Statements were taken by the public prosecutor from the interrogating team (İbrahim Yeşil, Hasan Arinç, Mustafa Kayma and Erol Çelebi) on 18 May 1992. Statements were taken from the arresting officers Ahmet Dinçer, Ali Sarı and Şevki Taşçı and the custody officers Ahmet Bal, Servet Ozyılmaz and Ömer İnceyılmaz on 22 May 1992. Statements were also taken from Behyettin El and Ferhan Tarlak on 8 May 1992, the applicant on 26 May 1992, Temir Salman (the father of Agit Salman) on 29 May 1992, Hasan Çetin and Abdurrahman Bozkurt, two taxi drivers, on 29 and 30 June 1992 respectively and from Dr Ali Tansı on 30 June 1992.

24. On 15 July 1992, the İstanbul Forensic Medicine Institute issued its opinion, which was signed by seven members of the 1st Specialist Committee including Dr Bilge Kirangil. This report recalled that Agit Salman had been pushed and shoved on his arrest, that he became unwell before his interrogation or, as was claimed, he died during interrogation. It deduced from the witness statements that he had been in his cell until he complained that his heart was giving him problems when he was taken immediately to hospital.

The report recounted the findings of the internal and external examination conducted at the autopsy. It concluded that, apart from small, fresh traumatic changes on the ankle and the old violet-coloured ecchymosis on the front thorax, no other traumatic changes were identified. The fresh haemorrhage around the sternum could be attributed to a resuscitation attempt. There was no evidence to suggest that he died from any direct trauma. The superficial traumas on his body could be attributed to the individual's resistance and struggle on arrest or his placement in the police vehicle though they could have been inflicted directly. They were not independently fatal. In view of the relatively large size of the heart, the arteriosclerotic changes in the heart arteries and signs of an old infectious disease on the membrane and muscles of the heart, there were indications of

a longstanding heart disease. The report concluded that, though the deceased had lived and worked actively prior to his arrest, his death within 24 hours of his arrest could have been caused by cardiac arrest connected with neurohumoral changes brought about by the pressure of the incident in addition to his existing heart disease.

25. On 19 October 1992, the Adana public prosecutor issued a decision not to prosecute. He stated that at about 01.15 hours on 29 April 1992 Agit Salman had informed officers that his heart was giving him problems and he had been taken to Adana State Hospital where he died. According to the forensic report, Agit Salman had a longstanding heart disease, any superficial injuries could have occurred on arrest and death was the result of a heart attack brought on by the pressure of the incident and his heart problem. There was no evidence justifying a prosecution.

26. On 13 November 1992, the applicant appealed against the decision not to prosecute claiming that Agit Salman had been interrogated and died under torture.

27. On 25 November 1992, the President of the Tarsus Assize Court rejected the applicant's appeal.

28. On 22 December 1992, the Minister of Justice referred the case to the Court of Cassation under article 343 of the Code of Criminal Procedure. On 16 February 1994, the Court of Cassation quashed the non-prosecution decision and sent the case back to the Adana public prosecutor for the preparation of an indictment.

29. In an indictment dated 2 May 1994, ten police officers Ömer İnceyılmaz, Ahmet Dinçer, Ali Sarı, Şevki Taşçi, Servet Özyılmaz, Ahmet Bal, Mustafa Kayma, Erol Çelebi, İbrahim Yeşil, Hasan Arinç) were charged with homicide under case number 1994/135. Hearings took place before the Adana Assize Court on, *inter alia*, 27 June, 26 September, 31 October and 1 December 1994. The defendants pleaded not guilty. Oral statements were given by six of the ten police officers (Ahmet Dinçer, Şevki Taşçi, Mustafa Kayma, Erol Çelebi, İbrahim Yeşil, Hasan Arinç) maintaining their written statements and denying any ill-treatment of Agit Salman. The court also heard Temir Salman, the father of Agit Salman, the applicant and Dr Ali Tansı, the doctor on duty in the emergency unit at Adana State Hospital. A written statement was obtained from Behyettin El.

30. In its decision of 26 December 1994, the Adana Assize Court found that it could not be established that the defendants had exerted force or violence on Agit Salman or threatened him or tortured him in order to force him to confess. The superficial traumas on his body could have derived from other causes, for example, when he was arrested. The forensic reports indicated that Agit Salman died of his previous heart condition being

compounded with superficial traumas. However there was no evidence to prove that the traumas were produced by the accused. It acquitted the defendants on the grounds of inadequate evidence.

31. The applicant, who had been a party to the proceedings as a complainant, did not appeal against the acquittal which became final on 3 January 1995.

32. The Commission found, in light of the written and oral evidence, the photographs and the medical opinions given by Professor Pounder and Professor Cordner, that Agit Salman had died rapidly, without a prolonged period of breathlessness. There were marks and abrasions on Agit Salman's left ankle for which there was no explanation and there was bruising and swelling on the sole of the left foot, which could not have been accidentally caused. These were consistent with the application of falaka. The bruise on the centre of the chest had not been accurately dated by histopathological means and had not been shown to be dissociated from the broken sternum. These injuries together could not have been caused by cardiac massage. The Commission also disbelieved the oral evidence of officers İbrahim Yeşil, Mustafa Kayma and Erol Çelebi that cardiac massage had been applied, noting that this had first been mentioned as having occurred when evidence was given before its Delegates in July 1996, four years after the events. The Commission concluded that Agit Salman had been subjected to torture during interrogation which had provoked the cardiac arrest and thereby caused his death.

33. On 24 January 1996, the applicant was summoned to the Anti-Terror Department at the Adana Security Directorate. A statement was taken by officers, on which her thumbprint was placed. It was headed "In relation with her application for help to the European Human Rights" and began, "The witness was asked: You are asked to explain whether you applied to the European Human Rights Association, if you asked for help and whether you filled in the application form. Who mediated in your application?" The statement purported to set out her explanations as to how she came to submit her application to the Commission. She confirmed that the legal aid documents had been filled in by her. In her oral evidence, which the Commission found credible and substantiated, the applicant claimed that she had been blindfolded, kicked and struck at the Directorate and that the officers had told her to drop the case.

34. The applicant was summoned a second time. A report dated 9 February 1996, signed by police officers, listed details of the applicant's income and expenditure and confirmed her declaration of means. On this or

another date, she was taken before the public prosecutor and again asked about her statement of means. No threats were made during that interview.

### B. The Government's submissions on the facts

35. The Government referred to the evidence given by the police officers, the autopsy report and report of the İstanbul Forensic Medicine Institute and the oral evidence of Dr Bilge Kirangil before the Commission's Delegates.

36. Agit Salman suffered from a pre-existing heart disease. When he was arrested, he suffered minor injuries. The bruise on his chest, which was violet-coloured and therefore old, predated his arrest. During his detention in the custody area in Adana Security Directorate, he was not interrogated as the operation had not yet been completed. At about 01.00 hours, he called for assistance and told the custody officer that his heart was giving him problems. The custody officer sought help from the officers of the interrogating team who were waiting nearby for the next stage of the operation. These officers placed Agit Salman who was having difficulties breathing in police minivan and drove to hospital. On the way, they stopped the van and Mustafa Kayma briefly applied mouth-to-mouth resuscitation and cardiac massage. They took Agit Salman to the emergency ward, where they were told that he had died.

37. The autopsy and report from the İstanbul Forensic Medicine Institute established that Agit Salman had not suffered any major trauma, that the broken sternum was caused by cardiac massage and that he had died of natural causes, despite all possible assistance being given.

38. Dr Bilge Kirangil in her evidence before the Commission Delegates had given the opinion that the bruise on the chest was at least two to three days' old and unrelated with the broken sternum and that the oedema in the brain was indicative of a prolonged period of breathlessness prior to death. No findings could be drawn from the photographs which were amateur and of poor quality. She did not consider the lack of proper forensic photographs to be a very major deficiency. There had been no findings of ill-treatment in the Institute's report as there was no evidence of such. Cardiac arrest, as in this case, could be triggered by hormonal or environmental factors, such as extremes of temperature. If a direct blow had inflicted the bruise and fractured the sternum, she would have expected to see contusion and ecchymosis on the back surface of the sternum and bruising on the front and back surface of the right ventricle of the heart. While the lungs of an individual who had been breathless for 30 minutes could generally be

expected to increase to 500-600g, this was not necessarily the case but depended on the individual (see the summary of Dr Kirangil's evidence, Commission Report, §§ 233-241).

## C. The expert medical reports

### *1. Report of Professor Pounder submitted on 26 November 1996 on behalf of the applicants*

39. Professor Pounder was Professor of the Department of Forensic Medicine at the University of Dundee, and was, *inter alia*, a Fellow of the Royal College of Pathologists, Overseas Fellow of the Hong Kong college of Pathologists and a Fellow of the Faculty of Pathology of the Royal College of Physicians of Ireland, and a Fellow of the Royal College of Pathologists of Australasia. The report was drafted, *inter alia*, on the basis of the domestic autopsy documents and statements and testimony of witnesses. It may be summarised as follows.

40. The autopsy findings indicated that Agit Salman suffered from pre-existing natural disease of the heart, namely, chronic inflammation involving pericardial adhesions, which was old and inactive. In the distant past, he might have suffered from rheumatic heart disease, which would have manifested itself at that time as an acute febrile illness, without necessarily any symptoms of heart involvement. The heart was enlarged, weighing 550g, showing that the heart muscle had increased to compensate.

41. A heart with a weight greater than 500g might give rise to sudden unexpected death at any time as a consequence of an abnormality of heart rhythm. This might be precipitated by physical or emotional stress or occur apparently spontaneously without any precipitating event.

42. In addition to the disease of the heart, there were four injuries:

At the front of right armpit there were two abrasions each 3cm by 1cm described as dried and parchmented. It was not apparent that they were dissected to discover if there was any associated bruising but given the description it was reasonable to accept they were *post mortem* changes.

There were two grazes 1cm by 1cm on the front of the left ankle, described as fresh and bloody. It appeared that these must have been caused during the period of police detention but their location and size did not indicate any specific causation.

There was a bruise 5cm by 10cm in the centre of the front of the chest, described as old and as violet-coloured.

The sternum was fractured, with fresh bleeding in adjacent soft tissues.

43. The bruise to the chest directly overlaid the fracture to the sternum. The haemorrhage around the fracture suggested that the fracture was produced during life and not after death. The production of such a fracture would be sufficient to induce an abnormality in the rhythm of the underlying heart and thus cause a sudden death. Consequently, the fracture of the sternum represented a possible cause of death. While theoretically, a fracture could be produced by a fall, it would be unusual, requiring impact on a raised object or edge and it would be associated with injuries to other parts of the body. Cardiac massage could also produce a fracture if very considerable force was applied. The fracture could also have been produced by a blow. In that case, bruising of the skin would be expected, even if the death which followed was rapid. Though Dr Fatih Şen characterised the bruise on the chest as old and as by implication resulting from a different event, his own view was that, given the bruise directly overlaid the fracture, it would require compelling medical evidence to conclude that they were unrelated. Dr Şen's opinion on the age of the bruise was based on the subjective, naked eye assessment of the colour. However, the bruise was described as violet-coloured which was entirely consistent with a fresh bruise. A bruise 2-3 days old would have been expected to have developed a yellowish tinge. A simple histopathological test would have clearly established whether it was a fresh bruise or an old bruise. Such a bruise would not have occurred as a result of the hand pressure applied during cardiac massage. His opinion was that, given the contiguity of the bruise and fracture and the absence of any clear evidence that the bruise occurred at a separate occasion, the bruise and fracture occurred at the same time as a result of a blow, which precipitated an abnormality of heart rhythm.

44. The autopsy findings, in particular the lung weights (300g) which were close to minimum weight indicated that the death was very rapid rather than prolonged. In individuals dying slowly with gradual heart failure, a lung weight of 500-600g was common and up to 1000g could occur. This was the result of accumulation of fluid in the lungs consequent on the failure of the pumping action of the heart and was expressed clinically by breathlessness and difficulty in breathing. Deaths involving instantaneous collapse were associated with low lung weight as in this case. A relatively slow death would be associated also with a congested liver. Thus the autopsy findings and histopathological examination weighed heavily against

the possibility of a prolonged dying period with symptoms of breathlessness and pointed rather towards a rapid death.

45. As regarded the autopsy procedures, these were seriously deficient. Though the only two theoretical possibilities for the fracture were external heart massage or a blow, no steps were taken to establish conclusively whether or not massage had been performed. The statement in the autopsy that it could have been caused by massage did not represent a full and frank statement and may be misread to imply that Dr Şen had knowledge that such resuscitation was attempted whereas he did not. He should have distinguished fact from speculation. There was also a need to include as much descriptive detail concerning the bruise, the fracture and heart disease and in this respect the detail was manifestly inadequate.

*2. Additional Report of Professor Pounder submitted on 26 November 1996 on behalf of the applicant*

46. In the addendum of 26 November 1996, there was an analysis of the four photographs, which were described as being of poor quality. However, the photograph of the undersurfaces of the feet nonetheless showed a distinctive purple-red discolouration of the sole of the left foot, with mild swelling. The right little toe had a white glistening band at its base. The discolouration of the instep and sole of the left foot was strongly suggestive of bruising with associated minor swelling and was not consistent with *post mortem* gravitational pooling of blood. Bruising of this extent could not be produced as a result of *post mortem* injury and injury of such location was unlikely to be caused by a fall sustained in life. Therefore the injury was strongly suggestive of one or more blows to the foot. The mark to the right toe was strongly suggestive of a ligature mark, though there was no congestion of the toe to suggest tight application of a ligature in life nor was the appearance suggestive of the passage of electricity. Neither possibility could be excluded and the mark was unusual.

47. The red injuries to the front of the left ankle, taken with the injuries to the sole of the left foot, suggested that the ankles were restrained by a mechanism across the front of both ankles and that, so restrained, the person was struck on the sole of his left foot.

48. The marks in the right armpit were not clearly shown. Their position, alignment and colouration were not what would normally be expected of *post mortem* artefactual injury and raised the possibility of an electrical contact mark produced in life. Combined with the unusual marking to the

right little toe, it raised the suspicion of the use of electricity with one terminal tied round the little toe and the other terminal applied to the right armpit. Whether or not the marks were electrical burns could have been established by histopathological examination.

49. The photograph of the back showed *post mortem* artefactual staining, with white areas of contact pallor. There were distinct marks, including a bright red abrasion at the spine at waist level and above this two dark reddish marks. Above these was a horizontal line of pink bruising or abrasion. All these could be *post mortem*, caused by the manipulation of the body over a rough or edged surface. They could also have been *ante mortem* injuries. To distinguish the two would have required dissection.

50. The photographs indicated that the autopsy dissection was inadequate in that the back was not dissected, nor were the sole of the left foot or the injuries to the ankle. It was not clear whether the injury to the armpit was dissected. They also indicated that the description of the body in the autopsy was incomplete.

*3. Report of Professor Cordner submitted on 12 March 1998 on the request of the Commission*

51. This report was drawn up by Professor Cordner, instructed by the Commission's Delegates (see paragraph 6 above), on the basis of the domestic medical evidence, the witness testimonies, the reports of Professor Pounder and the photographs supplied by the applicant.

52. As regarded the photographs, the variation in colours or mottling on the foot represented bruising. He considered that the photograph was too blurred to conclude that the white glistening band on the little right toe was associated with a ligature nor could he reach any conclusion that the appearance of the marks in the right arm pit were the result of the application of electrical devices. On the legs, he noted in addition to the marks which could correspond to the abrasions on the left ankle, small areas of reddening on the front and inner aspect of the right ankle. He agreed with Professor Pounder's findings on the back and noted in addition other areas of redness. Without the benefit of a dissection and/or histology of the dissection, the nature of the marks was uncertain. They could represent *ante* or *post mortem* phenomena. Bruising of the soles of the feet was relatively unusual and represented at least moderately severe force. Beating on the

sole of the foot could cause such bruising. A person with such an injury would not be able to walk without at least an obvious limp.

53. As regarded the ageing of the chest bruise, recent authors in forensic medicine agreed that caution should be exercised. It was not practicable to construct an accurate calendar of colour changes as was done in earlier textbooks as there were too many variables. If the violet colour of the chest bruise was relied on to distinguish its age from the "fresh" haemorrhage around the sternal fracture, this was an invalid conclusion. The materials did not permit a distinction in age to be drawn between the two. A recent study issued to show the level of disagreement amongst authors concluded that the only point of agreement was that a bruise with identifiable yellowing was more than 18 hours old. Thus, the violet coloured bruise could be fresh (i.e. less than 24 hours old) but could be older.

54. Concerning the broken sternum, there had been no complaint of chest pain so one could infer that it occurred shortly before or around the time of death. His view was that there was a coincidence of two injuries (the bruise and the fracture) which could not be distinguished in age or there was one injury. If there was no chest bruise when Agit Salman was taken into custody the issue was relatively easily resolved. Most pathologists would tend to regard them, *prima facie*, as one injury or state that it was a rebuttable presumption that they were one injury. As regarded the possibility of the bruising and fractured sternum being caused by resuscitation, significant chest bruising was rare in this context. Sternal fractures caused by CPR were usually associated with fractured ribs and not associated with surrounding haemorrhage or overlying bruising. If the chest bruise and fracture with associated haemorrhage were the result of one trauma, it was not a resuscitation associated trauma. A fracture from a fall onto a flat surface would be unusual. A heavy direct fall onto a relatively smooth broad protrusion could cause such an injury but he had no recollection of having seen this as an isolated accidental injury (ie. without injuries to other parts of the body occurring at the same time). A blow from a fist, knee or foot could also cause such an injury.

55. Lungs with oedema sufficient to be regarded as a sign of heart failure and to cause breathlessness of 20-30 minutes weighed more than 300g. The lung weights in this case fitted with a substantially more rapid

death. The oedema found in the brain was not significant, the average brain weight for a man of his age being slightly more.

56. The finding of underlying heart disease was undisputed. In his view, the best explanation for the death was as follows. In life, Agit Salman sustained significant trauma to the sole of his left foot and to the front of his chest, causing bruising and *prima facie* fracturing the sternum and causing a surrounding haemorrhage. Fear and pain associated with these events resulted in a surge of adrenalin increasing the heart rate and raising blood pressure. This put a severe strain on an already compromised heart which caused cardiac arrest and a rapid death. Alternatively, the compression of the chest associated with the fracturing of the sternum fatally disturbed the rhythm of the heart without leaving observable damage. The weakness in this opinion lay in the conclusion that the chest injuries represented one rather than two trauma, which depended partly on circumstantial factors and could not be completely resolved. However, even allowing for the possibility that they were separate injuries, the chest bruise could still be regarded as fresh and as having occurred while in custody, in which circumstances the formal cause of death would not differ - cardiac arrest in a man with heart disease following the occurrence of injuries to the left foot and chest. If the fractured sternum was regarded as resuscitation injury, the cause of death would only change if it was concluded that the bruise occurred prior to being taken into custody.

57. The critical task of an autopsy in this case was to evaluate the circumstances in which it was proposed that this man died, in particular, whether it was a natural death in custody or not. In this evaluation, the age of the chest bruise was critical. Even allowing for Dr Şen's view of the age based on colour, the autopsy should have been conducted in a way which allowed another pathologist at another time to come to his or her own view. Important observations had to be justified objectively. In the absence of photographs, histology was the obvious way for Dr Şen to establish the truth of his view. The lack of proper photography had also seriously impeded the investigation and evaluation of this case. Deficiencies also appeared in the insufficient subcutaneous dissection to seek out bruises not visible externally and a failure to take histology of lesions critical to the proper evaluation of the circumstances of the death.

58. Professor Cordner had met Professor Pounder professionally. He had not met either Dr Kirangil or Dr Şen.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

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

### A. Criminal prosecutions

60. Under the Criminal Code all forms of homicide (Articles 448 to 455) and attempted homicide (Articles 61 and 62) constitute criminal offences. It is also an offence for a government employee to subject some-one to torture or ill-treatment (Article 243 in respect of torture and Article 245 in respect of ill-treatment). The authorities' obligations in respect of conducting a preliminary investigation into acts or omissions capable of constituting such offences that have been brought to their attention are governed by Articles 151 to 153 of the Code of Criminal Procedure. Offences may be reported to the authorities or the security forces as well as to public prosecutor's offices. The complaint may be made in writing or orally. If it is made orally, the authority must make a record of it (Article 151).

If there is evidence to suggest that a death is not due to natural causes, members of the security forces who have been informed of that fact are required to advise the public prosecutor or a criminal court judge (Article 152). By Article 235 of the Criminal Code, any public official who fails to report to the police or a public prosecutor's office an offence of which he has become aware in the exercise of his duty is liable to imprisonment.

A public prosecutor who is informed by any means whatsoever of a situation that gives rise to the suspicion that an offence has been committed is obliged to investigate the facts in order to decide whether or not there should be a prosecution (Article 153 of the Code of Criminal Procedure).

61. 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.

62. If the suspected offender is a civil servant and if the offence was committed during the performance of his duties, the preliminary investigation of the case is governed by the Law of 1914 on the prosecution of civil servants, which restricts the public prosecutor's jurisdiction *ratione personae* at that stage of the proceedings. In such cases it is for the relevant local administrative council (for the district or province, depending on the

suspect's status) to conduct the preliminary investigation and, consequently, to decide whether to prosecute. Once a decision to prosecute has been taken, it is for the public prosecutor to investigate the case.

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

63. By virtue of Article 4, paragraph (i), of Legislative Decree no. 285 of 10 July 1987 on the authority of the governor of a state of emergency region, the 1914 Law (see paragraph 62 above) also applies to members of the security forces who come under the governor's authority.

64. If the suspect is a member of the armed forces, the applicable law is determined by the nature of the offence. Thus, if it is a "military offence" under the Military Criminal Code (Law no. 1632), the criminal proceedings are in principle conducted in accordance with Law no. 353 on the establishment of courts martial and their rules of procedure. Where a member of the armed forces has been accused of an ordinary offence, it is normally the provisions of the Code of Criminal Procedure which apply (see Article 145 § 1 of the Constitution and sections 9 to 14 of Law no. 353).

The Military Criminal Code makes it a military offence for a member of the armed forces to endanger a person's life by disobeying an order (Article 89). In such cases civilian complainants may lodge their complaints with the authorities referred to in the Code of Criminal Procedure (see paragraph 60 above) or with the offender's superior.

### B. Civil and administrative liability arising out of criminal offences

65. Under section 13 of Law no. 2577 on administrative procedure, anyone who sustains damage as a result of an act by the authorities may, within one year after the alleged act was committed, claim compensation from them. If the claim is rejected in whole or in part or if no reply is received within sixty days, the victim may bring administrative proceedings.

66. Article 125 §§ 1 and 7 of the Constitution provides:

> "All acts or decisions of the authorities are subject to judicial review ...
>
> The authorities shall be liable to make reparation for all damage caused by their acts or measures."

That provision establishes the State's strict liability, which comes into play if it is shown that in the circumstances of a particular case the State has failed in its obligation to maintain public order, ensure public safety or protect people's lives or property, without it being necessary to show a

tortious act attributable to the authorities. Under these rules, the authorities may therefore be held liable to compensate anyone who has sustained loss as a result of acts committed by unidentified persons.

67. 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 66 above), provides:

> "No criminal, financial or legal liability may be asserted against ... the governor of a state of emergency region or by provincial governors in that region in respect of decisions taken, or acts performed, by them in the exercise of the powers conferred on them by this legislative decree, and no application shall be made to any judicial authority to that end. This is without prejudice to the rights of individuals to claim reparation from the State for damage which they have been caused without justification."

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

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

## III. RELEVANT INTERNATIONAL REPORTS

### A. Investigations by the European Committee for the Prevention of Torture (CPT)

69. The European Committee for the Prevention of Torture (CPT) has carried out seven visits to Turkey. The two first visits in 1990 and 1991 were *ad hoc* visits considered necessary in light of the considerable number

of reports received from a variety of sources, containing allegations of torture or other forms of ill-treatment of persons deprived of their custody, in particular, relating to those held in police custody. A third periodic visit took place at the end of 1992, involving a visit to Adana Security Directorate. Further visits took place in October 1994, August and September 1996 and October 1997 (the latter two of which involved a visit to police establishments in Adana). The CPT's reports on these visits, save that which occurred in October 1997, have not been made public, such publication requiring the consent of the State concerned, which has not been forthcoming.

70. The CPT has issued two public statements.

71. In its public statement adopted on 15 December 1992, the CPT concluded that torture and other forms of severe ill-treatment were important characteristics of police custody. On its first visit in 1990, the following types of ill-treatment were constantly alleged, namely, palestinian hanging, electric shocks, beating of the soles of the feet ("falaka"), hosing with pressurised cold water and incarceration in very small, dark, unventilated cells. Its medical examinations disclosed clear medical signs consistent with very recent torture and other severe ill-treatment of both a physical and psychological nature. The on-site observations in police establishments revealed extremely poor material conditions of detention.

On its second visit in 1991, it found no progress had been made in eliminating torture and ill-treatment by the police. Many persons made complaint of similar types of ill-treatment - an increasing number of allegations were heard of forcible penetration of bodily orifices with a stick or truncheon. Once again, a number of the persons making such claims were found on examination to display marks or conditions consistent with their allegations. On its third visit from 22 November to 3 December 1992, its delegation was inundated with allegations of torture and ill-treatment. Numerous persons examined by its doctors displayed marks or conditions consistent with their allegations. It listed a number of these cases. On this visit, the CPT had visited Adana, where a prisoner at Adana prison displayed haematomas on the soles of his feet and a series of vertical violet stripes (10cm long, 2cm wide) across the upper part of his back, consistent with his allegation that he had recently been subjected to falaka and beaten on the back with a truncheon while in police custody. In Ankara police

headquarters and Diyarbakır police headquarters, it found equipment consistent with use in torture and the presence of which had no other credible explanation. The CPT concluded in its statement that "the practice of torture and other forms of severe ill-treatment of persons in police custody remains widespread in Turkey".

72. In its second public statement issued on 6 December 1996, the CPT noted that some progress had been made over the intervening four years. However, its findings after its visit in 1994 demonstrated that torture and other forms of ill-treatment were still important characteristics of police custody. In the course of visits in 1996, CPT delegations once again found clear evidence of the practice of torture and other forms of severe ill-treatment by police. It referred to its most recent visit in September 1996 to police establishments in Adana, Bursa and Istanbul, when it also went to three prisons in order to interview certain persons who had very recently been in police custody in Adana and Istanbul. A considerable number of persons examined by the delegations' forensic doctors displayed marks or conditions consistent with their allegations of recent ill-treatment by the police, and in particular of beating of the soles of the feet, blows to the palms of the hands and suspension by the arms. It noted the cases of seven persons who had been very recently detained at the Anti-Terror Department at Istanbul Police Headquarters which ranked among the most flagrant examples of torture encountered by CPT delegations in Turkey. They showed signs of prolonged suspension by the arms, with impairments in motor function and sensation which, in two persons, who had lost the use of both arms, threatened to be irreversible. It concluded that resort to torture and other forms of severe ill-treatment remained a common occurrence in police establishments in Turkey.

### B. The United Nations Model Autopsy Protocol

73. The Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions adopted by the United Nations in 1991 includes a Model Autopsy Protocol aimed at providing authoritative guidelines for the conduct of autopsies by public prosecutors and medical personnel. In its introduction, it noted that an abridged examination or report was never appropriate in potentially controversial cases and that a

systematic and comprehensive examination and report were required to prevent the omission or loss of important details:

> "It is of the utmost importance that an autopsy performed following a controversial death be thorough in scope. The documentation and recording of those findings should be equally thorough so as to permit meaningful use of the autopsy results."

74. In part 2(c), it stated that adequate photographs were crucial for thorough documentation of autopsy findings. Photographs should be comprehensive in scope and confirm the presence of all demonstrable signs of injury or disease commented upon in the autopsy report.

## PROCEEDINGS BEFORE THE COMMISSION

75. Mrs Behiye Salman applied to the Commission on 20 May 1993. She alleged that her husband, Mr Agit Salman had died as a result of being tortured while in police custody. She relied on Articles 2, 3, 6, 13, 14 and 18 of the Convention. In the course of the proceedings before the Commission, the applicant further alleged that she had been hindered in the effective exercise of the right of individual petition as guaranteed by former Article 25 § 1 of the Convention.

76. The Commission declared the application (no. 21986/93) admissible on 20 February 1995. In its report of 1 May 1999 (former Article 31), it expressed the opinion unanimously that there had been a violation of Article 2 on account of the death in custody of the applicant's husband; that there had been a violation of Article 3 in that her husband had been tortured; that there had been a violation of Article 13; that there had been no violations of Articles 14 and 18; and that Turkey had failed to comply with its obligations under former Article 25. The full text of the Commission's opinion is reproduced as an annex to this judgment[1].

## FINAL SUBMISSIONS TO THE COURT

77. The applicant requested the Court in her memorial to find that the respondent State was in violation of Articles 2, 3, 13, and former Article 25 § 1 of the Convention. She requested the Court to award her just satisfaction under Article 41.

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[1]. *Note by the Registry*. For practical reasons this annex will appear only with the final printed version of the judgment (in the official reports of selected judgments and decisions of the Court), but a copy of the Commission's report is obtainable from the Registry.

78. The Government requested the Court to dismiss the case as inadmissible on account of the applicant's failure to exhaust domestic remedies. In the alternative, they argued that the applicant's complaints were not substantiated by the evidence.

## AS TO THE LAW

### I. THE GOVERNMENT'S PRELIMINARY OBJECTION

79. The Government objected that the applicant had not exhausted domestic remedies, as required by Article 35 of the Convention, by making proper use of the available redress through the instituting of criminal proceedings, or by bringing claims in the civil or administrative courts. They referred to the Court's upholding of their preliminary objection in the Aytekin case (the Aytekin v. Turkey judgment of 23 September 1998, *Reports* 1998-VII, p. 2807).

The Government maintained that the applicant had been a party to the criminal proceedings brought against the police officers accused of torturing her husband and causing his death and that she had failed to appeal to the Court of Cassation against their acquittal. The Court of Cassation had previously quashed the decision not to prosecute the officers and could not be considered as an ineffective remedy. The applicant could also have obtained from domestic judicial bodies the compensation for pecuniary and non-pecuniary damage which she sought in the present proceedings.

80. The applicant's counsel submitted at the hearing that the applicant's appeal against the decision not to prosecute had been rejected before she introduced her complaints before the Commission. The procedure whereby the Minister of Justice referred the case to the Court of Cassation, which sent the case for trial, was an extraordinary remedy which the applicant was not required to exhaust. She also submitted that a further appeal would have served no purpose in light of the inadequate investigation and lack of evidence before the courts.

81. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 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 35 § 1 also requires that the complaints intended to be brought subsequently before the Court 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, and the Akdivar and Others v. Turkey judgment of 16 September 1996, *Reports* 1996-IV, p. 1210, §§ 65-67).

82. The Court notes that Turkish law provides administrative, civil and criminal remedies against illegal and criminal acts attributable to the State or its agents (see paragraphs 59 et seq. above).

83. With respect to an action in administrative law under Article 125 of the Constitution based on the authorities' strict liability (see paragraphs 65 and 66 above), the Court recalls that a Contracting State's obligation under Articles 2 and 13 of the Convention to conduct an investigation capable of leading to the identification and punishment of those responsible in cases of fatal assault might be rendered illusory if in respect of complaints under those Articles an applicant were to be required to exhaust an administrative-law action leading only to an award of damages (see the Yaşa v. Turkey judgment of 2 September 1998, *Reports* 1998-VI, p. 2431, § 74).

Consequently, the applicant was not required to bring the administrative proceedings in question and the preliminary objection is in this respect unfounded.

84. 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 68 above), the Court notes that a plaintiff in such an action must, in addition to establishing a causal link between the tort and the damage he or she has sustained, identify the person believed to have committed the tort. In the instant case, no evidence was forthcoming as to which police officer was responsible for the ill-treatment which was alleged by the applicant to have been inflicted on her husband and indeed, the report from the İstanbul Forensic Medicine Institute, the highest authority in the country, did not establish that any unlawful acts had occurred (see paragraph 24 above).

85. With regard to the criminal-law remedies (paragraphs 60-62 above), the Court notes that the applicant appealed unsuccessfully against the decision not to prosecute the police officers involved in her husband's detention. The procedure whereby the Minister of Justice referred the case to the Court of Cassation was an extraordinary remedy, which must normally be considered as falling outside the scope of Article 35 § 1 of the Convention. It is however the case that the applicant acted as a party in the proceedings which followed the Court of Cassation's decision to send the case for trial. The trial terminated in an acquittal of the police officers on the basis that there was insufficient evidence to establish that they had ill-treated her husband prior to his death or to establish that he had died because of ill-treatment. This was also the basis for the public prosecutor's original decision not to prosecute. The applicant has argued that in these

circumstances a further appeal had no reasonable prospect of success and cannot be regarded as a requirement of the principle of exhaustion of domestic remedies.

86. The Court emphasises that the application of the rule of exhaustion of domestic remedies 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 States have agreed to set up. Accordingly, it has recognised that Article 35 § 1 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 State 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 or her to exhaust domestic remedies (see the Akdivar and Others judgment cited above, p. 1211, § 69, and the Aksoy judgment cited above, p. 2276, §§ 53 and 54).

87. The Court considers that the limb of the Government's preliminary objection concerning civil and criminal remedies raises issues concerning the effectiveness of the criminal investigation that are closely linked to those raised in the applicant's complaints under Articles 2, 3 and 13 of the Convention. It also observes that this case differs from the Aytekin case relied on by the Government, as in that case, the soldier who had shot the applicant's husband had been convicted of unintentional homicide by the Batman Criminal Court. The appeal which was pending before the Court of Cassation concerned both the applicant's and the public prosecutor's claims that he should have been convicted of a more serious degree of homicide. In those circumstances, it could not be said that the investigation conducted by the authorities did not offer reasonable prospects of bringing the person responsible for the death of her husband to justice (Aytekin v. Turkey judgment cited above, p. 2827, § 83).

88. Consequently, the Court dismisses the Government's preliminary objection in so far as it relates to the administrative remedy relied on (see paragraph 83 above). It joins the preliminary objection concerning remedies in civil and criminal law to the merits (see paragraphs 104-109 below).

## II. THE COURT'S ASSESSMENT OF THE FACTS

89. The Court reiterates its settled case-law that under the Convention system prior to 1 November 1998 the establishment and verification of the facts was primarily a matter for the Commission (former Articles 28 § 1

and 31). While the Court is not bound by the Commission's findings of fact and remains free to make its own assessment in the light of all the material before it, it is however only in exceptional circumstances that it will exercise its powers in this area (see, among other authorities, the Akdivar and Others v. Turkey judgment, cited above, p. 1218, § 78).

90. The facts in dispute between the parties are closely linked to issues of Government responsibility for the treatment and death of Agit Salman while in police custody. The Court will examine together the factual and legal questions as they are relevant to the applicant's complaints under Articles 2, 3 and 13 of the Convention set out below.

## III. ALLEGED VIOLATIONS OF ARTICLE 2 OF THE CONVENTION

91. The applicant alleged that her husband, Agit Salman, had died as a result of torture at the hands of police officers at Adana Security Directorate. She also complained that no effective investigation had been conducted into the circumstances of the murder. She argued that 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."

92. The Government disputed those allegations. The Commission expressed the opinion that Article 2 had been infringed on the ground that Agit Salman had died following torture in police custody and also on the ground that the authorities had failed to carry out an adequate criminal investigation into the circumstances surrounding the death of Agit Salman.

### A. Submissions of those who appeared before the Court

#### *1. The applicant*

93. The applicant submitted that her husband had been killed while in custody. The weight of the medical evidence established that he had been subject to force which had led to cardiac arrest. The authorities had been

unable to provide any satisfactory explanation as to how Agit Salman had died but had developed a story clearly designed to cover up the truth. She submitted that where an individual was taken into custody in good health and died that death must be attributable to the actions of the authorities in the absence of a plausible explanation. No such explanation had been provided for the chest bruise, the broken sternum, the bruising to the left foot, the grazes on the left ankle and the wounds to the armpit.

94. The applicant also asked the Court to endorse the Commission's opinion that there had been a violation of Article 2 of the Convention on the ground that the investigation into the death of her husband had been so inadequate and ineffective as to amount to a failure to protect the right to life. In particular, the investigation was ineffective in providing the necessary medical evidence concerning Agit Salman. For example, there was a lack of histopathological analysis of bruises and no forensic photographs were taken contrary to the recommendations of the United Nations Model Autopsy Protocol (see paragraphs 73-74). Both Dr Şen and the İstanbul Forensic Medicine Institute drew subjective conclusions without giving equal weight to the possible causes which cast a negative light on the authorities. Similarly, the public prosecutors made no efforts to test the veracity of police officers' statements or ensure necessary evidence for criminal proceedings was obtained.

*2. The Government*

95. The Government maintained that the applicant's allegations were unfounded. The autopsy and İstanbul Forensic Medicine Institute report established that Agit Salman died of a cardiac arrest brought on by the excitement surrounding his apprehension and detention. He suffered breathlessness in his cell and was taken to the hospital by police officers, who tried to resuscitate him en route causing the broken sternum. The allegations that he suffered torture are unsubstantiated and based on unreliable photographs and speculations of doctors who did not examine the body. They emphasised that the İstanbul Forensic Medicine Institute was a body of the highest professional excellence and their findings could not be placed in doubt.

96. The Government contended that the investigation was adequate and effective. Statements were taken from all relevant witnesses and officials and all appropriate medical and forensic examinations were performed, including the verification of the cause of death by obtaining an expert opinion from the İstanbul Forensic Medicine Institute. The Ministry of Justice referred the case to the Court of Cassation, which quashed the decision not to prosecute the police officers and sent the case for trial. The

evidence was examined by the court which acquitted the officers. All necessary steps had therefore been taken in investigating the incident.

## B. The Court's assessment

### *1. The death of Agit Salman*

97. Article 2, which safeguards the right to life and sets out the circumstances when deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention, to which no derogation is permitted. Together with Article 3, it also enshrines one of the basic values of the democratic societies making up the Council of Europe. The circumstances in which deprivation of life may be justified must therefore be strictly construed. The object and purpose of the Convention as an instrument for the protection of individual human beings also requires that Article 2 be interpreted and applied so as to make its safeguards practical and effective (see the McCann and Others v. the United Kingdom judgment of 27 September 1995, Series A no. 324, pp. 45-46, §§ 146-147).

98. The text of Article 2, read as a whole, demonstrates that it covers not only intentional killing but also the situations where it is permitted to "use force" which may result, as an unintended outcome, in the deprivation of life. The deliberate or intended use of lethal force is only one factor however to be taken into account in assessing its necessity. Any use of force must be no more than "absolutely necessary" for the achievement of one or more of the purposes set out in sub-paragraphs (a) to (c). This term indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is "necessary in a democratic society" under paragraphs 2 of Articles 8 to 11 of the Convention. Consequently, the force used must be strictly proportionate to the achievement of the permitted aims (the McCann judgment, cited above, p. 46, §§ 148-149).

99. In the light of the importance of the protection afforded by Article 2, the Court must subject deprivations of life to the most careful scrutiny, taking into consideration not only the actions of State agents but also all the surrounding circumstances. Persons in custody are in a vulnerable position and the authorities are under a duty to protect them. Consequently, where an individual is taken into police custody in good health and is found to be injured on release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused (see, amongst other authorities, Selmouni v. France judgment of 28 July 1999, to be published in *Reports* 1999-..., § 87). The obligation on the authorities to account for the treatment of an individual in custody is particularly stringent where that individual dies.

100. In assessing evidence, the general principle applied in cases has been to apply the standard of proof "beyond reasonable doubt" (see Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, § 161). However, such proof may follow from the co-existence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation.

101. The Court finds that the Commission's evaluation of the facts in this case accords with the above principles.

102. Agit Salman was taken into custody in apparent good health and without any pre-existing injuries or active illness. No plausible explanation has been provided for the injuries to the left ankle, bruising and swelling of the left foot, the bruise to the chest and the broken sternum. The evidence does not support the Government's contention that injuries might have been caused on arrest nor that the broken sternum was caused by cardiac massage. The opinion of Dr Birangil that the chest bruise pre-dated the arrest and that Agit Salman died of a heart attack brought on by the stress of his detention alone and after a prolonged period of breathlessness was rebutted by the evidence of Professors Pounder and Cordner. In accepting their evidence as to rapidity of the death and the probability that the bruise and broken sternum were caused by the same event, a blow to the chest, the Commission did not fail to accord Dr Birangil's evidence proper weight nor gave undue preference to the evidence of Professors Cordner and Pounder. It may be observed that Dr Birangil signed the İstanbul Forensic Medicine Institute report which was in issue before the Commission and on that basis could not claim to be either objective or independent. There is no substance moreover in the allegations of collusion between the two professors made by the Government Agent at the hearing.

103. The Court finds therefore that the Government have not accounted for the death of Agit Salman by cardiac arrest during his detention at Adana Security Directorate and that their responsibility for his death is engaged.

It follows that there has been a violation of Article 2 in that respect.

*2. Alleged inadequacy of the investigation*

104. The Court reiterates that the obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see, *mutatis mutandis*, the McCann and Others v. the United Kingdom judgment of 27 September 1995, Series A no. 324, p. 49, § 161, and the Kaya v. Turkey judgment of 19 February 1998, *Reports* 1998-I, p. 329, § 105).

105. In that connection, the Court points out that the obligation mentioned above is not confined to cases where it is apparent that the killing was caused by an agent of the State. The applicant and the father of the deceased lodged a formal complaint about the death with the competent investigation authorities, alleging that it was the result of torture. Moreover, the mere fact that the authorities were informed of the death in custody of Agit Salman gave rise *ipso facto* to an obligation under Article 2 to carry out an effective investigation into the circumstances surrounding the death (see, *mutatis mutandis*, the Ergi v. Turkey judgment of 28 July 1998, *Reports* 1998-IV, p. 1778, § 82, and the Yaşa judgment cited above, p. 2438, § 100). This involves, where appropriate, an autopsy which provides a complete and accurate record of possible signs of ill-treatment and injury and an objective analysis of clinical findings, including the cause of death.

106. Turning to the particular circumstances of the case, the Court observes that the autopsy investigation was of critical importance in determining the facts surrounding Agit Salman's death. The difficulties experienced by the Commission in establishing any of those facts, elements of which were still disputed by the parties before the Court, derives in a large part from the failings in the *post mortem* medical examination. In particular, the lack of proper forensic photographs of the body and the lack of dissection and histopathological analysis of the injuries and marks on the body, obstructed the accurate analysis of the dating and origin of those marks, which was crucial to establishing whether Agit Salman's death had been provoked by ill-treatment in the 24 hours preceding his death. The unqualified assumption by Dr Şen that the broken sternum could have been caused by cardiac massage was included in his report without seeking any verification as to whether such massage had been applied and was in the circumstances misleading. The examination of Dr Şen's findings by the İstanbul Forensic Medicine Institute did not remedy these shortcomings. It compounded them by confirming that the autopsy disclosed that Agit

Salman had died of a heart attack provoked by a combination of a pre-existing heart disease and the excitement of his apprehension.

107. The lack of medical support for the applicant's allegations of torture was the basis for the public prosecutor's decision of 19 October 1992 not to prosecute and the Adana Assize Court's decision of 26 December 1994 to acquit the police officers. The Court considers that the defects in the autopsy investigation fundamentally undermined any attempt to determine police responsibility for Agit Salman's death. Furthermore, the indictment named indiscriminately all the officers known to have come in to contact with Agit Salman from his arrest to his death, including the three custody officers on duty over the period. No evidence was adduced concerning the more precise identification of the officers who did, or could have, ill-treated Agit Salman.

108. In these circumstances, an appeal to the Court of Cassation, which would only have had the power to remit the case for reconsideration by the first instance court, had no effective prospect of clarifying or improving the evidence available. The Court is not persuaded therefore that the appeal nominally available to the applicant in the criminal law proceedings would have been capable of altering to any significant extent the course of the investigation that was made. That being so, the applicant must be regarded as having complied with the requirement to exhaust the relevant criminal-law remedies.

109. The Court concludes that the authorities failed to carry out an effective investigation into the circumstances surrounding Agit Salman's death. This rendered recourse to civil remedies equally ineffective in the circumstances. It accordingly dismisses the criminal and civil proceedings limb of the Government's preliminary objection (see paragraphs 84-88 above) and holds that there has been a violation of Article 2 in this respect.

## IV. ALLEGED VIOLATIONS OF ARTICLE 3 OF THE CONVENTION

110. The applicant complained that her husband was tortured before his death. She invoked Article 3 of the Convention which provides:

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

111. The applicant submitted that her husband was subjected to treatment amounting to torture whilst in the custody of Adana Security Directorate. She relied on the marks on his feet and ankles as showing that he had been subjected to "falaka". He had also received a blow to the chest powerful enough to break the sternum. No other plausible explanation for the injuries on his body had been forthcoming from the authorities. She further argued that the claim that he had been tortured had never been

properly investigated by the authorities in violation of the procedural aspect of Article 3 of the Convention.

112. The Government denied that there was any sign of torture revealed by the medical evidence. They also disputed that there were any failings in the investigation.

113. The Court has found above that the Government have not provided a plausible explanation for the marks and injuries found on Agit Salman's body after he had entered custody in apparent good health (see paragraph 102 above). Moreover, the bruising and swelling on the left foot combined with the grazes on the left ankle were consistent with the application of "falaka", which the European Committee for the Prevention of Torture (CPT) reported was one of the forms of ill-treatment in common use, *inter alia*, in the Adana Security Directorate. It was not likely to have been caused accidentally. The bruise to the chest overlying a fracture in the sternum was also more consistent with a blow to the chest than a fall. These injuries, unaccounted for by the Government, must therefore be considered attributable to a form of ill-treatment for which the authorities were responsible.

114. In determining whether a particular form of ill-treatment should be qualified as torture, consideration must be given to the distinction, embodied in Article 3, between this notion and that of inhuman or degrading treatment. As noted in previous cases, it appears that it was the intention that the Convention should, by means of this distinction, attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering (see the Ireland v. the United Kingdom judgment cited above, p. 66, § 167). In addition to the severity of the treatment, there is a purposive element as recognised in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which came into force on 26 June 1987, which defines torture in terms of the intentional infliction of severe pain or suffering with the aim, *inter alia*, of obtaining information, inflicting punishment or intimidating (Article 1 of the UN Convention).

115. Having regard to the nature and degree of the ill-treatment ("falaka" and a blow to the chest) and to the strong inferences that can be drawn from the evidence that it occurred during interrogation about Agit Salman's suspected participation in PKK activities, the Court finds that it involved very serious and cruel suffering that may be characterised as torture (see also the Selmouni v. France judgment of 28 July 1999, to be published in *Reports* 1999-..., §§ 96-105).

116. The Court concludes that there has been a breach of Article 3 of the Convention.

117. It does not deem it necessary to make a separate finding under Article 3 of the Convention in respect of the alleged deficiencies in the investigation.

## V. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

118. The applicant complained that she has not had an effective remedy within the meaning of Article 13 of the Convention, which provides:

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

119. The Government argued that the investigation into the incident and the prosecution and trial of the police officers provided an effective remedy into the applicant's allegations. Furthermore, she had failed to avail herself of the possibility of appeal against the acquittal of the police officers and had therefore not made use of the available effective remedies.

120. The Commission, with whom the applicant agreed, was of the opinion that the investigation and criminal trial were rendered ineffective by the inadequate forensic investigation. The applicant also contended that the attempt of the authorities to concoct a story to conceal what had occurred gave rise to a serious aggravation of the violation of Article 13 in this case.

121. The Court reiterates that Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State (see the Aksoy judgment cited above, p. 2286, § 95; Aydın v. Turkey judgment of 25 September 1997, pp. 1895-96, § 103; and the Kaya judgment cited above, pp. 329-30, § 106).

Given the fundamental importance of the right to protection of life, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life

and including effective access for the complainant to the investigation procedure (see the Kaya judgment cited above, pp. 330-31, § 107).

122. On the basis of the evidence adduced in the present case, the Court has found that the Government are responsible under Articles 2 and 3 of the Convention for the death and torture in custody of the applicant's husband. The applicant's complaints in this regard are therefore "arguable" for the purposes of Article 13 (see the Boyle and Rice v. the United Kingdom judgment of 27 April 1988, Series A no. 131, p. 23, § 52, and the Kaya and Yaşa judgments cited above, § 107 and p. 2442, § 113 respectively).

123. The authorities thus had an obligation to carry out an effective investigation into the circumstances of the death of the applicant's husband. For the reasons set out above (see paragraphs 104-109), no effective criminal investigation can be considered to have been conducted in accordance with Article 13, the requirements of which may be broader than the obligation to investigate imposed by Article 2 (see the Kaya judgment cited above, pp. 330-31, § 107). The Court finds therefore that the applicant has been denied an effective remedy in respect of the death of her husband and thereby access to any other available remedies at her disposal, including a claim for compensation.

Consequently, there has been a violation of Article 13 of the Convention.

## VI. ALLEGED PRACTICE BY THE AUTHORITIES OF INFRINGING ARTICLES 2, 3 AND 13 OF THE CONVENTION

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

125. Having regard to its findings under Articles 2, 3 and 13 above, the Court does not find it necessary to determine whether the failings identified in this case are part of a practice adopted by the authorities.

## VII. ALLEGED VIOLATION OF FORMER ARTICLE 25 OF THE CONVENTION

126. Finally, the applicant complained that she had been subject to serious interference with the exercise of her right of individual petition, in breach of former Article 25 § 1 of the Convention (now replaced by Article 34), which provided:

"The Commission may receive petitions addressed to the Secretary General of the Council of Europe from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in [the] Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognises the competence of the Commission to receive such petitions. Those of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right."

127. The applicant submitted that she was called three times by the authorities. On the first occasion, she was blindfolded, beaten and forced to sign a document and told explicitly to drop her case before the Commission, On the second two occasions, she was questioned at length about her application for legal aid to the Commission. She submitted that this disclosed an interference with the free exercise of her right of individual petition.

128. The Commission, whose Delegates heard evidence from the applicant, accepted that she had been summoned on at least two occasions. This was substantiated by the documents provided by the Government which showed that officers of the Anti-Terror Department had questioned her about her application, and not merely her legal aid claim. The Commission also found that her claims that she had been blindfolded, struck and kicked at the Anti-Terror Department were credible and substantiated though it did not make any specific finding of ill-treatment insofar as any questioning of an applicant about her application by the police was, in its view, incompatible with the State's obligations under former Article 25 of the Convention.

129. The Government asserted that the applicant was contacted by the authorities in order to verify her declaration of means submitted in her application for legal aid before the Commission. She was asked only about her possessions and income and not subjected to any intimidation or pressure. In any event, she could not seriously claim to have been intimidated as she had been free to pursue the domestic proceedings against the police officers without any hindrance or fear.

130. The Court reiterates that it is of the utmost importance for the effective operation of the system of individual petition instituted by former Article 25 (now replaced by Article 34) that applicants or potential applicants should be able to communicate freely with the Convention organs without being subjected to any form of pressure from the authorities to withdraw or modify their complaints (see the Akdivar and Others judgment, cited above, p. 1219, § 105; the Aksoy judgment cited above, p. 2288, § 105; the Kurt v. Turkey judgment of 25 May 1998, *Reports* 1998-III, p. 1192, § 159; and Ergı v. Turkey judgment cited above, p. 1784, § 105). In this context, "pressure" includes not only direct coercion and flagrant acts of intimidation but also other improper indirect acts or contacts

designed to dissuade or discourage applicants from pursuing a Convention remedy (see the above mentioned Kurt judgment, *loc. cit.*).

Furthermore, whether or not contacts between the authorities and an applicant are tantamount to unacceptable practices from the standpoint of former Article 25 § 1 must be determined in the light of the particular circumstances of the case. In this respect, regard must be had to the vulnerability of the complainant and his or her susceptibility to influence exerted by the authorities (see the Akdivar and Others and Kurt judgments cited above, p. 1219, § 105 and pp. 1192-93, § 160 respectively). In previous cases, the Court has had regard to the vulnerable position of applicant villagers and the reality that in south-east Turkey complaints against the authorities might well give rise to a legitimate fear of reprisals, and it has found that the questioning of applicants about their applications to the Commission amounts to a form of illicit and unacceptable pressure, which hinders the exercise of the right of individual petition in breach of former Article 25 of the Convention (*ibid.*).

131. In the instant case, it is not in dispute between the parties that the applicant was questioned by police officers from the Adana Anti-Terror Department on 24 January 1996 and by police officers again on 9 February 1996. The document recording the first interview shows that the applicant was questioned, not only about her declaration of means, but also about how she introduced her application to the Commission and with whose assistance. Furthermore, the Government have not denied that the applicant was blindfolded while at the Adana Anti-Terror Department.

132. The Court finds that blindfolding would have increased the applicant's vulnerability causing her anxiety and distress and discloses, in the circumstances of this case, oppressive treatment. Also there is no plausible reason as to why the applicant was questioned twice about her legal aid application and in particular why the questioning was conducted on the first occasion by Anti-Terror Department police officers, whom the applicant had claimed were responsible for the death of her husband. The applicant must have felt intimidated by these contacts with the authorities. This constituted undue interference with her petition to the Convention organs.

133. The respondent State has therefore failed to comply with its obligations under former Article 25 § 1 of the Convention.

## VIII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

134. Article 41 of the Convention provides:

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

### A. Pecuniary damage

135. The applicant claimed loss of earnings of 39,320.64 pounds sterling (GBP). She submitted that her husband, who worked as a taxi driver at the time of his death and was 45 years of age, earned the equivalent of GBP 242.72 per month. Taking into account the average life expectancy in Turkey in that period, the calculation according to actuarial tables resulted in the capitalised sum quoted above.

136. The Government made no submissions as to the amounts claimed, rejecting that any violations had occurred requiring any awards of just satisfaction.

137. As regards the applicant's claims for loss of earnings, the Court's case-law establishes that there must be a clear causal connection between the damage claimed by the applicant and the violation of the Convention and that this may, in the appropriate case, include compensation in respect of loss of earnings (see, amongst other authorities, the Barberà, Messegué and Jabardo v. Spain judgment of 13 June 1994 (*Article 50*), Series A no. 285-C, pp. 57-58, §§ 16-20, Cakıcı v. Turkey judgment of 8 July 1999, to be published in *Reports* 1999-..., § 127). The Court has found (paragraph 103 above) that the authorities were liable under Article 2 of the Convention for Agit Salman's death. In these circumstances, there was a direct causal link between the violation of Article 2 and the loss by his widow and children of the financial support which he provided for them. The Court notes that the Government have not queried the amount claimed by the applicant. Having regard therefore to the detailed submissions by the applicant concerning the actuarial basis of calculation of the appropriate capital sum to reflect the loss of income due to Agit Salman's death, the Court awards the sum of GBP 39,320.64 to the applicant for pecuniary damage to be converted into Turkish liras at the rate applicable at the date of payment.

### B. Non-pecuniary damage

138. The applicant claimed, having regard to the severity and number of violations, GBP 60,000 in respect of her husband and GBP 10,000 in respect of herself for non-pecuniary damage.

139. The Government made no submissions as to the amounts claimed, rejecting that any violations had occurred requiring any awards of just satisfaction.

140. The Court recalls that it has found that the authorities were responsible for the death of the applicant's husband and that he had been tortured in police custody before he died. In addition to violations of Articles 2 and 3 in that respect, it has also found that the authorities failed to provide an effective investigation and remedy in respect of these matters contrary to the procedural obligation under Article 2 of the Convention and in breach of Article 13 of the Convention. Additionally, the applicant was subject to intimidation in the pursuance of her application. In these circumstances and having regard to the awards made in comparable cases, the Court awards on an equitable basis the sum of GBP 25,000 for non-pecuniary damage suffered by Agit Salman and to be held by the applicant as surviving spouse and the sum of GBP 10,000 for non-pecuniary damage suffered by the applicant in her personal capacity, such sums to be converted into Turkish liras at the rate applicable at the date of payment.

### C. Costs and expenses

141. The applicant claimed a total of GBP 28,779.58 for fees and costs incurred in bringing the application, less the amounts received by way of Council of Europe legal aid. This included fees and costs incurred in respect of attendance at the taking of evidence before the Commission's delegates at hearings in Ankara and Strasbourg and attendance at the hearing before the Court in Strasbourg. A sum of GBP 10,035 is listed as fees and administrative costs incurred in respect of the Kurdish Human Rights Project (the KHRP) in its role as liaison between the legal team in the United Kingdom and the lawyers and the applicant in Turkey, which included GBP 2,800 for translation costs. A sum of GBP 4,235.98 was claimed in respect of work undertaken by lawyers in Turkey.

142. The Government made no comments on the fees claimed.

143. Save as regards the translation costs, the Court is not persuaded that the fees claimed in respect of the KHRP were necessarily incurred. Deciding on an equitable basis and having regard to the details of the claims submitted by the applicant, it awards the applicant the sum of GBP 21,544.58 together with any value-added tax that may be chargeable, less

the 11,195 French francs (FRF) received by way of legal aid from the Council of Europe, such sum to be paid into the applicant's sterling bank account in the United Kingdom as set out in her just satisfaction claim.

### D. Default interest

144. According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 7,5% per annum.

## FOR THESE REASONS, THE COURT

1. *Dismisses* by sixteen votes to one the Government's preliminary objection;

2. *Holds* by sixteen votes to one that there has been a violation of Article 2 of the Convention in respect of the death of Agit Salman in custody;

3. *Holds* unanimously that there has been a violation of Article 2 of the Convention in that the authorities failed to carry out an adequate and effective investigation into the circumstances of Agit Salman's death in custody;

4. *Holds* unanimously that there has been a violation of Article 3 of the Convention;

5. *Holds* by sixteen votes to one that there has been a violation of Article 13 of the Convention;

6. *Holds* unanimously that the respondent State has failed to comply with its obligations under former Article 25 § 1 of the Convention;

7. *Holds* by sixteen votes to one
   (a) that the respondent State is to pay the applicant, within three months, the following sums, to be converted into Turkish liras at the rate applicable at the date of settlement:
      (i) 39,320.64 (thirty nine thousand, three hundred and twenty) pounds sterling and 64 (sixty four) pence for pecuniary damage;
      (ii) 35,000 (thirty five thousand) pounds sterling for non-pecuniary damage;
   (b) that simple interest at an annual rate of 7.5% shall be payable from the expiry of the above-mentioned three months until settlement;

8. *Holds* by sixteen votes to one
(a) that the respondent State is to pay the applicant, within three months and into the latter's bank account in the United Kingdom, in respect of costs and expenses, 21,544 (twenty one thousand, five hundred and forty four) pounds sterling and 58 (fifty eight) pence together with any value-added tax that may be chargeable, less 11,195 (eleven thousand, one hundred and ninety five) French francs to be converted into pounds sterling at the rate applicable at the date of delivery of this judgment;
(b) that simple interest at an annual rate of 7.5% shall be payable from the expiry of the above-mentioned three months until settlement;

9. *Dismisses* unanimously the remainder of the applicant's claims for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 27 June 2000.

Luzius WILDHABER
President

Michele DE SALVIA
Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following opinions are annexed to this judgment:
(a) concurring opinion of Mrs Greve, joined by Mr Bonello;
(b) dissenting opinion of Mr Gölcüklü.

L. W.
M. S.

# CONCURRING OPINION OF JUDGE GREVE, JOINED BY JUDGE BONELLO

I have voted with my colleagues in the majority in this case. The facts of the case suffice for the court's finding of violations as pronounced in the judgment. I do however, find it necessary to elaborate on a few aspects of the judgment where I believe the majority have made inferences beyond what is merited by the facts.

**1. Mr Salman was subjected to torture at the Adana security directorate but beyond this few conclusions as to the circumstances can be reached.**

In paragraph 114 the majority concludes that Mr Salman was ill-treated when interrogated about his suspected participation in the PKK. I cannot share this inference. There is absolutely *no* information in the case-file supporting a presumption that Mr Salman was tortured *during* interrogation and no possibility of establishing the issues addressed under the assumed interrogation. The Turkish authorities denied that Mr Salman was interrogated at all when in the custody of the Adana Security Directorate.

What can be established from the evidence available to the Court is this: The nature and degree of the ill-treatment inflicted on Mr Salman *when in the custody of the Adana Security Directorate* involved very serious and cruel suffering that may be characterised as torture. The body of Mr Salman showed injuries, some of which are compatible with him having been subjected to "falaka" and a blow to the chest. It is known that Mr Salman was wanted by the Security Directorate as he was suspected of alleged participation in the PKK. Whether his ill-treatment and death occurred prior to interrogation as claimed by the Turkish authorities, or in connection with interrogation - or after interrogation for that matter - is of no relevance to the Court's conclusion concerning torture.

**2. The *post mortem* examination of Mr Salman gives limited information and leaves a number of questions unanswered.**

The investigation carried out by the Commission in the case of Mr Salman was based on the understanding that his body had been subjected to an autopsy, that is, an autopsy as this term is normally understood (see in this context, for example, how "autopsy" is described in the United Nations Model Autopsy Protocol as referred to in paragraphs 73

of the judgment, and also in Recommendation No. R (99) 3 of the Council of Europe Committee of Ministers to Member States on the Harmonisation of Medico-Legal Autopsy Rules of 2 February 1999).

There are strong reasons in Mr Salman's case for referring to a *post mortem* medical examination of Mr Salman rather than to an autopsy. In particular, the significance of information in the case may be overlooked or confused due to the general inferences which may be made from a reference to an autopsy.

Concerning the "autopsy" of Mr Salman, the following information which raises serious questions concerning the content of the examination is available:

A. The Autopsy Report dated 29 April 1992 states that Mr Salman had died at the Adana State Hospital on that very day and that his death was "in suspicious circumstances". The autopsy had been requested by a letter of that date from the Adana Public Prosecution. The report states *inter alia* that "as a result of the autopsy performed at ... in the presence of ..., *parts of the deceased have been received for examination* has resulted *there being no objection to burial* and *the detailed report will be produced later*, ... as *no other aspect of causes for examination is observed*, [emphasis added]". The report is signed by Public Prosecutor Tevfik Aydın and the forensic medical expert Dr Fatih Şen.

B. Concerning the autopsy Dr Şen later gave the following witness statement:

> "*In most of our autopsies, we weigh every organ individually*: the brain, the heart, the liver, the spleen, the kidneys, all included. The weight of the heart of a normal adult male varies between 350 g and 450 g. Since we found a heart of 550 g in this case, a size greater than normal, I concluded that the heart was larger than normal. This is an objective evaluation, made *entirely visually* - that the heart was oversized [emphasis added]."

> "Well, in cases where we cannot arrive at the cause of death macroscopically, that is visually, we take small pieces of the organs for microscopic examination. As you will see in the report, these include almost all organs: from lungs, the coronary arteries of the heart, the heart muscle, the liver, the spleen, the suprarenal gland, the kidneys, the brain, the cerebellum and the spinal cord."

> "As the result of the examination of the corpse we made on 29th April 1992 and the autopsy conducted the same day, I stated, all of the macroscopic (*what can be seen with the eye*) and of the microscopic (laboratory) examinations in the conclusion of my autopsy report [emphasis added]."

This leaves it open to question, at the very least, whether in the case of Mr Salman all sampled organs were actually removed from the body and weighed separately or whether the weights were estimated visually. The latter may be the most likely, considering also the remarkably short time-span between Mr Salman's death, some time between 01.20 and 02.00 hours on 29 April 1992, and the release of his body for burial. The body was released only after all relevant examinations had been carried out, at about noon that same day, some ten hours after death occurred - that is, ten hours of which only a few were ordinary working hours. Mr Salman's son had been sought by the security forces at approximately 12.00 hours to be questioned about his father's health only to be told that his father had died and that he was expected to take the body with him from the morgue.

Dr Şen addressed his working conditions in his witness statement as follows:

> "[I] was a physician working alone in Adana at the time. I was carrying out forensic work of the entire Adana region alone. I did not have a single assistant either. I found the interpretation and presentation of a report on this issue [the death of Mr Salman] by only one person inadequate. Since I had that opinion, I stated in my report that is should be sent to the Istanbul Forensic Medicine Institute."

Also Public Prosecutor Tevfik Aydın gave information on his workload in his witness statement, saying,

> "I think we were told about it [the death] either by a police message or when the hospital officials report it to our clerk. If we were available at that moment we go immediately but if, let us say, I am in another hospital examining a body or if I am inspecting the scene of a road accident, I go whenever I have finished that business. It sometimes happens that we receive notification of a death from two, three or four places at the same time. So we attend to those calls one after the other, depending on how we can work out the itinerary."

The photos taken of Mr Salman before he was buried shows that, if an ordinary autopsy had been carried out with the removal of entire organs, the opening of the skull etc., the medical examination was carried out with an extraordinary effort to ensure a minimal impact on the appearance of the body when released for burial - the time required for such an exercise is not consistent with an ordinary and rougher approach.

If the "autopsy" was limited, the later elaborate considerations of the exact meaning of the weight especially of Mr Salman's heart and lungs are likely to be flawed.

C. The detailed "Autopsy Report" in Mr Salman's case is only dated 21 May 1992. In contradistinction to an ordinary autopsy report, the conclusion in this report is based not solely on the medical findings in the autopsy as such but also on "the findings of" "judicial enquiry". About the latter, Dr Şen has explained:

> "The information stated in the record of examination of the corpse is judicial investigation information for us. At the conclusion of our autopsy report, we say according to that information as well. As you may notice, we use the words 'judicial investigation'. In the autopsy report, the concept of judicial investigation refers to the supply to us of the information gathered outside us, in the record of the examination of the corpse. We call this judicial investigation."

The Autopsy Report does not itself contain this added information and its content thus cannot be read out of the report.

D. Some of the injuries/irregularities to which the photographs of Mr Salman bear evidence, and which his wife and brother described in their witness statements, are not recorded in the "autopsy" documents. When the "autopsy" was performed, it was not known to the authorities that the dead person later would be photographed or that there would be an international court case examining Mr Salman's death.

The day after Mr Salman's death and examination an *Identification Report* ascertained that the body of Mr Salman had been examined by the duty Public Prosecutor before it was transported to the morgue for autopsy. On the day of death and "autopsy", it was noted that "it was discovered that it was not possible to show the body to someone who knew the deceased and get a clear identification, and the relatives of the deceased applied to the prosecution today and because of their presence" were brought to the morgue for identification. This is not correct. The security forces had picked up Mr Salman's son to inform him of his father's death and told the son that he was expected to take his father's body with him, only some ten hours after Mr Salman had died.

To conclude, I find the *post mortem* medical examination of Mr Salman and the investigation related to his death to be so dismal that, at best, it gave no proper guidance as to the true causes of Mr Salman's death, and, at worse, it was utterly misleading. In short, it was not in conformity with the State's obligation to investigate loss of life in detention. The investigation/examination may have been superficial simply because the true cause of death was not considered of concern in a case where the next in kin were not expected to pursue the issue. One should thus not jump to the conclusion that the shortcomings stem from a premeditated cover up. This however, does not limit the responsibility for the Turkish authorities to ensure proper investigations in a case like this.

**3. The sole fact that someone has acted as a medico-legal expert does not deprive the expert of independence and impartiality.**

As emphasised in the above mentioned Recommendation No. R (99) 3 it is important that medico-legal experts exercise their functions with total independence and impartiality, and that they should be objective in the exercise of their functions. The sole fact that someone has acted as a medico-legal expert cannot be a reason for questioning the person's objectivity or independence. I thus cannot share my colleagues' negative remarks in paragraph 102 of the judgment concerning Dr Birangil of the Istanbul Institute of Forensic Medicine.

# DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

I regret that I am unable to share the view of the majority in this case for the reasons set below.

1. I agree that the Minister of Justice's appeal to the Court of Cassation against the decision not to prosecute was not available to the applicant and that the appeal was an extraordinary one. However, I do not agree with the opinion of the majority that once the criminal proceedings were initiated as a result of the appeal by the Minister of Justice, the applicant was dispensed from exhausting the whole criminal procedure because that procedure was an extraordinary one owing to the nature of the initiating appeal. That conclusion does not reflect the facts of Turkish law. I would like to underline that notwithstanding the nature of the initiating motion or appeal, the criminal proceedings in the Turkish courts follow the general ordinary rules, as they did in the instant case.

For this very reason, the applicant did not hesitate to intervene in the criminal proceedings and did not feel it superfluous merely because the proceedings in question were extraordinary ones owing to the nature of the initiating appeal. In view of the fact that the proceedings ensuing from the appeal of the Minister of Justice were of an entirely ordinary nature and that the applicant, acting in the full capacity of an intervener, carried on with the proceedings in the court of first instance, it cannot be said that the applicant was not required to seek a remedy under domestic law.

2. In my view, the underlying problem is that the applicant started to follow the rules of domestic law by intervening in the criminal proceedings but did not pursue the proceedings when it came to the appellate stage. Apparently, she simply gave up without having any acceptable reason for doing so. The applicant did not invoke any development that had taken place during the proceedings which would justify her not exhausting the legal remedies. In this regard, I am not convinced that the acquittal would amount to a reasonable excuse for the applicant's not pursuing the appellate review, given the fact that the appellate review would be carried out by the Court of Cassation, the court which quashed the non-prosecution decision prior to the criminal proceedings at first instance.

3. This also means that the appellate review which would be carried out by the Court of Cassation cannot be regarded as unavailable or ineffective. The Court of Cassation's decision quashing the non-prosecution decision at the outset of the whole procedure sufficiently proved the contrary.

It must also be noted that the Court of Cassation's examination is in no way confined to reviewing the legality of the decision of the first-instance

court. The court is equally competent to examine the merits of the case. It therefore cannot be said beforehand that the Court of Cassation would not enter into the merits of the case, thus leaving out the assessment of the evidence already gathered at first instance. It must be stressed that supervision of the assessment of evidence by the first-instance court is the prime issue in the appellate review carried out by the Court of Cassation.

I am not convinced that the state of the evidence would affect the appellate review adversely. I find no basis for such an assumption. Given that the Commission based its conclusions mainly on the evidence collected by the domestic authorities, it was equally possible for the Court of Cassation to evaluate the same body of evidence like the Commission and reach a similar conclusion. I therefore do not agree with the view of the majority that the appellate review of the Court of Cassation would have been ineffective.

4. I should have been satisfied if the majority of the Court had set out the reasons for departing from the grounds of the judgment of 23 September 1998 in the case of Aytekin v. Turkey. In that case the Court gave significant weight to the intervention of the applicant, Mrs Gülten Aytekin, in the criminal proceedings. The Court also concluded that as a consequence of that intervention, the applicant should have pursued the compensation remedies before the administrative courts in parallel to the criminal proceedings in which she had intervened (Aytekin judgment, § 84). It is clear that this conclusion is independent of the conviction by the domestic court, because the Court said "in parallel to the criminal proceedings" to mean that it should have been pursued prior to the conviction.

In the Aytekin judgment the Court pointed out the prospect of redress underlying the criminal proceedings (Aytekin judgment, § 84). Proceedings under the ordinary rules of procedure took place in the Aytekin case similar to those in *Salman*. There was therefore nothing in the procedure to prevent Mrs Behiye Salman from achieving a similar result to that in the Aytekin case, only Mrs Salman gave up and left the legal steps incomplete.

In my opinion, it is not legally well-founded to assume that the Court of Cassation would – in any event – have upheld the acquittal by the court below. That could not be predicted in the absence of the necessary appeal by Mrs Salman.

In conclusion, I must state that the circumstances of the present case do not justify departing from the standards of the Aytekin judgment. I am thus unable to share the view of the majority set out in paragraphs 82 and 83 of the judgment.

5. As to the violation of Article 2, I voted for finding a violation, but only with respect to the manner in which the investigation into Mr Salman's death was conducted. As to the responsibility for Mr Salman's death, I share entirely the partly dissenting opinion on the point of Mr E.A. Alkema, a member of the Commission (see the Commission's report in this case,

p. 79). There is no doubt that, as he said, "the conditions for applicability of Article 2 set out in § 312 of the report (intentional killing or the outcome of permitted use of force) have ... not been met". He continued: "To quote from § 284: 'There was no disagreement amongst the various doctors and experts that Agit Salman had an underlying heart disease'. This heart condition ... was apparently not known to those responsible for Mr Salman's arrest and detention."

It could be accepted that the circumstances of the treatment that Mr Salman was subjected to could have caused the heart failure and consequently Mr Salman's death. There is, however, no proof of intentional killing. The force applied to Mr Salman might amount to a violation of Article 3. But there is no evidence that the officers in charge could and ought to have foreseen that their ill-treatment would be lethal in effect. Thus, the conditions for applying Article 2 exclusively to this ill-treatment are not fulfilled.

6. As regards the finding of a violation of Article 13 of the Convention, I refer to my dissenting opinion in the case of Ergi v. Turkey (see the judgment of 28 July 1998, *Reports of Judgments and Decisions* 1998-IV).

Further, once the conclusion has been reached that there has been a violation of Article 2 of the Convention on the grounds that there was no effective investigation into the death that has given rise to the complaint, no separate question arises under Article 13. The fact that there was no satisfactory and adequate investigation into the death which resulted in the applicant's complaints, both under Article 2 and Article 13, automatically means that there was no effective remedy before a national court. On that subject, I refer to my dissenting opinion in the case of Kaya v. Turkey (see the judgment of 19 February 1998, *Reports* 1998-I) and the opinion expressed by a large majority of the Commission (see Aytekin v. Turkey, application no. 22880/93, 18 September 1997; Ergi v. Turkey, application no. 23818/94, 20 May 1997; Yaşa v. Turkey, application no. 22495/93, 8 April 1997).

7. As to the application of Article 41 of the Convention, I dissent from the majority judgment firstly as regards just satisfaction and secondly as regards the manner of reimbursing costs, for the following reasons.

8. To begin with, the compensation. In the great majority of cases the Court has pointed out and clearly affirmed the speculative and fictitious nature of claims in respect of pecuniary damage where primarily "actuarial calculations" were entailed and consequently has nearly always dismissed this type of claim.

9. In the rare, exceptional cases in which it awarded the applicant a specified sum for pecuniary damage, it determined the amount on an equitable basis, never exceeding reasonable limits and thereby avoiding any speculative calculation.

10. In the instant case the Court – ignoring its settled case-law – has not only undertaken speculative "actuarial calculations" but has moreover considered it just and reasonable to award the applicant an unprecedented and more than excessive sum (£39,320.64 plus £35,000). The average sum is between £15,000 and £20,000. I consider that the credibility and persuasive force of judicial decisions stem from consistency of case-law and adherence to it, which means avoiding extremes.

By way of justifying what has just been said, I take the liberty of referring to earlier judgments of the Court, as illustrations. I set out the relevant paragraphs in full below.[1]

## *Kurt* judgment of 25 May 1998
## (forced disappearance – violation)

**Claim**

"171. The applicant maintained that both she and her son had been victims of specific violations of the Convention as well as a practice of such violations. She requested the Court to award a total amount of 70,000 pounds sterling (GBP) which she justified as follows: GBP 30,000 for her son in respect of his disappearance and the absence of safeguards and effective investigative mechanisms in that regard; GBP 10,000 for herself to compensate for the suffering to which she had been subjected on account of her son's disappearance and the denial of an effective remedy with respect to his disappearance; and GBP 30,000 to compensate both of them on account of the fact that they were victims of a practice of 'disappearances' in south-east Turkey."

**Award**

"174. The Court recalls that it has found the respondent State in breach of Article 5 in respect of the applicant's son. It considers that an award of compensation should be made in his favour having regard to the gravity of the breach in question. It awards the sum of GBP 15,000, which amount is to be paid to the applicant and held by her for her son and his heirs."

## *Tekin* judgment of 9 June 1998
## (violation of Article 3)

**Claim and award**

"75. The applicant claimed compensation in respect of non-pecuniary damage of 25,000 pounds sterling (GBP) and aggravated damages of GBP 25,000."

1. Certain sentences and figures have been underlined by me.

...

"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. 917, § 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. 918, § 119)."

## *Ergi* judgment of 28 July 1998
## (violation of Articles 3 and 13)

**Claim**

"107. The applicant submitted that he, his deceased sister and the latter's daughter had been the victims both of individual violations and of a practice of such violations. He claimed 30,000 pounds sterling ("GBP") in compensation for non-pecuniary damage. In addition, he sought GBP 10,000 for aggravated damages resulting from the existence of a practice of violation of Article 2 and of a denial of effective remedies in south-east Turkey in aggravated violation of Article 13."

**Award**

"110. The Court observes from the outset that the initial application to the Commission was brought by the applicant not only on his own and his sister's behalf but also on behalf of his niece, Havva Ergi's daughter. ... Having regard to the gravity of the violations (see paragraphs 86 and 98 above) and to equitable considerations, it awards the applicant GBP 1,000 and Havva Ergi's daughter GBP 5,000, which amount is to be paid to the applicant's niece or her guardian to be held on her behalf.

111. On the other hand, it dismisses the claim for aggravated damages."

## *Oğur* judgment of 20 May 1999
## (violation of Article 2)

**Claim**

"95. In respect of the damage she had sustained, the applicant claimed 500,000 French francs (FRF), of which FRF 400,000 was for pecuniary damage and FRF 100,000 for non-pecuniary damage. She pointed out that she had had no means of support since the death of her son, who had maintained the family by working as a night-watchman."

**Award**

"98. ... Having regard to its conclusions as to compliance with Article 2 and to the fact that the events complained of took place more than eight years ago, the Court considers that it is required to rule on the applicant's claim for just satisfaction.

As regards pecuniary damage, the file contains no information on the applicant's son's income from his work as a night-watchman, the amount of financial assistance he gave the applicant, the composition of her family or any other relevant circumstances. That being so, the Court cannot allow the compensation claim submitted under this head (Rule 60 § 2).

As to non-pecuniary damage, the Court considers that the applicant undoubtedly suffered considerably from the consequences of the double violation of Article 2. ... On an equitable basis, the Court assesses that non-pecuniary damage at FRF 100,000."

## *Çakıcı* judgment of 8 July 1999
## (Grand Chamber)
## (violation of Articles 2, 3, 5 and 13)

**Claim**

*A. Pecuniary damage*

"123. The applicant requested that pecuniary damages be paid for the benefit of his brother's surviving spouse and children. He claimed a sum of 282.47 pounds sterling (GBP) representing 4,700,000 Turkish liras (TRL), which it is alleged was taken from Ahmet Çakıcı on his apprehension by a first lieutenant and GBP 11,534.29 for loss of earnings, this capital sum being calculated with reference to Ahmet Çakıcı's estimated monthly earnings of TRL 30,000,000."

**Award**

"125. The Court observes that the applicant introduced this application on his own behalf and on behalf of his brother. In these circumstances, the Court may, if it considers it appropriate, make awards to the applicant to be held by him for his brother's heirs (see the Kurt judgment cited above, p. 1195, § 174).

...

127. As regards the applicant's claims for loss of earnings, the Court's case-law establishes that there must be a clear causal connection between the damage claimed by the applicant and the violation of the Convention and that this may, in the appropriate case, include compensation in respect of loss of earnings (see, amongst other authorities, the Barberà, Messegué and Jabardo v. Spain judgment of 13 June 1994 (*Article 50*), Series A no. 285-C, pp. 57-58, §§ 16-20). The Court has found (paragraph 85 above) that it may be taken as established that Ahmet Çakıcı died

following his apprehension by the security forces and that the State's responsibility is engaged under Article 2 of the Convention. In these circumstances, there is a direct causal link between the violation of Article 2 and the loss by his widow and children of the financial support which he provided for them. The Court notes that the Government have not queried the amount claimed by the applicant. Having regard therefore to the detailed submissions by the applicant concerning the actuarial basis of calculation of the appropriate capital sum to reflect the loss of income due to Ahmet Çakıcı's death, the Court awards the sum of GBP 11,534.29 to be held by the applicant on behalf of his brother's surviving spouse and children."

*B. Non-pecuniary damage*

**Claim**

"128. The applicant claimed GBP 40,000 by way of non-pecuniary damages in relation to the violations of the Convention suffered by his brother..."

**Award**

"130. The Court recalls that in the case of Kurt v. Turkey (cited above, p. 1195, §§ 174-75) the sum of GBP 15,000 was awarded for violations of the Convention under Articles 5 and 13 in respect of the disappearance of the applicant's son while in custody, which sum was to be held by the applicant for her son and his heirs, while the applicant received an award of GBP 10,000 in her own favour, due to the circumstances of the case which had led the Court to find a breach of Articles 3 and 13. In the present case, the Court has held, in addition to breaches of Articles 5 and 13, that there has been a violation of the right to respect for life guaranteed under Article 2 and torture contrary to Article 3. Noting the awards made in previous cases concerning these provisions from cases in south-east Turkey (see, concerning Article 3, the Aksoy judgment cited above, pp. 2289-90, § 113, the Aydın judgment cited above, p. 1903, § 131, the Tekin judgment cited above, pp. 1521-22, § 77; and, concerning Article 2, the Kaya judgment cited above, p. 333, § 122, the Güleç v. Turkey judgment of 27 July 1998, *Reports* 1998-IV, p. 1734, § 88, the Ergi v. Turkey judgment of 28 July 1998, *Reports* 1998-IV, p. 1785, § 110, the Yaşa judgment cited above, pp. 2444-45, § 124, and the Oğur v. Turkey judgment of 20 May 1999, to be published in the Court's official reports, p. ..., § 98) and having regard to the circumstances of this case, the Court has decided to award the sum of GBP 25,000 in total in respect of non-pecuniary damage to be held by the applicant for his brother's heirs. ..."

## *Mahmut Kaya* judgment of 28 March 2000 (violation of Articles 2, 3 and 13)

*A. Pecuniary damage*

**Claim**

"133. The applicant claimed 42,000 pounds sterling (GBP) in respect of the pecuniary damage suffered by his brother who is now dead. He submitted that his brother, aged 27 at his death and working as a doctor with a salary of the equivalent of GBP 1,102 per month, can be calculated as having a capitalised loss of earnings of GBP 253,900.80. However, in order to avoid any unjust enrichment, the applicant claimed the lower sum of GBP 42,000."

**Award**

"135. The Court notes that the applicant's brother was unmarried and had no children. It is not claimed the applicant was in any way dependent on him. This does not exclude an award of pecuniary damage being made to an applicant who has established that a close member of the family has suffered a violation of the Convention. ... In the present case however, the claims for pecuniary damage relate to alleged losses accruing subsequent to the death of the applicant's brother. They do not represent losses actually incurred either by the applicant's brother before his death or by the applicant after his brother's death. The Court does not find it appropriate in the circumstances of this case to make any award to the applicant under this head."

*B. Non-pecuniary damage*

**Claim**

"136. The applicant claimed, having regard to the severity and number of violations, GBP 50,000 in respect of his brother and GBP 2,500 in respect of himself for non-pecuniary damage."

**Award**

"138. As regards the claim made on behalf of non-pecuniary damage for his deceased brother, the Court notes that awards have previously been made to surviving spouses and children and where appropriate, to applicants who were surviving parents or siblings. ... The Court notes that there have been findings of violation of Articles 2, 3 and 13 in respect of the failure to protect the life of Hasan Kaya. ... It finds it appropriate in the circumstances of the present case to award GBP 15,000, which is to be paid to the applicant and held by him for his brother's heirs.

139. The Court accepts that the applicant has himself suffered non-pecuniary damage which cannot be compensated solely by the findings of violations. Making its assessment on an equitable basis, the Court awards the sum of GBP 2,500 to the applicant, such sum to be converted into Turkish liras at the rate applicable at the date of payment."

## ***Kılıç* judgment of 28 March 2000**
## **(violation of Article 2)**

*A. Pecuniary damage*

**Claim**

"100. The applicant claimed 30,000 pounds sterling (GBP) in respect of the pecuniary damage suffered by his brother who is now dead. He submitted that his brother, aged 30 at his death and working as a journalist with a salary of the equivalent of GBP 1,000 per month, can be calculated as having a capitalised loss of earnings of GBP 182,000. However, in order to avoid any unjust enrichment, the applicant claimed the lower sum of GBP 30,000."

**Award**

"102. The Court notes that the applicant's brother was unmarried and had no children. It is not claimed the applicant was in any way dependent on him. This does not exclude an award of pecuniary damages being made to an applicant who has established that a close member of the family has suffered a violation of the Convention (see Aksoy v. Turkey judgment of 18 December 1996, *Reports* 1996-VI, § 113, where the pecuniary claims made by the applicant prior to his death for loss of earnings and medical expenses arising out of detention and torture were taken into account by the Court in making an award of damages to the applicant's father who had continued the application). In the present case however, the claims for pecuniary damage relate to alleged losses accruing subsequent to the death of the applicant's brother. They do not represent losses actually incurred either by the applicant's brother before his death or by the applicant after his brother's death. The Court does not find it appropriate in the circumstances of this case to make any award to the applicant under this head.

*B. Non-pecuniary damage*

**Claim**

103. The applicant claimed, having regard to the severity and number of violations, GBP 40,000 in respect of his brother and GBP 2,500 in respect of himself."

**Award**

"105. As regards the claim made on behalf of non-pecuniary damage for his deceased brother, the Court notes that awards have previously been made to surviving spouses and children and where appropriate, to applicants who were surviving parents or siblings. ... The Court notes that there have been findings of violations of Article 2 and 13 in respect of failure to protect the life of Kemal Kılıç, who died instantaneously, after a brief scuffle with unknown gunmen. It finds it appropriate in the circumstances of the present case to award GBP 15,000, which amount is to be paid to the applicant and held by him for his brother's heirs."

## *Ertak* judgment of 9 May 2000 [French only] (violation of Article 2)

*A. Damage*

**Claim**

"146. Le requérant demande une réparation pécuniaire de 60 630,44 GBP pour pertes de revenus, montant calculé par référence aux revenus mensuels estimés de Mehmet Ertak, soit 180 000 000 TRL, en valeur actuelle, qu'il détiendra pour la veuve et les quatre enfants de celui-ci.

147. Le requérant réclame 40 000 GBP en réparation du dommage moral lié aux violations de la Convention subies par son fils ainsi que d'une pratique de telles violations, comme qu'il détiendra pour la veuve et les quatre enfants de celui-ci, plus 2 500 GBP pour lui-même en raison de l'absence d'un recours effectif. Il invoque les

précédentes décisions de la Cour rendues pour détention illégale, torture et absence d'enquête effective."

**Award**

"150. Pour ce qui est de la demande du requérant concernant la perte de revenus, ... la Cour a constaté (paragraphe 155 ci-dessus) qu'elle peut tenir pour établi que Mehmet Ertak est décédé à la suite de son arrestation par les forces de l'ordre et que la responsabilité de l'Etat est engagée au regard de l'article 2 de la Convention. Dans ces conditions, il existe bien un lien de causalité directe entre la violation de l'article 2 et la perte par la veuve et les orphelins de Mehmet Ertak du soutien financier qu'il leur fournissait (voir arrêt Çakici précité, § 127). La Cour alloue au requérant, qui la détiendra pour le compte de la veuve et des orphelins de son fils, la somme de 15 000 GBP.

151. Quant au dommage moral, ... en l'espèce, la Cour a constaté une violation substantielle et procedurale de l'article 2. Prenant acte des sommes précédemment octroyées dans des affaires concernant l'application de cette même disposition dans le sud-est de la Turquie (voir les arrêts Kaya (précité), p. 333, § 122, Güleç c. Turquie du 27 juillet 1998, *Recueil* 1998-IV, p. 1734, § 88, Ergi c. Turquie du 28 juillet 1998, *Recueil* 1998-IV, p. 1785, §110, Yaşa (précité), pp. 2444-2445, § 124, et *Oğur c. Turquie* du 20 mai 1999, à paraître dans le recueil officiel de la Cour, p. ..., § 98) et tenant compte des circonstances de l'affaire, la Cour décide d'accorder, en réparation du dommage moral, une somme de 20 000 GBP, que le requérant détiendra pour la veuve et les quatre enfants de son fils. ..."

11. Lastly, I cannot accept that the costs awarded under Article 41 should be paid to the applicant in her "bank account in the United Kingdom".

This point is an aspect of the general issue of payment of costs and expenses. To make clear what I mean, I must go back to certain earlier facts and arguments.

The manner of implementing Article 50 (now Article 41) as regards costs (including counsel's fees) was discussed in depth by the old Court, because some applicants' lawyers (always the same ones) continually sought, very insistently, to have the costs paid to them direct into their bank account abroad in a foreign currency. The Court always dismissed those applications except in one or two cases in which it agreed to payment in a foreign currency (but always in the country of the respondent State). After deliberating, the Court decided that costs would be paid (1) to the applicant, (2) in the country of the respondent State, and (3) in the currency of the respondent State (if there was a high rate of inflation in the respondent State, the sum was to be expressed in a foreign currency and converted into that State's currency at the date of payment: see the Tekin judgment of 9 June 1998, § 77). In accordance with that decision, all other types of

application have been categorically rejected. Whereupon, counsel for the applicant began to seek to have costs paid to the applicant, a national of the respondent State and resident in its territory, in his bank account abroad and in a foreign currency. They have never succeeded; despite numerous applications of this kind (always by the same counsel), not a single decision has yet been taken allowing such an application.

Is it not astonishing that almost all the applicants living in very humble circumstances in a small village or hamlet in a remote corner of south-eastern Anatolia should have bank accounts in a town of another European State?

12. If certain counsel have problems with their clients, that is none of the respondent State's business, since the contract between the lawyer and his client is a private one which concerns them alone, and the respondent State is not a party to disputes concerning them.

13. I must point out that in the system established by the Convention the Court has no jurisdiction to issue orders to the Contracting States as to the manner in which its judgments are to be executed.

In my opinion, any payment under Article 41 must be made to the applicant as before, in the currency of the country and in the country concerned.

# Appendix C

Ilhan v Turkey: Decision of European Commission of Human Rights

# EUROPEAN COMMISSION OF HUMAN RIGHTS

**Application No. 22277/93**

**Nasır Ihan**

**against**

**Turkey**



## REPORT OF THE COMMISSION

(adopted on 23 April 1999)

## TABLE OF CONTENTS

# I. INTRODUCTION

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

## A. The application

2. The applicant is a Turkish citizen resident in I∏ıklar, Urfa and born in 1950. He is represented before the Commission by Professor K. Boyle and Professor F. Hampson, both lecturers at the University of Essex. He brings this application on behalf of his brother Abdüllatif Ahan, who is partially paralysed and has authorised the applicant to act on his behalf.

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

4. The applicant complains that his brother, Abdüllatif Ahan, was beaten and severely injured by gendarmes when they apprehended him at his village and that he did not receive the required medical treatment. He complains also of the lack of access to court and of any effective remedy in respect of these matters and alleges discrimination in the enjoyment of his rights on the basis of his brother's Kurdish origin. He invokes Articles 2, 3, 6, 13 and 14 of the Convention.

## B. The proceedings

5. The application was introduced on 24 June 1993 and registered on 20 July 1993.

6. On 28 February 1994, the Commission decided, pursuant to Rule 48 para. 2 (b) of its Rules of Procedure, to invite the respondent Government to submit written observations on the admissibility and merits.

7. The Government's observations were received on 25 May 1994 after an extension in the time-limit. The applicant submitted observations and information on 13 July and 9 August 1994.

8. On 22 May 1995, the Commission declared the application admissible.

9. The text of the Commission's decision on admissibility was sent to the parties on 1 June 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.

10. On 27 September 1995, the Government submitted supplementary information.

11. On 26 October 1995, the Commission decided to take oral evidence in respect of the applicant's allegations. It appointed three Delegates for this purpose: Mr Pellonpää, Mrs Liddy and Mr Lorenzen. The Government were requested to identify certain witnesses.

12. By letter dated 6 December 1995, the applicant made certain proposals concerning the taking of evidence.

13. By letter dated 8 December 1995, the Government provided information concerning witnesses.

14. By letter dated 15 January 1996, the applicant provided certain information concerning witnesses.

15. By letters dated 14 and 23 January 1997, the Government provided certain documents.

16. By letter dated 18 February 1997, the applicant provided information concerning the ability of his brother to attend the hearing of witnesses.

17. By letter dated 16 July 1997, the applicant made requests concerning witnesses and documents.

18. By letter dated 24 July 1997, the Delegates requested the Government to submit particular documents and information.

19. On 26 September 1997, the Government provided some documents.

20. Evidence was heard by the Commission's Delegates in Ankara on 29 and 30 September 1997. Before the Delegates, the Government were represented by Mr A. Gündüz, Mr S. Alpaslan and Mr D. Tezcan, Acting Agents, assisted by Ms M. Gül∏en, Mrs Y. Renda, Mr A. Kaya, Mr H. Karahan and Mrs N. Ayman. The applicant was represented by Ms F. Hampson, Ms A. Reidy and Mr O. Baydemir, as counsel, assisted by Mr S. Leader, Mr K. S∞dar, Mr Metin Kilavuz and Mr Mahmut Kaya (interpreter).

21. On 14 October 1997, the Delegates requested the Government to provide certain information and documents.

22. By letters dated 27 and 28 November 1997, the Government provided some of the documents and information.

23. On 18 December 1997, the Delegates informed the parties that they had decided to call two further witnesses to a hearing to take place in Ankara in May 1998. They requested the Government to provide copies of any notes made by medical gendarme personnel concerning the examination of Abdüllatif/lhan.

24. By letter dated 18 March 1998, the Delegates requested information from the Government. The Government replied on 23 March 1998.

25. Evidence was heard by the Commission's Delegates in Ankara on 4 May 1998. Before the Delegates, the Government were represented by Mr M. Özmen, Agent, assisted by Ms M. Gül∏en, Mrs Y. Renda, Mr A. Kaya, Mr ™. Ünal, Ms B. Cankorel, Mr K. Alata∏, Mr E Genel, Mr F. Polat, Mr A. Karata∏, Mrs N. Eser and Mrs N. Ayman. The applicant was represented by Ms F. Hampson and Ms A. Reidy, as counsel, assisted by Ms A. Akat, Ms Z. /nanç and Mr H. Bak∞ken.

26. By letter dated 12 May 1998, the Delegates requested further documents.

27. On 13 July 1998, the Government provided further information.

28. On 14 July and 7 August 1998, the applicant and the Government, respectively requested an extension in the time-limit for the submission of their final observations, which was granted until 15 October 1998. The Government requested a further extension on 14 October 1998, which was also granted until 30 October 1998.

29. The Government's observations were submitted on 6 November 1998. The applicant's observations were submitted on 20 November 1998, following an explanation and apology for the delay.

30. On 19 April 1999, the Commission decided that there was no basis on which to apply former Article 29[1] of the Convention. It also noted that in the applicant's observations of 20 November 1998 the applicant complained for the first time of the fairness of Abdüllatif /han's trial in March 1993. As these complaints were not included, expressly or impliedly, within the scope of the decision on admissibility, the Commission has not included them in its examination of the merits.

31. After declaring the case admissible, the Commission, acting in accordance with former 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.

[1] The term "former" refers to the text of the Convention before the entry into force of Protocol No. 11 on 1 November 1998.

## C. The present Report

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

MM S. TRECHSEL
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H. DANELIUS
Mrs G.H. THUNE
MM F. MARTINEZ
C.L. ROZAKIS
Mrs J. LIDDY
MM L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
Sir Nicolas BRATZA
MM I. BÉKÉS
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

33. The text of this Report was adopted on 23 April 1999 by the Commission and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with former Article 31 para. 2 of the Convention.

34. The purpose of the Report, pursuant to former 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.

35. The Commission's decision on the admissibility of the application is annexed hereto.

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



## II. ESTABLISHMENT OF THE FACTS

37. The facts of the case, particularly concerning events during the apprehension and treatment of the applicant's brother Abdüllatif Ahan between 26 and 28 December 1992, are disputed by the parties. For this reason, pursuant to former Article 28 para. 1 (a) of the Convention, the Commission has conducted an investigation, with the assistance of the parties, and has accepted written material, as well as oral testimony, which has been submitted. The Commission first presents a brief outline of the events, as claimed by the parties, and then a summary of the evidence submitted to it.

### A. The particular circumstances of the case

#### 1. Facts as presented by the applicant

38. The various accounts of events as submitted in written and oral statements by the applicant are summarised in Section B: "The evidence before the Commission". The version as presented in the applicant's final observations on the merits is summarised briefly here.

39. The applicant's brother, Abdüllatif Ahan, lived in Aytepe village. Aytepe was situated on a hillside with gardens to the south. While part of the gardens are on a slope, the main part is flat. The gardens are a relatively rocky area, with some trees and bushes. There were two rivers, one to the east and one to the west. On the morning of 26 December 1992, there were 3-4 inches of snow on the ground.

40. At about 07.30 hours, when they heard that a military operation was on the way to the village, Abdüllatif Ahan and brahim Karahan decided to hide in the gardens for fear of being beaten up. They hid in a flat area at the end of the gardens in the bushes, about 15-20 metres within sight of each other. The two men had however been spotted by soldiers who were on the hills above with a view of the gardens. After about 20 minutes, the soldiers arrived in the gardens and found them. One group of soldiers found brahim Karahan first and began to beat him and kick him. An officer arrived and told them to stop. Some minutes later, a second group of soldiers found Abdüllatif Ahan and began to beat him. They hit him with rifle butts, in particular inflicting a blow to the right hand side of the head, and kicked him. Neither brahim Karahan or Abdüllatif Ahan had tried to run away.

41. Abdüllatif Ahan slipped into unconsciousness and the soldiers dragged him to the stream nearby and immersed him in water to revive him. He was brought with brahim Karahan to the gendarme commander, ™eref Гakmak. As a result of the blows, Abdüllatif Ahan's left eye was bruised and swollen to the extent that the eye was shut, there was a mark over his right eye and bruises on other parts of his body. His clothes were also soaked from the river. His clothes were not changed. The commander was conducting a search of the village. brahim Karahan was asked to show his house and that

of Abdüllatif Ahan. A third individual, Veysi Aksoy[2], wanted on suspicion of aiding the PKK, was apprehended. Abdüllatif Ahan was unable to walk, and slipping in and out of consciousness. The commander ordered Ibrahim Karahan to carry Abdüllatif Ahan to the station. When they reached Ahmetlı, they were able to borrow a mule. Ibrahim had to hold Abdüllatif Ahan on the mule, otherwise he would have fallen off. After a few hours, when it was dark, they reached Konak station. Abdüllatif Ahan was placed in the cafeteria while Ibrahim Karahan and Veysi Aksoy were place in the custody room. After one to one and a half hours, a vehicle was arranged to take the commander and the suspects to Mardin station. En route, the gendarmes stopped twice for one to one and a half hours at Öguzköy and Akinci. They reached Mardin station in the early hours of 27 December 1992. Soon after their arrival, two men in civilian clothes appeared, one of whom was said to be a doctor. They looked at the detainees, without approaching, and said that they were OK. The commander, ™eref Γakmak, considered that Abdüllatif Ahan was acting ill on purpose. Neither Abdüllatif Ahan nor Ibrahim Karahan were entered into a custody record. They remained in the cafeteria, until about 17.00 hours, when they were taken to the main station and ™eref Γakmak took their statements. He then released them and told them to leave the station.

42. Ibrahim Karahan took Abdüllatif Ahan to a nearby coffee shop. There a customer offered to get his car and bring them to the State hospital. At about 19.10 hours, Abdüllatif Ahan was seen by a doctor at the State hospital. He was diagnosed as having concussion, hemadermy in the left eye, left hemiplegia and his life was considered to be in danger. His immediate transfer to Diyarbakır hospital was recommended. Ibrahim Karahan persuaded the doctor to allow the use of the ambulance. Abdüllatif Ahan was admitted to Diyarbakır State Hospital. Ibrahim Karahan telephoned the applicant shortly afterwards to inform him of what had happened.

43. On 28 December 1992, the applicant arrived at Diyarbakır hospital. Abdüllatif Ahan was in intensive care. He had not been speaking and was slipping in and out of unconsciousness. The applicant could see that his brother had sustained an injury to the area around his left eye, which was completely black and blue and closed over. He had a mark four inches long above his eyebrow on the right hand side of his head, which had been bleeding. His legs were all bruised and marked. On 29 December 1992, the applicant took his brother to get a CAT scan at the Gulsağ health clinic as the hospital did not have this equipment. On the basis of the scans, Dr Rahmanlı concluded that there had been haemorrhaging but that there was no need to operate. Abdüllatif Ahan remained for 19 days in hospital, being treated by medicine.

44. On 29 December 1992, the applicant went to the Human Rights Association (HRA) to make a statement based on the few words his brother had spoken and the short account given by Ibrahim Karahan. On 11 February 1993, the public prosecutor, Abdülkadir Güngören, decided to prosecute Abdüllatif Ahan for resisting arrest and not to prosecute the gendarmes for injuring him. On 30 March 1993, Abdüllatif Ahan appeared in a court in Mardin, without a lawyer or translator. The applicant was not allowed into the court with him. Abdüllatif Ahan told the court that it was not correct that he had tried

[2] Sometimes referred to as Veysi Aksu.

to run away but the court recorded that he said that he had tried to run away. It convicted him of resisting arrest and sentenced him to seven days' imprisonment, which was converted to a fine and suspended. None of the gendarmes or İbrahim Karahan were called to give evidence.

2. Facts as presented by the Government

45. The Government's account of events as based on their observations are summarised as follows.

46. Based on intelligence reports, *inter alia*, indicating that the owner of a minibus at Aytepe village was giving shelter to two members of the PKK, an operation was conducted at Aytepe village on 26 December 1992. As the teams approached the village, it was noticed that two persons, who were acting as lookouts started to run away. They continued to run away after they were ordered to stop and surrender. Since the direction of their flight was covered with snow, Abdüllatif İhan slipped and fell over a rocky surface and received injuries to the left eye and left leg. He, İbrahim Karahan and Veysi Aksu, who had been reported as making propaganda for the PKK, were apprehended and taken first to Konaklı gendarme headquarters and then to Mardin provincial gendarme headquarters. At Konaklı, Abdüllatif İhan made a statement which said that he had run away from the soldiers and slipped while running. In his second statement taken at Mardin, he stated that while he was running away he fell over bushes onto rocks near the stream and was injured.

47. By notice of 27 December 1992, the Mardin gendarme commander informed the Mardin public prosecutor of the incident, presenting documents as completing the investigation into the offence of resisting security officers, pursuant to Articles 258 and 260 of the Turkish Penal Code (TPC). The notice informed the prosecutor also that Abdüllatif İhan had been sent to Mardin State hospital, from where he had been transferred to Diyarbakır State Hospital.

48. The public prosecutor issued an indictment against Abdüllatif İhan for passive resistance to security officers contrary to Article 260 of the TPC. His trial took place on 30 March 1993 at the Mardin Justice of the Peace Court. He was present and questioned by the court. He accepted what was said in the indictment, namely, that at first he did not understand the order to stop and ran away and that later he understood their request but was afraid and continued to run away. Having regard to the circumstances and his record, the judge sentenced him to seven days' imprisonment but altered it to TL 35 000 heavy fine pursuant to art. 4 of Code 647 on the Execution of Punishments (decision 1993/74).

49. On 11 February 1993, the public prosecutor issued a decision of non-prosecution concerning Abdüllatif İhan's injuries, since they resulted from an accidental fall while he fled from the security forces and no-one, directly, indirectly, intentionally or negligently, had caused them.

50. Information received from the authorities indicated that the PKK terrorists used to come to Kaynak village, (Abdüllatif Âhan's previous home) and ask for food and

supplies. As the villagers refused to assist them, they were forced to evacuate their houses, moving to Yardere and Aytepe. The deserted village hamlet of Kaynak was burned down by the terrorists as an example to other villagers who might attempt to resist them.

## B. The evidence before the Commission

### 1) Documentary evidence

51. The parties submitted various documents to the Commission. These included documents from the investigation and court proceedings and statements from the applicant and witnesses concerning their version of the events in issue in this case.

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

**a) Documents submitted by the applicant in his application to the Commission**

Statement dated 29 December 1992 of the applicant taken by the HRA

53. He stated that his brother Abdüllatif /lhan was 32 years' old, married and the father of six children. On the day of the incident, his brother was living in Aytepe. Ten months before, his brother's village had been burned down by the security forces and his brother had fled to I∏ıklar to work as a shepherd.

54. On the date of the incident, while carrying out an operation at Aytepe, the security forces inflicted severe ill-treatment on his brother and /brahim Karahan in very cold, snow conditions. They threw them on the ground and beat them viciously with rifle butts. After beating his brother for some time, they put him in water with his clothes on and forced him to ride on a horse and in a military vehicle. His brother was now receiving treatment in the brain surgery ward, Diyarbakır State Hospital. There was a possibility that he was paralysed. He pressed charges against the persons who treated his brother in this inhuman fashion and requested an appropriate investigation.

Statement dated 4 January 1993 of/brahim Karahan taken by the HRA

55. On 26 December 1992, at about 07.30 hours, his village Aytepe was raided by soldiers from the local Konak station and soldiers from Mardin. He and Abdüllatif/lhan hid in a garden as they were afraid that they might be ill-treated or detained. Three-four months before, soldiers had come to the village and beaten him and other villagers ferociously. The soldiers saw where they were hiding and, without asking anything, beat them with rifle butts and kicked them for a long time. Abdüllatif lost consciousness because of blows to the head. He was plunged into the water several times and dragged through the snow to where Ibrahim was lying, 20-30 metres away. He had to carry Abdüllatif on his back to the village and then he had to leave Abdüllatif on the ground in the snow while he showed the soldiers Abdüllatif's house.

56. After the house searches, the commander asked Abdüllatif what had happened to him. Abdüllatif said that he had been beaten by the soldiers. The soldiers said that he was lying and that he had fallen over. The commander told Ibrahim to carry Abdüllatif on his back to the station. He carried Abdüllatif, who was half-unconscious, to the village of Ahmetlı, one kilometre away, where they got a mule. They put Abdüllatif on the mule and continued 2 km to Yardere and then 4-5 km to Konak, where the station was. They had left Aytepe at about 08.30 hours and arrived at Konak at about 13.00 hours. Abdüllatif was put in the station canteen while he was put in a cell. After two hours, both were placed in a military vehicle. On the way to Mardin, they stopped at the villages of Oğuz and Akinci. They were detained in Mardin central gendarme headquarters until the evening of the next day. After their statements were taken, they were released.

Statement dated 15 December 1993 of Abdüllatif Ihan taken by the HRA

57. In this statement bearing his thumbprint, Abdüllatif Ihan stated that on 26 December 1992, he became disabled due to severe ill-treatment by soldiers in Aytepe village. Because he was either in hospital or confined to bed, it was impossible for him to exercise his rights or to make a personal application. Therefore his brother Nasır made the application in his place. At first, he had been unable to speak or move and his brother had to do the application himself. Afterwards, when he recovered a little, he was not in a condition to make applications. When, after 18 days in hospital, he returned to Aytepe, there was a raid on the village by the captain, who was the commander of Mardin central gendarmerie headquarters, who talked to the villagers. He asked where Abdüllatif Ihan was and when told he was ill in bed, sent a NCO to see if he was really ill. A First Sergeant and two soldiers came to his house. The NCO talked to him, saying that it was his fault that he was ill as he jumped over a wall as he was running away and the wall fell down. The NCO also asked whether it was true that he had made applications to the HRA. From fear, he said that he had not. They made no official petitions as those who did were sent to the provincial gendarme command headquarters. They also knew that they would suffer more if they did so.

58. Ten months before the incident, a warning had been issued that they should leave their village, Kaynak hamlet, Ahmetlı village, but they had not done so. At 09.00 hours one day their house was burned down by the soldiers with all their goods inside. He and his spouse fled to Aytepe village. When they went back to their own village, they found nothing usable left and returned to Aytepe. He used to make a living from his livestock. Of his 200 goats, some had been burned and others fled, 70 only being collected afterwards. He sold them later for 30 million when he was ill. His brother had also spent about 40 million for the costs of his treatment. They had to pay 3 million for films of his head which showed that there were drops of blood in his brain. Since he was not insured, he had to pay for all his treatment. He received drugs while he was in hospital and was still receiving them. He returned to Diyarbakır hospital after 20 days at home for a check-up, and then at successive intervals of 40 days and 3 months. Each time he received a prescription. On the recommendation of the doctor, he went to Istanbul but there were no beds at the hospital. His costs were met by 20 million lira from the

applicant. He waited three weeks for a bed but as he had no money left he had to leave /stanbul for Mardin again.

59. He had been ruined financially by his illness. He had had six children. One of them, Güler, died from illness because they could not afford a doctor. The applicant supports them all. He has 8 children of his own and is also financially destroyed because of his illness.

Supplementary information on Nasır /lhan by Mahmut Sakar, Secretary of the HRA submitted on 13 July 1994

60. After giving detailed information at the HRA on 15-16 December 1993, Abdüllatif /lhan nominated his brother Nasır /lhan to follow his case as he was paralysed. He placed his fingerprint on this document as he was illiterate and did not know how to sign. It was therefore not possible that Abdüllatif /lhan signed the statements taken on 26 December 1992 by the gendarmes. An examination of these documents shows that the signature is not a signature but a scribbling made by forcibly holding the person's hand.

**b) Documents relating to the apprehension and detention of Abdüllatif /lhan**

Incident report dated 26 December 1992 bearing signatures of Abdüllatif /lhan, /brahim Karahan and gendarme officers including ™eref Γakmak and Ahmet Kurt

61. This statement, recorded as drawn up at the scene of the incident and read and signed by the persons present, stated that on the basis of records (nos. 329 of 23.12.92 and 331 of 24.12.92) from the Intelligence Unit of Mardin-/nci gendarmerie headquarters, operation "Yıldırım" was carried out at Aytepe village on 26 December 1992 by 2 squads from <name illegible> and 5 squads from Mardin headquarters. While the village was being cordoned off, it was seen that two persons were trying to run away. They were warned to stop. They could be followed due to their tracks in the snow. They apprehended /brahim Karahan. Since the ground was stony and snow-covered, Abdüllatif /lhan who was running ahead of him fell down the slope of a hill, injuring his left eye and left leg and was apprehended. In the village, they also apprehended Veysi Aksu who had been denounced by other villagers as having spread propaganda and having acted as a messenger for the PKK. No further suspects or elements of crime were discovered in the search. Veysi Aksu, Abdüllatif /lhan and Ibrahim Karahan who had failed to stop when ordered to do so, were taken to Konaklı headquarters for questioning and subsequent transfer to Mardin Provincial Gendarme Headquarters.

Statement dated 26 December 1992 of Abdüllatif /lhan taken by gendarme sergeant Ahmet Kurt

62. The statement, which was taken at Konaklı station and signed above the name Abdüllatif /lhan, stated that the suspect was asked why he had fled from the security forces during the operation at Aytepe village. He said that he saw the soldiers arriving at

the village and because he was afraid of the soldiers he left his house and ran towards a wooded area. He could see the soldiers coming after him. They were shouting for him to stop. He became more afraid and headed for Yardere village. The rocks were icy and, as he crossed the river and jumped over the bushes, he slipped and fell, hitting his head and shoulder on a rock. He hid behind bushes but the soldiers followed his footprints and found him.

Statement dated 26 December 1992 of /brahim Karahan taken by gendarme sergeant Ahmet Kurt

63. This statement, taken at Konaklı gendarme station, stated that the applicant was questioned as to why he ran away from the security forces at Aytepe. It stated that he had been sitting in his house when he saw soldiers entering the village. As he was frightened of the soldiers, he intended to hide amongst the trees and gardens until they left. When the soldiers saw him and shouted after him, he was very frightened and ran away along the banks of the stream. When the soldiers approached, he hid in the bushes. Soldiers coming from the other direction saw and apprehended him.

Statement dated 27 December 1992 of Abdüllatif /lhan taken by gendarme officer ™eref Γakmak

64. This statement, taken at the provincial central gendarme headquarters at Mardin, stated that the applicant was asked why he had run away from the security forces during an operation at Aytepe. He stated that he was standing in front of his house when he saw the soldiers coming to the village. PKK members had frequently been to his house and told him not to have anything to do with soldiers. He ran away towards the stream below the village. The soldiers saw him. After running 200-300 metres, he fell on the rocks by the stream. He was injured in the eye and leg. He could no longer run and hid himself in the bushes near the stream. The soldiers followed his footprints from the garden and caught him in the bushes. He had not committed any offence. The statement was stated as being confirmed with a thumbprint as he did not have a signature.

Statement dated 27 December 1992 of /brahim Karahan taken by gendarme officer ™eref Γakmak

65. This statement, taken at Mardin Central Gendarme Headquarters, stated that the suspect was asked why he had run away from the security forces at Aytepe. He stated that he was on his way to get the midwife for his wife who was about to give birth when he saw security forces coming from the hills opposite. As he was frightened, he hid in the shrubs in the gardens. Members of the PKK had been coming to his house and had told him not to talk to soldiers. The soldiers followed his footprints and pulled him out of the bushes.

Letter dated 27 December 1992 from ™eref Γakmak to the chief consultant Mardin State Hospital

66. The subject of the letter was identified as the transfer of Abdüllatif Λhan and Λbrahim Karahan. It requested that these persons who had fallen on steep, stony ground and hurt themselves while fleeing from the security forces at Aytepe be sent for treatment. They were under summons in connection with an ongoing preliminary investigation.

Report, date illegible, from Mardin provincial central gendarme command

67. This report addressed to provincial governor, the Mardin provincial gendarme command and Mardin chief prosecutor, is in a pro forma numbered format. It referred to the offence of resistance to security forces at item 1. At item 4., it stated that on receipt of provincial gendarmes command's order relating to intelligence that Mehmet Koca, owner of a minibus and resident of Aytepe, was sheltering Bedirhan Çiçek and Hamdin Çiçek who were wanted for aiding and abetting the PKK, an operation was carried out on 26 December 1992 to apprehend the suspects. On realising that Abdüllatif Λhan, Λbrahim Karahan and Veysi Aksoy were carrying out surveillance duty and saw the security forces approaching, an order to stop was given. They did not obey but ran towards the rocky terrain on the outskirts of the village. A pursuit was launched. As a result of the snow and mud-covered terrain, the feet of Λbrahim Karahan and Abdüllatif Λhan slipped and they fell on the rocky terrain. The suspects who were followed due to their footprints resisted the gendarmes with stones. They were apprehended. Abdüllatif Λhan and Λbrahim Karahan were injured due to falling and transferred to Mardin State Hospital for treatment.

68. Under a section headed Abdüllatif Λhan, there was an item E. "aiding and abetting the PKK" and under separate sections headed Λbrahim Karahan and Veysi Aksoy, point E. also referred to aiding and abetting the PKK.

Report dated 27 December 1992 from ™eref Γakmak to the Mardin public prosecutor

69. The subject was stated to be "resistance to security forces". It stated that on receipt of intelligence that PKK members were in Aytepe village an operation involving seven teams was carried out in the village on 26 December 1992. Upon the security forces entering the village, the two individuals, Λbrahim Karahan and Abdüllatif Λhan, ran away towards the outskirts of the village. Notwithstanding numerous orders to stop, they continued to run away. There was a lengthy pursuit. Upon the suspects being informed that they were going to be summoned to the station, they physically resisted by pushing members of the security forces. During their attempt to escape by pushing these persons, they fell from the rocks. As a result, Abdüllatif Λhan was injured to a life-threatening degree, having hit his head on the stones while escaping.

70. Abdüllatif Λhan's initial treatment was carried out at Mardin State Hospital and then he was referred to Diyarbakır. Λbrahim Karahan was sent to accompany him in the absence of relatives.

71. The investigation documents relevant to their offence of unarmed resistance to apprehending officers and not complying with an order to stop were enclosed.

Decision not to prosecute dated 11 February 1993 by public prosecutor Abdülkadir Güngören

72. This identified Abdüllatif Ahan as the injured party and described the incident by stating that "He slipped and fell and injured himself." The investigation documents had been examined. Since it transpired that the injured party fell and injured himself as a result of carelessness while fleeing from the security forces and that no-one acted deliberately or negligently, a decision of lack of grounds to proceed had been reached.

Indictment dated 11 February 1993 concerning Abdüllatif Ahan drawn up by public prosecutor Abdülkadœr Güngören

73. The indictment specified that the offence was resistance to officers, citing Article 260 of the TPC. It transpired from the defendant's admission and a witness statement that in the course of an operation by the security forces who were searching for PKK terrorists the defendant fled, ignoring their orders to stop.

Minutes of the court hearing of 30 March 1993 at Mardin Justice of the Peace Court

74. The defendant was asked to give evidence. He stated that the charge was true. On the day of the incident, he did not understand the security forces' stop warning. Although he understood it afterwards, he ran away for fear that they would harm him. He requested an acquittal or for the sentence to be converted into a fine and suspended.

Decision dated 30 March 1993 of the Mardin Justice of the Peace Court

75. The court found that Abdüllatif Ahan had admitted that he had failed to comply with the gendarmes' order to stop during an operation and thus had resisted the officers, contrary to Article 260 of the TPC. The sentence of 7 days' imprisonment was commuted to a fine of TL 35 000 and suspended, having regard to the fact that it was his first offence and that he would not commit a new offence.

Letter dated 13 May 1994 from the Mardin provincial gendarme command to the Mardin public prosecutor's office

76. This letter, signed by Lt. Col. Ridvan Özden, recounted that Abdüllatif Ahan and brahim Karahan had been carrying out a surveillance duty for the PKK and ran away despite repeated "Halt" warnings. After a lengthy pursuit, the suspects were apprehended hiding in the bushes. Upon this, they attempted to escape by pushing and resisting the security personnel. Due to the slippery ground, Abdüllatif Ahan was injured by falling amongst bushes and rocks. He was referred to Mardin State Hospital and transferred to Diyarbakır State Hospital due to his injuries.

**c) Documents relating to Abdüllatif Ilhan's condition and treatment**

77. A number of documents have been provided, referring to Abdüllatif Ilhan's treatment. The documents relating to his care in hospital are largely illegible but indicate that he was admitted at Diyarbakır State Hospital, Brain Surgery Department on 27 December 1992 and discharged on 11 January 1993. The documents regarded as relevant by the Commission are summarised below.

Report dated 27 December 1992, at 19.20 hours, signed by Dr Mehmet Aydoğan, Mardin State Hospital

78. This stated that the general condition of Abdüllatif Ilhan, who was brought in as a result of a blow, was average, conscious, responsive. Hemadermy was present in the left eye periorbital. The report was interim and indicated the presence of a life threatening situation to the patient, who had left hemiparesis present.

Mardin State Hospital polyclinic register

79. The entries for 27 December 1992 included no. 22833 Abdüllatif Ilhan, referred to Diyarbakır neurosurgery and no. 22834 Ibrahim Karahan, with a largely illegible reference to trauma and right ear and a referral.

Addendum to the report 27 December 1992 by Dr Mehmet Aydoğan dated 26 December 1996

80. This stated that the word "blow" had been included in the report (above) because of the patient's verbal explanation. However, the actual lesion was due to trauma which could have been caused by a blunt instrument or by a fall.

Medical report 27 December 1992 Diyarbakır State Hospital

81. This report, signed by Dr Ömer Rahmanlı, stated: "General situation fair concussion left hemiplegion, risk of death, accepted in hospital."

Medical report 16 December 1993 Diyarbakır State Hospital

82. The report, signed by Dr Ömer Rahmanli and Dr Selahattin Varol, stated that Abdüllatif Ilhan had been examined on 10 June 1993. It was established that he had left hemi-paresis, which had caused a 60% loss of motor functions. Intracerebral haematoma had been diagnosed as the result of the head trauma suffered, and he had been treated as an in-patient in their clinic. The findings (paralysis) had remained as after-effects.

CAT SCANS and report dated 9 February 1998

83. The report, signed by a doctor at the Gunsağ clinic, gave a technical description of the findings from the enclosed CAT scans of the brain of Abdüllatif Ilhan, concluding that

there was a encefelomasic area located at the right bazal ganglions and that the neighbouring right lateral ventricle front horn and its stem had been expanded compensatorily.

Report dated 17 April 1998 by Dr Alan Kermond

84. This report, provided by the applicant, explained that the CAT scans and analysis, indicated that there was brain atrophy or loss of brain substance in the region of the right caudate nucleus extending posteriorly and laterally to involve the right internal capsule, with some expansion of the right lateral ventricle. The most common cause of this appearance in a man of this age was atrophy following trauma with intra-cerebral haemorrhage. In his view, the trauma would need to be severe as is commonly seen with a direct blow to the skull resulting from a road accident or similar major episode. A simple fall in this age group would not produce this appearance.

**2) Oral evidence**

85. The evidence of the 11 witnesses heard by the Commission's Delegates may be summarised as follows:

(1) Abdüllatif Ihan

86. The witness was born in 1956. In December 1992, he was living in Aytepe. He had been there for a year. An operation took place. He and Ibrahim Karahan were afraid of the soldiers as soldiers beat people and took them away. There had been other operations. Their houses were next to each other. They ran towards the southern part of the village, about 100 metres from the village into the gardens below. The gardens were level, with trees and rocks. Some parts were separated by walls into small fields. He agreed with the Government Agent that at these parts a person could not see another at five to ten metres but added that in other parts a person could see for 200 metres. They sat down on the right hand side. There was a lot of snow. They could not hide. The witness was under a tree. He did not hear any soldiers shout at them to stop running. He sat under the tree until the soldiers arrived and told him to stand up. He could see Ibrahim Karahan from where he was. Because of the snow, they could see the soldiers from a distance and the soldiers could see them. They thought that the soldiers could not see them in the gardens but they were on a hill high up.

87. Ibrahim Karahan was about 10-15 metres away from him. The soldiers beat him quite a bit. Some stayed with Ibrahim Karahan and others came over to him. The soldiers kicked and beat him with rifle butts. When asked how many soldiers beat him, he said that it was a lot: 10, 15 or 20. They did not ask questions beforehand. One of them had a rank, a non-commissioned officer. When questioned more precisely by the Government Agent, he recalled being struck once on the right side of the head with a rifle butt and being kicked many times. He was hit on the hip with the barrel of a G3 which tore his skin all the way down. The blow to his head was very bad. He lost consciousness after

being beaten for about 20 minutes. The witness was thrown in the river to revive him. There was a river close to the place where the beating occurred.

88. He did not remember anything after he fainted. He was unconscious for a week. He was taken from one station to another and again to another, and finally to the central station. He was on a mule at one point. /brahim Karahan told him that he held the witness on the mule. He did not know who was in the military vehicle with him or remember being placed near a stove.

89. He was at the Diyarbakır State Hospital for 20 days. He went back every two months for a check up. His brother took him. His brother talked to the doctors as he did not know how to. He did not sign anything. He did not know how to. He signed no statement on 26 December 1992 saying that he fell on the rocks. He denied signing either that statement or the incident report, when they were shown to him. When shown his statement of 27 December 1992, he said that it was his thumb print but he did not remember putting it on a statement. He remembered going to court as he was charged with running away but he did not run away and he told the judges that he did not. There was no lawyer with him in court and his brother had to wait outside as they would not let him enter the court. He had told the public prosecutor also that he had not run away. He was now crippled. He had taken medication for a year and a half but had to give it up as he had no money.

(2) The applicant

90. The applicant was born in 1950. In December 1992, he was living in I∏ıklar village, Ceylanpınar, Urfa. He saw his brother two days after the incident. His friend, /brahim Karahan, had called him from Diyarbakır State Hospital, saying that his brother was seriously injured and that he should come quickly. He took the bus next morning and arrived at Diyarbakır. He saw /brahim Karahan first. He was in someone's house, in bed as he was not feeling well. He asked which hospital his brother was in. He found his brother was in the intensive care unit at Diyarbakır State Hospital. The nurse said that he had not spoken. He went in to see him. He responded to his name and said that he was hungry. He lost consciousness again after eating a biscuit. He was only able to talk a little at that stage. He did say that the soldiers beat him. His brother had injuries to his head. His left eye was swollen, black and shut and there was a mark on the right side of the head above the eyebrow. It was black as if it had bled a little. When asked how long the mark was, he indicated a distance of about 4 inches. His nose was swollen too. There were marks on his left side and his foot. The marks were all over the legs from the knees down. He had marks everywhere. He saw no scratches on his hands or arms. /brahim Karahan told him that the soldiers had beaten his brother and that he had brought him from Mardin. /brahim Karahan had also many bruises on him from being beaten and kicked but he had not received a heavy blow.

91. The doctor told the applicant that his brother might need a special operation and that the applicant should obtain a special X-ray of his head. The doctor had asked how the injuries had occurred and he said his brother had been beaten by soldiers. His brother was X-rayed in a private clinic in a big machine to see if there had been haemorrhaging. The

(3) İbrahim Karahan

96. The witness was born in 1952. In December 1992, he lived in Aytepe. When the soldiers came, he and Abdüllatif went outside. The soldiers had surrounded the village. Because they were afraid, they went and hid in the gardens, sitting down in the thorny shrubs. This was 200-300 metres from the village. The ground was icy and covered with snow, about four fingers thick. There were two gardens, separated by a high wall 75cm to one metre high. On the other side of the wall, there was a river, 15-20 metres away from the gardens, with small stones on the bank from the river. There was no difficulty in walking. On previous occasions, the soldiers had come and beaten the villagers. He had been beaten himself two months before. The soldiers must have seen them as they followed. They did not hear the soldiers shouting after them to stop. Neither of them slipped or fell on the way to the gardens.

97. After 20 minutes, the soldiers found him. He did not try to run away. They beat him. He was thrown to the ground and kicked in the head. His ears were bleeding. They said, "You also have a friend." A NCO approached, and was angry, telling them to stop the beating. He asked the witness if he had a friend. The witness denied it to prevent his friend being beaten. There were footprints in the snow. The soldiers followed the tracks and found Abdüllatif 15-20 metres away. There were two groups of soldiers. The group with the witness was about eight in number. Three stayed with him, five left to join another group, six or seven, coming from the other direction. They caught Abdüllatif. One or two beat him with their rifle butts and others kicked him. The witness saw them raise and lower their weapons. He did not see where the rifle butt actually struck. They were gathered round his head. Abdüllatif passed out. They dragged him by his jacket to the river nearby and immersed him in the water. The witness spoke to him, but he was not fully conscious or coherent. His left eye was very swollen and black and closed up completely within five minutes. There was a mark on the right side also, all the way to the ear. He saw that Abdüllatif's hips were all black from the kicking later, at Mardin, when he helped Abdüllatif at the lavatory. The soldiers told the witness to carry him on his back. He carried Abdüllatif to the road, not far from the village. The company commander, ™eref Çakmak, told the witness to come to the village. Abdüllatif was left. The witness showed the commander his house and Abdüllatif's, which was facing it, 5-10 metres away. They searched the houses but found nothing.

98. The commander then went with the witness to Abdüllatif. The commander asked Abdüllatif who had beaten him. Abdüllatif said, "You did." He was not altogether himself. The commander asked the soldiers who had beaten him. The soldier said, "He fell off a wall." The commander told the witness to carry Abdüllatif to Konak. The witness carried him as far as Ahmetlı. There he found a mule and he held Abdüllatif on. From there, they went to Yardere and from there to the station at Konak, where they arrived at about 16.00-17.00 hours. Abdüllatif was taken to the cafeteria and the witness was placed in a cell. He was not questioned during this time. He was asked details of his name and his parents which were noted on a piece of paper, not in a book. After one or one and a half hours, they were placed in a vehicle and driven to Oğusköy where they got out as the soldiers had something to do there. After a while (15 or 20 minutes or half an hour), they were taken to the gendarmerie in Akıncı, where the commander got out and

101. About two months later, when there was another operation in the village, ™eref Γakmak took him into custody and after five days at the central station, he was released. Γakmak told him to leave his village. The witness went to /stanbul for 8 months. In the autumn, he returned. Three or four days later, there was an operation at the village. ™eref Γakmak took him into custody again for 19 days at Mardin. During that time, he was tortured and suspended. He was released without being taken before the public prosecutor.

102. His son Hasan disappeared and went to the mountains a year after the incident in this case.

(4) ™eref Γakmak

103. The witness was born in 1966. In December 1992, he was the commander of the central gendarmerie of Mardin province. He had taken up that post in July 1992. He had the primary responsibility for the security and order in the villages within the jurisdiction of the central district of Mardin province. He was also responsible for judicial matters concerning village guards and in civilian matters to the provincial governor. He answered to the courts in judicial matters and also had military duties.

104. On 26 December 1992, he carried out an operation in Aytepe village. The purpose of the operation was stated in the messages wired at the time. He remembered that there were rumours about the village but did not recall the details, save that they did not go there to apprehend Abdüllatif /lhan. They left Konaklı station on foot at midnight. There was snow on the ground, of a hand's span depth, and it was snowing continuously, changing to drizzle as it grew warmer.

105. Half an hour before daybreak, they surrounded the village and waited. He was above the village, probably to the west or north west. After daybreak, he checked the village was completely surrounded. At that moment the team to the south-west of the village radioed that two people who had escaped from the village were heading speedily towards Yardere village. He gave the order to capture them. He continued to search the village.

106. At some point, he received news that one of them, /brahim Karahan, had been caught. He knew /brahim from a previous occasion. He gave instructions for the search to continue for the second person, as there was a chance that he was a terrorist. After about half an hour, he was informed on the radio that they had caught the second person, Abdüllatif /lhan. He remembered telling the villagers with them that they had run away for nothing. He was told on the radio that Abdüllatif /lhan had resisted the first gendarme who had seen him. He did not want to surrender and pushed the gendarme. The witness ordered the gendarmes to bring Abdüllatif /lhan to an accessible area. He met the group on the Ahmetlı road 200 metres from the village. Abdüllatif /lhan was sitting on the ground, his clothes were wet. He had been hiding in the snow and there were scratch marks from the thorn bushes on his hands and parts of his face, which was bleeding. /brahim was in the same state. Abdüllatif /lhan had an additional injury, a wound above his eye but he did not remember on which side. He would have remembered if his eye

had swollen shut. There was no injury to Abdüllatif Ahan's legs either. But when referred to the reference in the incident report, he agreed that there must have been but that they did not know what the injury was. He mentioned seeing a wound on the foot. He asked the gendarmes what had occurred. They said that Abdüllatif Ahan fell from one of the stone walls in the garden. According to the soldiers, he fell several times. The upper layer of water in the river had frozen and he had fallen there in the running water. There was so much water that it could have swept away and drowned a child. It was very cold at that time. He ordered a fire to be built and that the two suspects should stay there and warm up as they were shivering and cold from hiding in the snow, and in Abdüllatif Ahan's case, from being completely soaked in the icy river. He may even have covered Abdüllatif Ahan with a soldier's parka and gloves. He returned to the village to carry on the search. They did not find anything else but apprehended a wanted individual, Veysi Aksoy.

107. The witness described the area as follows. Below the village were gardens, each between 10 and 20 square metres, separated from each other by walls the height of a man. The walls had been built gradually by the villagers using stones gathered in the gardens. Inside the gardens were thorny bushes, fruit shrubs and other plants, including blackberry bushes. The walls were difficult to climb over. At specific spots, the villagers had put pieces of wood to assist climbing over. On the right and left side of the gardens were two river beds. The water level was high in both and with erosion there were steep banks that could only be descended by rope. In his opinion, it was probable that Abdüllatif Ahan fell twice - once on the wall, once into the water. Crossing the river, the ice broke and he fell into the water. That was what he imagined. Any scenario was possible in that terrain. When he talked to the soldier who found Abdüllatif Ahan, the soldier said that Abdüllatif Ahan pushed him and ran away about 5 to 10 metres. That meant that he had to jump a wall, cross the river, go over an archway, manoeuvre between thorn bushes. He had no reason to suspect any other cause of injury. The ground was covered with snow and ice. He himself slipped many times as he was going down hill towards the village. He thought it would have been impossible for Ibrahim Karahan to see Abdüllatif Ahan from where he was hiding, as they were 50-60 metres apart. This was what he was told. There was one team in the arrest area, under Ahmet Kurt commander of Konaklı. A team was anything from 8 to 20 soldiers. They would have been spread out, 7, 8 or 10 metres apart.

108. When he first saw them, he asked Abdüllatif Ahan and Ibrahim Karahan why they had run away. They replied that they were frightened of the soldiers but could not explain it clearly. When he enquired about their injuries, they gave evasive answers and said that they were fine. He noticed that Abdüllatif Ahan's speech was impeded and that he was not speaking normally. He did not know Abdüllatif Ahan's state of health or if he had a speech impediment however. As they had resisted the gendarmes, he told Abdüllatif Ahan and Ibrahim Karahan that he would take them to the public prosecutor. Abdüllatif Ahan did not lose consciousness nor did anyone tell the witness that he had.

109. The incident report was drawn up at Aytepe. Abdüllatif Ahan wanted to sign it and did so, as did the other two suspects. If Abdüllatif Ahan had complained that the soldiers had beaten him, the witness would have brought them to court. But he did not suspect any transgression because of what the soldiers said and the lack of complaint from Abdüllatif

Ilhan. He did not recall who saw Abdüllatif Ilhan falling. At least three persons had to sign an incident report and it was not possible that they had each witnessed everything that had occurred. He did not permit soldiers under his command to ill-treat people and knew of no occasion on which they had done so, save for one allegation that they bound handcuffs too tightly when transferring a particular prisoner.

110. The operation would have ended at noon or after. As they had no vehicles, he asked Ibrahim Karahan to help Abdüllatif Ilhan. Ahmetli village was 300-500 metres away. The witness, in answer to questions by the applicant's representative, said Ibrahim Karahan only had to hold him by the arm. At an earlier point, he explained that since Abdüllatif Ilhan could not walk, he obtained a mule from the villagers at Ahmetli. Abdüllatif Ilhan sat on the mule until they reached Konakli station. It took a long time to climb the steep road and they did not arrive until evening. He told the station commander's assistant to take the two men's statements to ease his own workload the next day. The witness requisitioned a vehicle as it would not be right to return on foot. Normally they would not have returned to Mardin in a vehicle. The soldiers burdened with their weapons would be unable to assist another person. Because of the risks of mines however, a certain portion of the road had to be checked with a mine detector before the vehicle could reach Konakli station. By midnight, they were still waiting for the road to be secured. Finally, the vehicles could leave. He was with Abdüllatif Ilhan in the covered vehicle. Abdüllatif Ilhan had been warmed up by the stove in the station. He seemed to have slightly improved at that time and could sit more comfortably.

111. They arrived in Mardin towards morning on 27 December 1992. As Abdüllatif Ilhan did not seem to be improving, the witness called their doctor as soon as they arrived. He was aware from his experience as a gendarme that a blow to the head can be very serious. Within half an hour, maybe 10 or 15 minutes, the doctor came in his civilian clothes from his bed. He looked at Abdüllatif Ilhan and said, "I can't find anything. He's probably trying to trick you in order to be released." The doctor was accompanied by a paramedic soldier. The doctor told the paramedic to wipe off the blood and put a dressing on his wound above his eye. He listened to Abdüllatif Ilhan's heart, pulled up his clothes on his back, checked the back of his head and his pulse. The paramedic took Abdüllatif Ilhan's blood pressure. The doctor said the signs were normal. He did not see the doctor make notes of the examination. The doctor did have a notebook which he always carried with him but he did not know if the doctor made any entries on this occasion. The witness was reassured by the doctor. He took the statements of both men. He doubted that Abdüllatif Ilhan was signing properly and had him put his thumb print on it. At one point, he said that he would have finished the formalities by noon, but in answer to further questions was more hesitant in remembering the time. He admitted that, perhaps, as he was less concerned now, he waited too long to take the statements A new working day had started and there were many duties to perform. Because Veysi Aksoy was wanted, he was taken to the custody room, his name recorded, his statement taken and then sent to the public prosecutor.

112. Abdüllatif Ilhan was speaking haltingly. Though he could make himself understood, he was not very articulate. He could speak Turkish. After taking the statements, the witness prepared the incident report. He discussed the matter over the

telephone with the public prosecutor, informing him that he was sending Abdüllatif Ⱥhan to see a doctor. He prepared the documents for the public prosecutor and sent both men to the hospital under escort. At another point, he referred to the conversation with the public prosecutor occurring after Abdüllatif Ⱥhan was sent urgently to Diyarbakır. He then sent the investigation file to the public prosecutor, charging Abdüllatif Ⱥhan with obstructing a security officer, disobeying a stop order. On the orders of the doctor, Abdüllatif Ⱥhan was taken urgently to Diyarbakır in an ambulance with the paramedic. The scratches on Ibrahim Karahan were very different and he would not have been concerned about those. When referred to a document from which it seemed that both Abdüllatif Ⱥhan and Ⱥbrahim Karahan were referred for treatment in Mardin, the witness stated that he had to obtain medical reports of persons who were to be sent to the public prosecutor as part of the file. He was not surprised when one of his men informed him that Abdüllatif Ⱥhan was in a serious condition but he had not noticed him deteriorate particularly at the station.

113. In 1995, he was asked questions about what had happened to Abdüllatif Ⱥhan, when written requests were received from the prosecutor's office and the European Commission of Human Rights. He gave a reply in writing. He agreed that it was an aggravating factor that Abdüllatif Ⱥhan had pushed the soldier in resisting him. When referred to the fact that the incident report did not mention this, he said that they were in a hurry and neglected to do so. It would have been better to mention it but they simply forgot. When referred by the Government Agent to the letter of 13 May 1994, he agreed that Ridvan Özden could have obtained the information from him about the pushing and that this completed the information in the case.

114. When taking up his duties in July 1992, he had been informed that the Ⱥhan family in Aytepe co-operated readily with the PKK. The names of Hasan or Mehmet Ⱥhan may have been mentioned. There had been many incidents in the six months preceding the operation in Aytepe. One of his soldiers had stepped on a mine in a hamlet of Ahmetlı and a gendarmerie was raided. He carried out 30 operations in that time and he often went to Aytepe. He knew that Ⱥbrahim Karahan had been involved in taking two female terrorists up to the terrorist cell in the mountains, though he did not have any proof of it.

115. Abdüllatif Ⱥhan's name and data were not placed in Konaklı custody register as they were only in transit, not staying there. Also they could not take anyone into custody until they had been seen by a doctor. He was probably not entered at Mardin station either since they had come from 60 to 70 kilometres away and they turned over the file to the public prosecutor the same day. It would not have been necessary. He did not give the order for the entry to be made. He was unable to remember when Abdüllatif Ⱥhan and Ⱥbrahim Karahan left the station. The statements were taken at noon. Nor could he recall when they went to Mardin State Hospital. He confirmed that the vehicle in which Abdüllatif Ⱥhan was carried would have passed by that hospital on the way to the Mardin central provincial gendarme station.

(5) Ahmet Kurt

116. The witness was born in 1972. In December 1992, he was the deputy commander of Konaklı gendarme station under the command of Mardin provincial gendarmerie

headquarters. When asked to recount what happened at Aytepe on 26 December 1992, he requested to refresh his memory from the documents, which were duly given to him. He then stated that he had accompanied units from the central station on an operation in Aytepe. He was assigned to a particular area. The weather was cold, but not snowing, with about 20 cm of snow on the ground. While watching with binoculars, he saw two persons running away from soldiers carrying out the search. He notified the unit commander who ordered him to capture them. He went with his team of 17 men in the direction of the escapees. That area was very woody, with many walls. There were hundreds of small gardens south of the village. It was about 1 km from where he had first spotted them and it took them about half an hour to get to the gardens. He slipped three of four times as he came down the hill as the stones were icy and covered with snow.

117. After half an hour, a private informed him that they had caught one. He went to the place and recognised /brahim Karahan. The soldier told him that they had followed his footprints and caught him hiding in the snow, under some trees. The witness asked /brahim Karahan where the second person was. Karahan said that he was alone. They insisted but he still denied it. He saw no sign that the soldiers had beaten him.

118. About 15-20 minutes later, a private shouted that a man was fleeing. The witness headed in that direction and was informed that the man had been caught. When the witness went up to him, he saw that it was Abdüllatif /lhan. He was told by the private that the man, while jumping over one of the garden walls, slipped, fell and hit his head. The scratches on his face were from the thorny bushes under which he had been hiding. The private said that he had seen Abdüllatif /lhan, ordered him to stop and that Abdüllatif /lhan had panicked and tried to escape by pushing the soldier. The soldier called out to the other soldiers that some-one was trying to escape. Abdüllatif /lhan fell when he was jumping the wall and that is when he was caught. The witness did not himself see Abdüllatif /lhan slip and fall. There were two or three other soldiers at the scene who had come to help and subdue Abdüllatif /lhan. They were holding him, standing, by the arms, as he had tried to flee by pushing the private and resisting. The walls were one and a half or two metres high. It would have been difficult for some-one to see another person at 15 to 20 metres. /brahim Karahan could not have seen Abdüllatif /lhan's capture as it took them another 15-20 minute search to uncover him.

119. The witness saw that Abdüllatif /lhan was bleeding on the head, not on the face - he guessed on the left side. He did not look closely. Abdüllatif /lhan was limping slightly, but he did not remember on which side and he did not check if there was a wound. His clothes were wet from the river. When asked how his clothes were wet, the witness denied saying that he had fallen in the river but stated that the soldiers said that he got wet when he fell. In answer to further questions by the Government Agent, he stated that he fell in the creek when he was jumping over the wall which was near the water. The river had a strong current and was difficult to cross in autumn and winter. They brought Abdüllatif /lhan to the commander who ordered a fire to be lit. They asked him why he had tried to escape and not stopped when ordered. He said that he was afraid and had panicked. His speech was clear.

120. They arrived back at Konaklı at about 15.30 or 16.00 hours. He estimated that Abdüllatif Ahan remained there about four or five hours before leaving in a vehicle at about 21.00 or 21.30 hours. The witness took Abdüllatif Ahan's statement at Konaklı on the order of ™eref Çakmak. He put a pen in Abdüllatif Ahan's hand and told him to sign the statement, which he did. Abdüllatif Ahan was talking normally at this time. However, he would not say that he was in a very good condition. He knew Turkish well enough to make himself understood. He recalled signing the report drawn up by ™eref Çakmak after he had taken the statement at Konaklı. Abdüllatif Ahan did not sign the incident report in his presence. It took four to five hours to go from Konaklı to Mardin. He thought that they must have arrived in Mardin at between 01.00 and 02.00 hours. Though it was 40 km, vehicles had to proceed slowly while the road was checked for mines.

121. The witness was never asked any questions about Abdüllatif Ahan's injuries. The report omitted mentioning that Abdüllatif Ahan pushed the soldier probably due to his inexperience, as he had only held the post one year. He was not surprised that Abdüllatif Ahan's signatures on various documents looked different as the man was illiterate.

(6) Selim Uz

122. The witness was born in 1972. In December 1992, he was doing his military service in Konaklı station, Mardin. He confirmed that it was his signature on the bottom of the incident report.

123. On the day of the incident, they were approaching Aytepe village, going down a hill and dispersed to comb the area. They saw two persons running away into dense woods and bushes and going in different directions. They split into two groups to follow and find them. The witness had difficulty getting through the trees. At one point, he found himself in a thicket where the trees and undergrowth were so dense that he could not get through. He had to turn back. As he did so, he saw a person there. The witness immediately told him to lie down on the ground and not to move. As the witness approached him, the man suddenly got up and pushed him. At another point, he described the man as pushing him when he dived to the ground. When questioned further, he said that he shouted at the man to stop and to lie down, that the man did lie down and when he went over and caught hold of him, the man pushed the witness. The witness was bewildered, anxious, as the man might be carrying a weapon. When he had seen the man, his first reaction was fear. It was a hair-raising situation and his adrenalin was flowing. When he was pushed, he was afraid. He realised that the man did not have a gun but he reckoned that the man might have a sharp instrument and that he might attack. It did not occur to him that the man would run away. He expected that the man would grapple with him and attack him with the sharp instrument.

124. When the man hit him, the witness staggered. Then the man jumped over the bushes. He lost his balance and fell. He got up and fell down. There was a stream further on, where the ground was slippery. The man fell because it was slippery and cracked his head against the stones and a big boulder on the bank of the stream. He did not fall in the stream. He fell on his left side of the body and probably hit that too. Then, the witness's colleagues got to him. Two of them had been about 15-20 metres away. They threw water

on his face to wash a cut and then picked him up. The witness collected himself and went over. He did not run. There had been no need for him to follow the man as he was fleeing straight for his colleagues. If his colleagues had hit him, he would have seen it. If they had he would have intervened. If the witness had intended to hit him, he would have done it. The witness had been the first one to see him and had felt his life in danger, so why should anyone else have hit him.

125. He noticed that the man was bleeding a little on the forehead above the left eyebrow and that there was purple bruising. He had injured his left foot, where there was a slight scratch, which was bleeding. The witness presumed that he tore his trousers as he jumped over the bushes. There were also scratches on his face and hands from the bushes. They helped the man to stand up. The witness held him by the arm. Their commander arrived and they took him to the station. When asked whether he had seen the man fall, he appeared to confirm this. The incident definitely was not intentional. If he had struck the man with his rifle butt or kicked him on the ground, the man would never have been able to run away. The witness stated that when he saw the man he was so agitated and afraid that if he had hit him he would not have known how he would have hit him. If he had hit him, he would have been bound to die as the first place that he would have hit him would have been the head.

126. When referred to the incident report's reference to a warning shout, he stated that they had been spread out over the hillside and that when they first saw the men running they were too far away to shout out to stop. It took 25 to 30 minutes to find them from the moment they saw them from the hill. The stream was only 1-2 metres wide. A person could step into the water and cross it. There was no risk of being swept away. The man was trying to run back towards the village again to hide.

127. When asked if Abdüllatif Åhan's clothes were wet, he said that Abdüllatif Åhan was bound to have crossed the stream when he left the village so his clothes would have got wet then. When he fell by the stream, his head was partly in the water. Maybe in the excitement, without being deliberately doused, he might have got wet when they washed his cut to stop the bleeding. There was snow on the ground, so it was pretty cold. They did not provide him with dry clothes as they could not go into the village. When asked if anything else was done to dry or protect him, the witness said that they sat him down, gave him a cigarette or a drink and wrapped him in the soldiers' ponchos. When the Government Agent pointed out that ™eref Γakmak said that on their way along the road, they lit a fire to dry Abdüllatif Åhan, the witness said that that might well have been but he did not seem to have any personal knowledge of this.

128. The witness did not see Åbrahim Karahan being apprehended. It was not possible to see from one place to another at that location, as the thicket was very dense. When searching the area, the soldiers were walking in a line at about 15-20 metres. While there was no-one with him when he came across Abdüllatif Åhan, the others were within a few metres. When Abdüllatif Åhan ran away from him, he jumped a hedge fence, the bottom of which was built of stone and there were bushes wedged in. It was high in some places. It was waist high where Abdüllatif Åhan jumped it. When he had jumped over, he could not see exactly what had happened. Since the other soldiers were walking along in a line

and the man was running back towards the village, nobody could have seen him fall or exactly how he fell. But he definitely slipped. His footprints could be seen clearly at the edge of the stream.

129. The witness returned with the others to Konaklı station, arriving towards evening. He could not recall after the lapse of time but he thought that ™eref Гakmak and his men returned to Mardin that same day between 17.00 and 20.00 hours. Abdüllatif Λhan's condition was normal while at the station. There was no stove in the station canteen, only in the dormitories and station commander's room. When Abdüllatif Λhan arrived, his shoes and things were changed because they were wet. ™eref Гakmak and his men went back in military vehicles. There was no other way, since it was quite impossible for them to walk to Mardin from there. Road security measures were taken as a matter of course. When asked if he had told Ahmet Kurt, his team leader, that he had been pushed, he said first that he did not think it was necessary and then that he could not remember whether he had told any of his superiors or not. At another point, to the Government Agent, he commented that things were a bit stressful when they got back to the station because of the commander's questioning and they did not think it necessary to give so many details. He was unclear as to where the incident report was signed but, to one question, stated that it was not signed by all the people together.

(7) Dr Mehmet Aydoğan

130. The witness was born in 1970. In December 1992, he was working in the emergency ward of Mardin State Hospital. He had graduated in August 1991 and taken up his duties in October 1991. He confirmed his signature on two medical reports but could not recall seeing Abdüllatif Λhan. He wrote the second report following an official letter from the Ministry of Foreign Affairs. The time 19.10 hours on the first report referred to the time the patient was received at the hospital, not the time of examination. Unless another urgent case required life-saving treatment, he would generally treat a patient when he arrived.

131. When his report stated that Abdüllatif Λhan was conscious, this would mean that his answers were making sense. Referring to his report of December 1996, he wrote the word "blow" because of what the patient said. Though he did not recall this patient, that was when they used the word "blow". In reply to later questions, he stated that the word "blow" covered a fall anyway. He could no longer recall if Abdüllatif Λhan had told him that he had been hit. If Abdüllatif Λhan had been drifting in and out of consciousness, he would have noted it. The report only indicated that he did not observe it himself.

132. In his opinion, a patient with the injuries described should be seen immediately by a doctor. If not, there was the risk that the lesion on his head might develop and paralysis occur. While the paresis (semi-paralysis) could not be prevented whether the patient was seen immediately or within five days, the condition could only be prevented from developing further if a doctor was consulted immediately.

133. The gendarmes used to bring in people to the hospital. Generally, their own doctor brought them. They also had their own ambulance. He did not recall if this patient was accompanied by gendarmes.

134. A person without medical experience would have seen the haematoma around the eye. But hemiparesis could only be diagnosed by a doctor. It could decrease muscular strength and sensation, without impeding ability to walk or other movements. On the morning of 27 December 1992, a doctor who carried out a detailed neurological examination would have been aware of the need to transfer Abdüllatif Ahan to hospital. Without the necessary equipment, if the patient was conscious, replying to questions, it would depend on the doctor's opinion - he might not consider the patient to be an urgent case.

135. If there had been other major injury, he would have noted it in his report. But they were a busy hospital, they could not devote all that much time to a patient. To save time, they did not look everywhere unless the patient said he had a problem. If it was an urgent case, it was more important to refer the patient as soon as possible. It took the ambulance an hour and a half - two hours and a half in bad weather - to reach Diyarbakır. He commented that he would not have expected hemiparaplegia (complete paralysis) to have developed in the short time which it would have taken for Abdüllatif Ahan to reach Diyarbakır.

(8) Dr Ömer Rahmanlı

136. The witness was born in 1955 and he was currently professor at the brain surgery department of the Faculty of Medicine at Lice University. In December 1992, he was working as a brain surgeon at Diyarbakır State Hospital. He remembered treating Abdüllatif Ahan. As far as he could recollect and from what he understood from the file, his general condition had been middling, his state of consciousness somnolent (he was inclined to sleep), there was a decrease in the movements of the left arm and leg, called hemiplegia. There was a risk of death when he was admitted. The trauma was on the right side of the head. He did not recall that there was any serious wound requiring stitching, which would have been noted.

137. The injury to the head resulted from a blunt head trauma, which could be caused by a fall from a high place, a car accident, hitting against a surface or by a blow. It could have been caused by a single blow or several blows, depending on the force used. This was a trauma of medium or medium-light severity. In a very severe trauma, there was always a skull fracture. He thought that Abdüllatif Ahan told him that he had received the injury from being beaten.

138. In his opinion, delay in Abdüllatif Ahan coming to the hospital would not have affected the treatment of his condition. The head trauma was not very serious. There were some contusions, an oedema and small intracerebral haematomas in the brain. A surgical intervention was not necessary as the bleeding in the brain could be resorbed spontaneously so the delay did not have much effect on his recovery or the risk of death. He thought that Abdüllatif Ahan would have been incapacitated on the day that he was

admitted. Afterwards, he could walk, though he limped. Earlier intervention could not have prevented the paralysis. In time, the degree of paralysis might decrease and this could be reduced to a minimum by physical therapy and rehabilitation. There was no CAT scanner at the hospital at that time and the patient would have gone to the Günsağ clinic, where the people with him would pay for the scans.

139. In respect of patients with head trauma, the clinical picture became clear within 24 to 48 hours. In the first one or two hours, it was probable that nothing would be found. In acute cases, the picture might take shape within an hour or two. In the case of Abdüllatif Ìhan, it would have taken longer. This included the manifestation of the oedema, the weaknesses in the arm and leg and the intracerebral contusions. A doctor who examined him at noon that day might not have been aware of brain damage. He agreed that head traumas were unpredictable and that it was important to keep the person under observation. After the trauma, in general, the patient loses consciousness for a short time but regains it. Such patients have headaches, nausea, vomiting and can give illogical answers to questions.

140. When shown the recent CAT scans of Abdüllatif Ìhan, he commented that he could see light lesions remaining in the brain. That could be connected with a slight loss of strength or loss of movement. He recalled seeing him on three or four subsequent occasions when the loss of strength in his left arm and leg had been considerably restored.

(9) Dr Selahattin Varol

141. The witness was born in 1952. In December 1992, he was a chief consultant at Diyarbakır State hospital. He was a urologist. He stated that he did not sign the report of 16 December 1993 but that it was his assistant's signature on his behalf. He did not remember anything of Abdüllatif Ahan.

142. When referred to the medical report concerning Abdüllatif Ahan, he stated that the danger to life resulted from the violence of the blow. With a light blow there might be no oedema in the brain but with a violent impact with a blunt object there can be brain oedema. If it was more severe there might be paralytic lesion; if less serious, there could be paraesthesis, which gave a numbing, tingling sensation. In the hospital notes, he read out the findings of the tomography or CAT scan report as indicating that Abdüllatif Ahan had cerebral oedema, contusion, oedema of the right parietal bone and left hemiparesis.

143. He was unable to state at what time the symptoms of hemiparesis would have become apparent. From the reports, if Abdüllatif Ahan's condition at Mardin had been as it was on arrival at Diyarbakır, he would not have been able to make any statement or be described as conscious. In his view, a doctor who saw the swelling above the eye of a patient as described here, who was conscious, should have been aware of the possibility that paralysis could develop.

(10) Abdülkadir Güngören

144. The witness was born in 1959. In December 1992, he was public prosecutor at Mardin, where he had taken up office at the end of 1991. He recalled the case of Abdüllatif Ahan. There had been a record in the file, drawn up by the gendarmes as to the incident, a medical report and a statement from the suspect in line with what the gendarmes had said. He only recalled one statement from Abdüllatif Ahan. The gendarmes had apparently warned him to stop, he had ignored them and fallen off the rocks trying to get away, as the ground was snow-covered and wet. There was nothing in the file or evidence to arouse suspicion or anything claiming that the contrary had occurred, so they opened criminal proceedings in the magistrates' court.

145. When asked if he had questioned any of the gendarmes involved, the witness had received an oral statement from ™eref Гakmak. From the information he was given ™eref Гakmak was present when Abdüllatif Ahan was arrested. He was not told that Abdüllatif Ahan had pushed a gendarme and tried to flee. This was more serious and he would have instituted proceedings under Article 258 of the TPC. The witness knew Aytepe and the area around it. He was not aware of the name of the gendarme who gave the warning to stop. He would have been a person under ™eref Гakmak's command. He agreed that he had been concerned that Abdüllatif Ahan had suffered serious injuries on arrest. He did not feel the need to take a statement from him personally as the statement from the other person who had fled, the incident record signed by five people and his own statement all tallied. The medical report had stated that he was conscious as well. The

signatures on the incident report were regarded as an admission of the correctness of the record.

146. When asked whether he had looked to find medical reports of the detainees in the file, the witness stated that they had not been questioned and not taken into custody. He did not recall seeing a document signed by ™eref Γakmak concerning the transfer of the two suspects to hospital. When shown the statement of Abdüllatif Λhan dated 27 December 1992, he stated that this was the first time that he was aware that Abdüllatif Λhan had not been sent to hospital until late on 27 December 1992. In those circumstances, he would expect to see a record of that detention in the gendarmerie. There would be an entry in the custody record if he was actually detained in custody but not everyone taken into the commander's room was in custody, for example, if he was receiving treatment or had nowhere to go. People taken into custody go to a special unit. The offence with which they were charged in this case was punishable with a fine of TL 3500. No-one was taken into custody for that. He knew that these two suspects were not detained. Abdüllatif Λhan was sent to hospital and since he did not have anyone else, Λbrahim Karahan went with him. Also it was impossible in 1992 for civilians or military to travel at night, so they might not have been able to send him for that reason. When the applicant's representative told him that ™eref Γakmak had kept Abdüllatif Λhan to take his statement a second time, the witness said that this should not have happened as once was sufficient.

147. When asked why Λbrahim Karahan was not prosecuted, he explained that there was no reason to prosecute him as he did not run away. He merely hid before the order to stop was given. When it was pointed out that in his statement Karahan said that he tried to escape, the witness stated that trying to escape was an attempt stage. Though the incident report indicated that both had failed to stop, this had been clarified orally by ™eref Γakmak. Since court proceedings are public, Abdüllatif Λhan could have been accompanied when he appeared in court.

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148. The witness was born in 1972. In December 1992, he was a soldier. He served as a medical orderly, having had three months' training. He was based at Mardin where the doctor at the time was Dr Hayri Savur. They looked after the health of the soldiers. If the health of detained persons needed to be checked, it was part of his function also. He was involved in that frequently, once a week, once a month or thereabouts. He did not recall assisting in the examination of Abdüllatif Λhan or anyone injured in the face. He was never called out at night. Initially, he stated that he never heard anything about some-one trying to trick them by pretending to be in a worse condition than he was. Then he said this sometimes happened, when somebody said they had a headache or a pain. But there were no external injuries in those cases. His commander was the station commander, not ™eref Γakmak, who was the commander of the provincial central commando company. He did not recall if ™eref Γakmak had ever called him out but it was not in his functions to examine his detainees. He would have remembered if he had been called by him during the night.

149. He was not involved in the keeping of records about examinations. The doctor compiled those. He did not know where they were filed or sent. When the doctor examined people, it took 15-20 minutes and he looked all over. They only examined people in the infirmary, nowhere else. Records were taken of those persons brought into the infirmary.

Witness who did not appear

150. The Commission's Delegates had also called as witness Dr Osman Hayri Savur.

151. By undated letter which was provided to the Commission during the hearing, Dr Savur stated that he could not attend the hearing on 4 May 1998 as his child was ill.

## C. Relevant domestic law and practice

152. The Commission has referred to submissions made by the parties in this and previous cases and to the statements of domestic law and practice recited by the Court (see eg. Eur. Court HR, Kurt v. Turkey judgment of 25 May 1998, pp. 1169-1170, paras. 56-62 and Tekin v. Turkey judgment of 9 June 1998, pp. 1512-1513, paras. 25-30, Reports of Judgments and Decisions 1998).

### 1. State of Emergency

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

154. 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.

155. The second, Decree No. 430 (16 December 1990), reinforced the powers of the Regional Governor, for example to order transfers out of the region of public officials and employees, including judges and prosecutors, and provided in Article 8:

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

**2. Criminal law and procedure**

156. The Turkish Penal Code contains provisions dealing with unintentional homicide (Articles 452, 459), intentional homicide (Article 448) and murder (Article 450). It is a criminal offence to subject someone to torture or ill-treatment (Articles 243 and 245) and to issue threats (Article 191).

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

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

158. 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.

159. 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 para. 1, provides that all security forces under the command of the Regional Governor (see para. 154 above) shall be subject, in respect of acts performed in the course of their duties, to the Law on the Prosecutor of Civil Servants. Thus, any prosecutor who receives a complaint alleging a criminal act by a member of the security forces must make a decision of non-jurisdiction and transfer the file to the Administrative Council. These councils are made up of civil servants and have been criticised for their lack of legal knowledge, as well as for being easily influenced by the Regional Governor or Provincial Governors, who also head the security forces. A decision by the Council not to prosecute is subject to an automatic appeal to the Council of State.

**4. Constitutional provisions on administrative liability**

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

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

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 the theory of "social risk". Thus, the Administration may indemnify people who have suffered damage from acts committed by unknown or terrorist authors when the State may be said to have failed in its duty to maintain public order and safety, or in its duty to safeguard individual life and property.

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

**5. Civil law provisions**

163. 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 Code of Obligations, an injured person may file a claim for compensation against an alleged perpetrator who has caused damage in an unlawful manner whether wilfully, negligently or imprudently. Pecuniary loss may be compensated by the civil courts pursuant to Article 46 of the Code of Obligations and non-pecuniary or moral damages awarded under Article 47.

**6. Offences of resistance to officers etc**

164. Article 258 of the Turkish Penal Code provides in its first paragraph:

> "Whoever, by force or threat, resists a public officer or his assistants during the performance of their official duties, shall be punished by imprisonment for not less than six months nor more than two years."

165. Article 260 of the Turkish Penal Code provides:

> "Whoever exerts any influence or force to prevent the execution of any of the provisions of law or regulations, shall be punished by imprisonment for not more than one year."

166. The Commission notes that Abdüllatif Ihan was convicted under Article 260 for failing to stop during an operation which was deemed by the Mardin Justice of the Peace Court to disclose resistance to public officers in contravention of this provision (see para. 75).

## III. OPINION OF THE COMMISSION

### A. Complaints declared admissible

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

- that his brother Abdüllatif Ihan was subjected to life-threatening treatment by the gendarmes who apprehended him;

- that his brother suffered torture and denial of medical treatment for serious injuries;

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

- that his brother suffered discrimination in respect of the above matters on the grounds of his Kurdish origin.

### B. Points at issue

168. 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 6 and/or 13 of the Convention;

- whether there has been a violation of Article 14 of the Convention.

### C. Evaluation of the evidence

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

i. The Commission has based its findings on the evidence given orally before its Delegates or submitted in writing in the course of the proceedings; in the assessment 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. Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact and, in addition, the conduct of the parties when evidence is being obtained may be taken into account (mutatis mutandis, Eur. Court HR, Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 65, para. 161).

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

iii. In a case where there are contradictory and conflicting factual accounts of events, the Commission is acutely aware of its own shortcomings as a first instance tribunal of fact. The problems of language are adverted to above; there is also an inevitable lack of detailed and direct familiarity with the conditions pertaining in the region. In addition, the Commission has no powers of compulsion as regards the attendance of witnesses. In the present case, while 12 witnesses were summoned to appear, one potentially key-witness failed to give evidence before the Commission's Delegates. It was also hampered by difficulties in identifying eye-witnesses to events and in obtaining documents relating to the incident. The Commission has therefore been faced with the difficult task of determining events in the absence of potentially significant evidence. It acknowledges the unsatisfactory nature of these elements which highlights forcefully the importance of Contracting States' primary undertaking in Article 1 to secure the rights guaranteed under the Convention, including the provision of effective remedies as under Article 13.

**1. General background**

170. The incident in which Abdüllatif /lhan was injured occurred near the village of Aytepe, which is located in the south-east of Turkey, approximately 60-70 kilometres from the town of Mardin. At this time, December 1992, this region was subject to considerable threats to peace and security. The PKK organisation was engaged in activities of a violent character, necessitating counter-measures by the security forces. The Commission notes that the road leading from Mardin to Aytepe had to be checked for mines to ensure the safety of military and civilian vehicles and that the gendarme stations in the area had been subject to attack.

171. Abdüllatif /lhan was registered as being from Ahmetlı village. Approximately a year before the incident, he had come to live with his family, his wife and children, at Aytepe village nearby as his own hamlet Kaynak had apparently burned down. While there are differing allegations as to whether it was the PKK or the security forces who burned down the hamlet, this element is not in issue in the current application.

172. There was a gendarme station at Konaklı station several villages away, and since the area came under the jurisdiction of the gendarme forces in Mardin, gendarme units from Mardin paid frequent visits. It appears from the testimony of ™eref Γakmak, the commander of the central gendarmerie of Mardin province, that he had often been to Aytepe. He stated that he had been informed on taking up his functions in July 1992 that the /lhan family co-operated with the PKK. He also knew /brahim Karahan, the friend and neighbour of Abdüllatif /lhan in Aytepe village, whom he suspected of involvement with the PKK.

173. Aytepe village was located in a hilly area. The village was on high ground, with an area south below the village, described as containing gardens, where there were fruit trees and bushes. There were streams, or rivers, the descriptions differing, on the east and west sides of this garden area. There were also differing descriptions of the way in which the gardens were laid out. According to Abdüllatif Ahan, the gardens were on level ground, filled with trees and rocks, and separated in some parts by walls into small fields while in other parts, the terrain was open, with visibility of 200 metres. Ibrahim Karahan described the gardens as being split into two areas by a high stone wall of 75cm, with a river on one side of the wall. Temeref Çakmak stated that the gardens were divided in areas of 10 to 20 square metres, separated by stone walls the height of a man. These walls were difficult to climb over, with pieces of wood placed at various spots to assist persons in crossing. He described the rivers as having steep, eroded banks, with the water level high and the current fast, though at this time the upper layer was covered with ice. Ahmet Kurt, the NCO from the nearby Konaklı station, said that there were hundreds of small garden areas, divided by stone walls and that the area was woody. He also described the river as having a strong current and being hard to cross. Selim Uz, the gendarme, who claimed that he found Abdüllatif Ahan hiding in the garden area, stated that there were patches of dense thickets and trees, which obscured visibility. He described the water nearby as being a stream, not more that 1-2 metres wide, which could be stepped across, with no risk from any current. He made no mention of the water being iced over. The wall which he described was high, though only waist high in some places.

174. The Commission observes that it is common ground that there were stone walls in the garden, which were in places quite high and that there were bushes and trees. The difference in the description of the rivers or streams is striking. Selim Uz was the only gendarme witness who claimed to have seen Abdüllatif Ahan fall by the water. Temeref Çakmak who knew the area generally was not at the particular spot where the incident occurred. This discrepancy in the accounts of the terrain however is closely bound up in the assessment of the credibility of the various accounts of events which have been given and is considered further below.

175. The weather at the time of the incident was very cold. There was snow on the ground, described variously as 20cm or four fingers thick. According to Temeref Çakmak, it was snowing continuously, changing to drizzle as it got warmer. None of the other witnesses who had been at the village recalled that it was snowing at this time.

**2. The operation at Aytepe on 26 December 1992**

176. According to the report issued by the Mardin provincial central gendarme command, the operation at Aytepe, conducted by units from Mardin and Konaklı, took place pursuant to intelligence reports that Mehmet Koca, one of the villagers, was harbouring two persons wanted for aiding and abetting the PKK (see paras. 67-68). There is no indication that there was any intention to apprehend either Ibraham Karahan or Abdüllatif Ahan. The units were under the command of Temeref Çakmak.

177. The gendarmes proceeded from Konaklı station on foot, surrounding the village shortly before dawn. Ahmet Kurt was assigned with his team of 17 men to an area towards the south. He saw through his binoculars two men running away. He reported this to ™eref Γakmak on the radio and was instructed to find and catch the two men. He and his men conducted a search, moving downhill and into the garden area south of the village, which was about 1 km from where he had been positioned when he sighted the men. Considering the distance involved, Ahmet Kurt's oral testimony to the effect that there was no attempt to call a warning to stop to the two men is entirely credible. It is however in contradiction to the reports issued after the incident and the statements taken from the two men, which allege or imply that stop warnings were shouted when the men were first seen to be running away. This is one of the many elements which cast doubts on the reliability of the written official documents concerning the incident.

178. On this issue, the oral testimony of the two men concerned, Abdülattif Λhan and Λbrahim Karahan, also coincides with that of Ahmet Kurt. They both described that, when they decided to run out of the village to hide from the soldiers whom they realised were coming, they heard no-one shouting after them. Abdülattif Λhan explained how the soldiers had been high on the hills and that, naively, they had not realised that the soldiers would be able to see them running away to hide in the gardens.

179. The oral testimony before the Delegates and certain of the official documents in the case also show marked differences as regarded the motive for the two men to run away. Abdülattif Λhan and Λbrahim Karahan stated that they were afraid, from past experiences, that they might be beaten by the gendarmes. ™eref Γakmak stated that, though he asked them, he received no explanation for why they had run away, besides their assertion that they were frightened. The written statements attributed to the two men dated 27 December 1992 make reference to the fact that PKK members had visited their houses and warned them not to speak to soldiers. The undated gendarme report, and the later letter of 13 May 1994 from the Mardin provincial gendarme command to the Mardin public prosecutor, asserted that the two men had been carrying out surveillance duty for the PKK, the former alleging that the two men had been aiding and abetting the PKK. The Government in their observations, which appear to rely on these latter two documents, also submit that the two men were acting as lookouts. There is no indication on what factual basis this assertion was made and there is no evidence before the Commission to substantiate it. The Commission observes that in the course of the subsequent search no discovery was made of the presence of any PKK members and that the only other person detained was a villager, Veysi Aksoy, apparently wanted for aiding and abetting the PKK.

180. As regards events after that point, the accounts given orally by Abdüllatif Λhan and Λbrahim Karahan and the three gendarmes who gave evidence are completely at odds - the former asserting that, when they were discovered in the garden, they were beaten, Abdüllatif Λhan being injured in the head probably by a rifle butt, and the latter asserting that neither was beaten and that the injuries received by Abdüllatif Λhan were the result of his falling down several times, and hitting his head on a stone.

181. The Commission's Delegates found that Abdüllatif Ihan was still visibly suffering from the after-effects of his injury. His account, given in Kurdish, was expressed in simple, unelaborate terms but was generally consistent and believable. While he did not recall much of what occurred immediately after he was beaten, he was clear that he remembered being kicked by the soldiers and being struck by a rifle butt on the head. His testimony was confirmed by Ibrahim Karahan, who claimed that after he had been found in the garden and had been beaten, he saw soldiers beating Abdüllatif Ihan who was discovered hiding about 15-20 metres away. The way in which he gave his testimony was also credible and convincing.

182. The Government have submitted that the testimony of both men cannot be relied on as they are full of contradictions and are implausible. As regards Abdüllatif Ihan, they point out that at one stage he appeared to say that he had a lawyer and then that he did not; that he accepted that he had put a thumb print on the statement of 27 December 1992 but denied signing anything that day; that he said that there had been no incidents at the village before the operation and then that there had been previous operations at the village; that he alleged that they were hiding in such a way that they could be seen from the village and by the soldiers and had no reasonable explanation for hiding in this way; that it was incredible that he could have been soaked in an icy river as alleged and not suffer pneumonia or at least a cold. As regards Ibrahim Karahan, they draw attention to the fact that he alleged that he had been beaten himself but made no complaint himself to the commander nor mentioned it in his statement of 27 December 1992, which he signed; that he admitted the terrain was rough, with lots of bushes and hedges which did not permit persons more than 5-6 metres from seeing each other, and that therefore he could not have seen what he claimed to have seen; that he initially claimed that 10-12 persons were beating Abdüllatif Ihan and then altered his allegation to one or two hitting him; that he said that Abdüllatif Ihan's eye was not bleeding although the gendarmes had mentioned this. They point out that, although he was willing to testify for his friend, in respect of his own allegations that he was later detained and tortured for 19 days in 1993 he had taken no steps whatsoever by way of complaint about his own treatment. They submit that it is hard to rely on the testimony of someone whose son has joined the PKK.

183. The Commission has considered these points, and the others made in the Government submissions but finds that they do not disclose any fundamental inconsistencies which might cast doubt on the reliability and honesty of the two witnesses. It notes that Abdüllatif Ihan's testimony on several points seemed contradictory but that on examination of the transcript it appears that he might have misunderstood the ambit of some of the questions. For example, he replied that he had a lawyer to a question by the Commission's Delegates but then later to questions by his own legal representative stated that there was no lawyer with him in court at Mardin. When asked by the Delegates to clarify this, he referred to a lawyer at Diyarbakır and maintained that there was no lawyer in court at Mardin. This would be consistent with his having been in contact with a lawyer in the HRA in Diyarbakır who was not however involved in the criminal proceedings at Mardin. The Government has furthermore not provided any minutes of the court proceedings which indicate that he was represented by a lawyer at Mardin. Abdüllatif Ihan's denial of incidents occurring before the operation and his reply that there had been operations before the occasion on which he was injured

may also be explained by a slowness of understanding as to what the questions concerned. In relation to the signature on the statement of 27 December 1992, the Commission notes that the applicant as illiterate would be unlikely to sign (see further below) and finds nothing inconsistent in his acknowledgement that he placed his thumb print on the statement. As regards his allegedly unsatisfactory explanation of the hiding places in the gardens, it would appear to the Commission that the way in which the two men fled in sight of the soldiers gave evidence of some panic in which rational thinking might not have been to the fore. It sees no weight in the argument that if his story about being soaked was correct he would have suffered pneumonia or other ill consequences. On the account of the gendarme witnesses, on whom the Government rely, Abdüllatif Ahan had been wet or soaked and this is one point on which all witnesses appear agreed. That he did not suffer illness additional to his other injuries is an element of good fortune rather than a sign of dishonesty.

184. As regards Ibrahim Karahan, the Commission finds no ground to discount his testimony merely on the basis that one of his children is said to have joined the PKK. It does not find it surprising that Ibrahim Karahan did not issue any petitions in respect of alleged ill-treatment in late 1993 . On his own account, he had been the subject of repeated interest by the gendarmes and he might credibly have considered that complaining would not serve him any useful purpose but might attract further problems. Similarly, his failure to complain to TMeref Takmak about being beaten in the gardens on 26 December 1992 could be reasonably attributed to his vulnerable position, fearing further ill-treatment or a belief that the commander condoned the behaviour. His apparent signing of the statement of 27 December 1992 though he rejected the contents is also not inconsistent in light of his explanation that he could not read and it was not read out to him. The Commission does not find that he unequivocally agreed to the description given by the Government Agent at the hearing to the effect that the gardens were not on one level and that bushes and walls prevented one from seeing something at 5-6 metres distance. The Government Agent's description culminated in an invitation to Ibrahim Karahan to describe the terrain. Ibrahim Karahan answered only that the garden where he and Abdüllatif Ahan were was level and that the soldiers dragged Abdüllatif Ahan to the water and immersed him. The Commission sees no inconsistency in Ibrahim Karahan's description of Abdüllatif Ahan's eye as not bleeding. His description that the eye was swollen and black referred to the left eye, whereas Abdüllatif Ahan also had received a blow to the right side of the head. The gendarmes' descriptions of the injuries are not so clear or unequivocal as to indicate that this is a significant contradiction (see further below). Finally, as concerns the number of soldiers that he alleged were beating Abdüllatif Ahan, his testimony is entirely consistent with his account that a group of soldiers gathered round Abdüllatif Ahan and were involved in beating him, of whom he saw one or two hitting with a rifle butt and another kicking. His clarification that he saw the rifle butt going up and down but that he did not see it strike is also credible and discloses a clarification, rather than a contradiction. The Commission has further considered the reliability of the testimony of both Abdüllatif Ahan and Ibrahim Karahan in conjunction with the documentary evidence and the oral evidence of the gendarme witnesses.

185. The Commission notes that in the incident report of 26 December 1992 and in the statements taken by the gendarmes signed by Abdüllatif Ýhan and Ýbrahim Karahan on 26 and 27 December 1992, there is no mention of any ill-treatment and that Abdüllatif Ýhan is described as receiving injuries from falling. These contemporaneous documents present numerous difficulties however.

- The incident report and the statement of 26 December 1992 are purported to be signed by Abdüllatif Ýhan. He however is illiterate and cannot sign his name, placing his thumb print instead. It is to be noted that the statement produced on 27 December 1992 bore a thumbprint, in addition to a signature. The signature on the incident report is an illegible scrawl, which differs considerably from the purported signatures on the two statements. When Ahmet Kurt who took the first statement was questioned about this, he considered that, since Abdüllatif Ýhan was illiterate, the difference in signatures, was hardly surprising. ™eref Ýakmak told the Delegates that Abdüllatif Ýhan volunteered to sign the incident report taking the pen in his hand, though he commented at a later point that he did not think that Abdüllatif Ýhan was signing correctly but considered that this was still useful for undefined forensic purposes. The Commission finds this to be a remarkable explanation, when by ™eref Ýakmak's own account, Abdüllatif Ýhan purportedly volunteered to sign the report shortly after striking his head on a rock and when he was in a condition whereby he had difficulty walking. It considers that grave doubts arise as to the circumstances in which the purported signature of Abdüllatif Ýhan came to appear on these documents.
- There are doubts as to where in fact the incident report was drawn up. ™eref Ýakmak stated that it was drawn up at Aytepe, as the report itself stated. Ahmet Kurt however was sure that it was only presented to him to sign at Konaklı later that day. Selim Uz also recalled that the report was not signed by all the people together.
- The contents of the incident report do not coincide with the events as they occurred according to the oral testimony of any of the gendarmes, in particular Selim Uz, the only one of the three gendarmes who claimed to have witnessed Abdüllatif Ýhan receiving his injury. According to his version, he found Abdüllatif Ýhan hiding, ordered him to freeze but Abdüllatif Ýhan pushed him and, running away, fell first as he jumped a wall and then by the edge of the stream. ™eref Ýakmak and Ahmet Kurt admitted that they had no first hand knowledge of what occurred. It is not readily apparent therefore on what basis the report states that the two men were warned to stop when they were seen running from the village and Abdüllatif Ýhan fell down the slope of a hill and injured himself.
- There is also some obscurity as to why statements were taken from Abdüllatif Ýhan and Ýbrahim Karahan on 26 December 1992 at Konaklı station and also on 27 December 1992 at Mardin. The public prosecutor Abdülkadir Güngören claimed that he had only seen the statements of 26 December 1992 and that there was no necessity for taking a second set of statements at Mardin. The second set of statements makes reference for the first time to the two men having run away because they had been warned by the PKK who had been to their homes not to have anything to do with the soldiers but apart from that they add no further

details as to how the injury of Abdüllatif Ilhan occurred. It is to be noted that the statements of Abdüllatif Ilhan do not coincide on significant points with the oral testimony of the gendarmes. The statements give events in reverse order, alleging that Abdüllatif Ilhan hid in the bushes after he had slipped and fallen whereas Selim Uz's detailed oral explanation was to the effect that he fell after he had been discovered hiding.

- The incident report, which purports to be the most contemporaneous document, makes no reference to the alleged assault by Abdüllatif Ilhan on Selim Uz. However, the report from ™eref Γakmak to the public prosecutor dated 27 December 1992 refers to both suspects physically resisting by pushing members of the security forces and the report to the Mardin provincial central gendarme command alleges that they resisted the gendarmes with stones. These accounts, which all derive from the Mardin gendarmes, are strikingly inconsistent and give the impression that the story was increasingly embroidered with the passage of time.

186. The Commission has had occasion to observe previously that the reports drawn up after an incident have provided unreliable accounts of what occurred.[3] Though such reports are allegedly drawn up at the location of the incident and immediately afterwards, the signatories of such reports have often proved to have no independent knowledge of the events allegedly recounted and it has not been possible to identify the source of the information contained in them. It observes that the incident report in this case fails to identify which of the signatories could be regarded as a source for any one of the stated facts therein, while no one signatory could be regarded as a witness to the factual assertions as a whole. The report also fails to identify who drew it up for signature by the signatories. As indicated above (para. 185), the report misleadingly purports to have been drawn up and signed by all the signatories at the scene of the incident.

187. The Commission finds that there are serious doubts as to the reliability of both the incident report and the statements taken by the gendarmes. It has given careful consideration to the oral testimony of the three gendarmes, who were or should have been in a position to give an account of what occurred. It would observe however that while it requested the Government to identify the gendarme or gendarmes who apprehended Abdüllatif Ilhan the Government provided the name only of Selim Uz. On questioning by the Delegates, it appeared that while he indeed claimed to have found Abdüllatif Ilhan in hiding, he was not in fact immediately on the spot when his colleagues allegedly caught Abdüllatif Ilhan.

188. As mentioned above, ™eref Γakmak, the commander of the gendarme units, did not witness the incident himself. He did however provide the Delegates with an elaborate account. The Commission is not satisfied that it can be regarded as reliable. It has already noted above that his description of the scene of the incident differed strikingly from that of the gendarme Selim Uz who had apparently been there and that the alleged pushing of Selim Uz was not included by him in the incident report, despite it disclosing that a more

[3] See eg. Eur. Court HR, Ergi v. Turkey judgment of 28 July 1998, Comm. Rep. 20.5.97, paras. 128 and 153.

serious offence had been committed. He also sought to explain the fact that Abdüllatif Ahan was soaked by referring to his alleged fall into the river, whereas Selim Uz referred only to Abdüllatif Ahan falling by the river and water being thrown on his face. The Commission accordingly gives little weight to his testimony about how the injuries occurred. It also has reservations concerning his evidence as to what occurred after he went to meet the gendarmes and their prisoners 200m down the Ahmetlı road outside the village. On the one hand, he accepted that Abdüllatif Ahan showed sign of an injury to the head and that he spoke in an impeded, abnormal fashion, but on the other hand saw no reason for particular concern. Though the incident report and the statements of Abdüllatif Ahan drawn up at the time referred to the fact that Abdüllatif Ahan's left leg was also injured, ™eref Γakmak told the Delegates that his leg was not injured and that brahim Karahan only had to assist him by holding him by the arm. He later conceded that since Abdüllatif Ahan could not walk it was necessary to obtain a mule for him to ride on to the station. This seems to show not only an inconsistency but an inclination to attempt to minimise the visible extent of Abdüllatif Ahan's injuries. ™eref Γakmak also seemed at some pains to show that he was nonetheless attentive to the care of the suspects under his responsibility. He explained that since it was very cold and Abdüllatif Ahan was soaked from falling in the river he ordered a fire to be lit, though the possibility of allowing him to obtain dry clothes from his house did not occur to him. While Ahmet Kurt also referred to a fire being lit, Selim Uz appeared to have no personal knowledge that this occurred and to be surprised by the suggestion. The Delegates found the testimony on this aspect to be unconvincing and lacking in credibility.

189. The Commission recalls that Ahmet Kurt, though in charge of the squad who searched for and found Abdüllatif Ahan, stated that he was not on the spot when the injuries occurred. He recounted what he said that he had been told by the soldiers, including the allegation that Abdüllatif Ahan had fallen into the river, though he was rather confused as to what he had been told and his explanation varied. He noticed on arrival at the scene that Abdüllatif Ahan was bleeding on the head and limping. He saw nothing to remark in the way in which Abdüllatif Ahan spoke though he conceded that he could not say that Abdüllatif Ahan was in a very good condition when he was at Konaklı. The Commission perceives the same reluctance to admit that Abdüllatif Ahan was seriously hurt at Aytepe and places little weight on his account of how the injuries occurred.

190. The Commission finds that the testimony of the gendarme Selim Uz is of particular significance. He claimed to be the gendarme who found Abdüllatif Ahan hiding in thick undergrowth and described with graphic detail how Abdüllatif Ahan lunged at him, pushing him and then ran away. He repeated several times that the incident was not intentional. He talked dramatically of how scared he was, that he had feared first that Abdüllatif Ahan had a gun, then that he might have a knife. When asked about whether any other soldiers had beaten Abdüllatif Ahan, he volunteered the comment that if anyone had had the motive to hit Abdüllatif Ahan, it would have been him and that he was in a state in which he could have done anything. The Delegates found that he gave his evidence in a quite distinctive manner which contrasted with his denial that Abdüllatif Ahan had in fact been ill-treated. In answer to questions he tended to repeat the same

explanation but would then abruptly volunteer information about his personal feelings, in such a way as to give the impression of trying to vindicate himself. The Commission also notes that he was very unclear as to the information which he passed onto his superior officers about what had occurred and seemed to accept the possibility that the accounts which were given were not wholly accurate. He also explained the fact that Abdüllatif Ilhan was soaked by describing how they splashed water on him to wash the cut on his face, but that, unintentionally, they could perhaps have doused him in the excitement. His comment that things were stressful at Konaklı due to the commander's questioning also gives a distinct impression that the events were less than orderly and routine both at the scene of the incident and later and that the soldiers themselves were considerably agitated and had to do some explaining.

191. The Commission also observes some difficulties with Selim Uz's description of events. He stated that he found Abdüllatif Ilhan hiding in dense thicket, which he could not push through and that he told him to freeze and lie down, which in itself seems contradictory. He also stated that Abdüllatif Ilhan pushed him back and ran away, jumping over a wall, falling on the other side and by the river. However, he described himself as reeling backwards, having to steady himself and admitted that he made no attempt to pursue the escaping man. It is not apparent how he would have been in a position to see himself that Abdüllatif Ilhan had fallen twice in the way described or what occurred when he was caught by other gendarmes. When this was put to him, he admitted that he could not exactly see what happened. The Government have therefore not succeeded in producing a witness who could unequivocally state that they witnessed Abdüllatif Ilhan receiving his injuries as a result of a fall.

192. The three gendarmes were adamant in refuting the testimony of Ibrahim Karahan, who alleged that he had himself witnessed Abdüllatif Ilhan being beaten. It was stated in contradiction of these two men's evidence that they were not hiding in the same vicinity and that the layout of the area, with walls and thickets, was such that his claim to have witnessed anything was impossible. As stated above, the Delegates found Ibrahim Karahan's testimony to be credible and given in a convincing manner, whereas serious difficulties arise in relation to the accounts by the gendarmes. His claim that he himself was beaten receives substantiation from the fact that he received medical treatment at Mardin for trauma to the ear, which is unexplained by any of the testimony of the soldiers who stated that he had only received scratches from bushes.

193. As regards the visible extent of the injuries to Abdüllatif Ilhan's head, the accounts vary. According to Ibrahim Karahan and the applicant, who saw him the next day, the area around his left eye was swollen and bruised and he also had a mark on the right hand side of his head. The applicant described this mark as four inches long above the eyebrow and stated that it looked as if it had bled a little. The gendarmes' evidence also indicated that there was visible injury to the head. TMeref Cakmak recalled that there had been scratches on his face but also a larger wound that bled, though he could no longer recall on which side. Ahmet Kurt recalled that Abdüllatif Ilhan's left side of his head was bleeding, rather than his face. Selim Uz was rather confused in his recollection, but stated that he was bleeding a little on the left hand side above the eyebrow, but also that he was bleeding from scratches from bushes on other parts of his face. He

remembered bruising also. That there was bruising around the left eye is confirmed by the report of Dr Aydoğan, who recorded a periorbital haematoma on that side. However, the injury to the brain, which resulted in semi-paralysis on the left side, was caused by trauma on the right hand side (see Dr Rahmanli's testimony). Abdüllatif Ahan indeed stated that he had been struck by the rifle butt on the right side of the head. This accords with Ibrahim Karahan's and the applicant's recollection of there being a mark on that side. The Commission finds the gendarmes' accounts coincide to the extent that they recall what must have been the more visible signs of injury on the left hand side but are otherwise not particularly clear or consistent. The references to bleeding on the left hand side are difficult to reconcile with the medical evidence while reliance on scratches from bushes on the face as accounting for other marks on the face is unconvincing. It is to be remarked that the gendarmes' account of a fall is not easily reconcilable with Abdüllatif Ahan having received two injuries on different sides of his face.

194. As regards other injuries, Abdüllatif Ahan, who had emphasised his head injury, also referred to being kicked and hit in the hip by a G3 rifle. Ibrahim Karahan confirmed that he had seen that his hips were all black, when he had helped him at the lavatory in Mardin. The applicant, who saw Abdüllatif at the hospital, described marks on his left side and foot, and marks over his legs. As mentioned above, the incident report referred to an injury to the left leg though ™eref Гakmak in his oral testimony said that there was no injury to his legs. Ahmet Kurt recalled however that Abdüllatif Ahan was slightly limping and Selim Uz explained that he had hurt himself on the left side, in the context of the alleged fall, and remembered a graze on the foot. In the Commission's view, the weight of the evidence is clearly in support of Abdüllatif Ahan having been severely bruised on the left hip and leg.

195. While the medical report of Dr Mehmet Aydoğan made no reference to bruising elsewhere than on the face, he admitted before the Delegates that he would have concentrated on the serious head injury which required urgent referral to Diyarbakır and the Commission finds that this does not contradict its own findings. There was some discussion before the Delegates as to the use of the phrasing in that report that Abdüllatif Ahan "had been brought in as a result of a blow". Dr Aydoğan had produced an addendum to his report, apparently at the request of the Government, in which he explained that the word "blow" had been used because of the patient's explanation but the injury could have been caused by a trauma from a fall or a blunt instrument. Before the Delegates, he had little recollection of either report but thought that the word "blow" covered a fall anyway. In the absence of his recollection that Abdüllatif Ahan had complained to him of being beaten, the Commission is unable therefore to draw any conclusions from his report, though it notes that Dr Rahmanli in a more precise analysis distinguished a blow from a fall or a car accident.. However, Dr Rahmanli, who treated the Abdüllatif Ahan in hospital, did have some recollection that Abdüllatif Ahan had told him that he had received his injury from being beaten, which is further substantiation of his account.

196. In light of the above, the Commission finds that Abdüllatif Ahan was beaten by one or more gendarmes after being discovered hiding in the gardens below the village. He received at least one blow to the head from a rifle butt, and briefly lost consciousness, following which the soldiers sought to revive him by dipping him in the water of the

nearby stream. He was visibly injured on the head, with bruising around the left eye and a mark from a blow on the right hand side, which had bled. He was limping, indicating the presence of injury to the left leg. He was having difficulty walking and there were also noticeable irregularities in his manner of speaking when he was questioned. Though his clothes were wet and the temperatures were low, no steps were taken to obtain dry clothing from the village for him. The Commission also treats with considerable scepticism the varying claims that he was covered with a soldier's poncho or given gloves.

**3. Subsequent events: Konaklı**

197. Notwithstanding the claims from the gendarmes to the contrary, Abdüllatif Ahan was in a state unfit to walk after receiving his injuries. The Commission finds that Abrahim Karahan was required to carry him to the next village of Ahmetlı, about 1 km from Aytepe. The soldiers who were carrying their arms and equipment were regarded by ™eref Γakmak as being unable to assist Abdüllatif Ahan. At Ahmetlı, a mule was found and Abdüllatif Ahan rode 5 km to the Konaklı station, with Abrahim Karahan helping to hold him in the saddle.

198. At the station, Ahmet Kurt took the statements of both men. Abdüllatif Ahan otherwise was kept in the canteen while Abrahim Karahan was placed in the custody area. Despite requests for the custody register of the station to be provided, the Government have not submitted it. ™eref Cakmak explained that their names would not have been entered since no-one could be detained without being seen by a doctor and anyway they were in transit. The Commission notes the explanations proffered by the prosecutor Abdülkadir Güngören who considered that persons in transit or not held in the actual cells themselves would not be registered and who considered that not all persons who were taken to a gendarme station could be regarded as being detained. However, the Commission finds no indication that Abdüllatif Ahan and Abrahim Karahan were voluntarily in the company of the gendarmes. They were described as having been caught and were taken to the station to make their statement and continued to be held after that event.

199. According to Ahmet Kurt, they arrived back at Konaklı station at about 15.30 to 16.00 hours. ™eref Γakmak and his men, along with Abdüllatif Ahan and Abrahim Karahan, stayed at the station for 4-5 hours while security checks were made on the road to enable them to proceed safely in their vehicles to Mardin, 60-70 km away. He placed the time of departure of the vehicles at about 21.00 or 21.30 hours. He considered that since it took about four to five hours to cover that distance while checking for mines they would have reached Mardin at about 01.00 or 02.00 hours. Selim Uz's memory was less precise but he thought that the vehicles left for Mardin the same day between 17.00 and 20.00 hours. Abrahim Karahan's account placed them arriving at Konaklı at about 16.00 - 17.00 hours and leaving after one or one and a half hours. His description also implies that they arrived at Mardin during the night, as he states that the commander instructed the stove to be kept going until the morning. While these accounts are more or less reconcilable, the small differences being referable to difficulties of memory after a lapse of time, ™eref Γakmak's testimony stands out as markedly different. Though the

operation finished at noon, he said that it took till evening to return to the station as the road was steep. He gave the impression that there were no vehicles at Konaklı and that if it had not been for the presence of Abdüllatif Ahan they would, remarkably, have returned to Mardin on foot. Thus he explained that there was considerable delay while a vehicle was requisitioned and the road checked for mines, such that they did not leave until midnight. Consequently, on his version, they arrived in Mardin, not during the night, but towards morning. The Commission considers that this version lacks credibility and discloses a desire to account for as much time as possible elapsing before Abdüllatif Ahan received medical treatment. As regards the timing of events, the Commission accordingly accepts the testimony of Ahmet Kurt and finds that Abdüllatif Ahan and Ibrahim Karahan arrived at Mardin central provincial gendarme station during the night of 26-27 December 1992. It notes that the vehicle in which Abdüllatif Ahan was carried passed by the Mardin State Hospital on the way to the Mardin central provincial gendarme station.

**4. Subsequent events: Mardin central provincial gendarme station**

200. On arrival at Mardin during the night, Abdüllatif Ahan and Ibrahim Karahan were taken to the cafeteria, where it was warm. There they appear to have remained until Tmeref Takmak called them to his office to take a second set of statements. Until that moment, the only other significant event was the summoning of a doctor, who arrived with a paramedic, to look at Abdüllatif Ahan.

201. Tmeref Takmak stated that the doctor was summoned within half an hour of their arrival at the station, while Ibrahim Karahan stated that he arrived within five minutes. The Commission finds that the doctor must have been sent for more or less immediately and arrived quite quickly. The accounts of the examination which took place however differ considerably. Ibrahim Karahan said that the doctor merely looked Abdüllatif Ahan over from a distance without taking any steps to examine him physically. Tmeref Takmak stated that the doctor conducted a proper examination, involving the taking of blood pressure and checking other vital signs. The paramedic also put a dressing on the wound over Abdüllatif Ahan's eye. The Delegates sought to resolve this significant dispute of fact by obtaining the testimony of the doctor and paramedic involved. Unfortunately, the doctor, identified by the Government as Dr Hayri Savur, did not appear to give evidence. The paramedic, identified by the Government as Nuri Ay, did give evidence before the Delegates. He confirmed that he had assisted Dr Savur during this period, while he was stationed at Mardin. He had no recollection however of being called out during the night to help in the examination of a detainee and stated that he would have remembered such an event. The Delegates had also requested copies of any infirmary or medical records which would have indicated whether or not treatment was given to Abdüllatif Ahan at the station at Mardin. The Government have informed the Commission that there are no records and that civilians were only treated on an emergency basis at gendarme stations, in which cases no records would be made.

202. The Commission is left with considerable doubts as to the thoroughness of the examination of Abdüllatif Ahan by whoever may have been involved but finds it inappropriate to make any findings on this point. Both Ibrahim Karahan and Tmeref

Γakmak agreed that the "doctor" took the view that there was nothing wrong with Abdüllatif Ahan other than the cold and that he was exaggerating his symptoms on purpose. It is therefore undisputed that Abdüllatif Ahan received no more than cursory first-aid treatment and that the purported doctor discounted visible signs of distress, without taking any precautionary steps in respect of an evident trauma to the head.

203. The two detainees remained at the station until after they had given their statements to ™eref Γakmak. The Commission has already commented above that the necessity of taking a second statement is not apparent, yet it was for this reason that there was a delay in Abdüllatif Ahan being taken for medical treatment. ™eref Γakmak showed some consciousness to the Delegates of the difficulties arising from this lapse of time. He explained that he had other duties, and that his mind had been put at rest by the doctor's opinion that Abdüllatif Ahan was faking. He recalled in any event that he took the statements by noon, though he showed some hesitation when pressed on the point, but was sure that he sent the two men to the Mardin State Hospital when the statements were completed. On the other hand, brahim Karahan stated that their statements were not taken until 17.00 or 17.30 hours and that they were not released until 21.00 or 22.00 hours. Since the medical report on Abdüllatif Ahan issued by Dr Aydoğan at Mardin State Hospital includes the noted time of 19.10 hours, which Dr Aydoğan confirmed before the Delegates was the time of admission, the Commission is satisfied that the two men arrived at the Hospital at or around that time. Insofar as ™eref Γakmak's testimony sought to give the impression that the two men were released earlier in the day, the Commission finds it unreliable. However, to the extent that ™eref Γakmak stated that the two men were released from the station after having given their statements to him, this would be roughly consistent with brahim Karahan's recollection of the statements having been taken at about 17.00-17.30 hours, one and a half to two hours before their admission in the hospital. It therefore finds that Abdüllatif Ahan was detained at the station from the early hours of the morning until not long before his admission to hospital at 19.10 hours.

204. The circumstances in which Abdüllatif Ahan arrived at the hospital are disputed. brahim Karahan stated that the gendarmes released them from the station, leaving it to him to take steps to obtain medical treatment for Abdüllatif Ahan. He gave a detailed account of how they eventually found some one to help them in a coffee shop. ™eref Γakmak however stated that he arranged for them to be sent to the hospital, with a gendarme as escort. He explained that this was part of the procedure whereby he had to obtain medical reports of persons who were to be sent to the public prosecutor. He also stated that he spoke on the phone to the public prosecutor as he was about to send over the investigation file charging Abdüllatif Ahan with disobeying a stop order. However, at one point, he described talking to the public prosecutor before he sent the two men to the hospital and at another point, he placed the conversation as occurring after Abdüllatif Ahan had been urgently sent to Diyarbakır from Mardin State Hospital. His explanation has another difficulty. Since he had entered neither man into the custody record, despite their long presence at the station, it is not apparent that they attracted the formal procedure of medical examinations for persons leaving custody.

205. Nonetheless, there is a document dated 27 December 1992 signed by ™eref Γakmak addressed to the Mardin State Hospital which requests that /brahim Karahan and Abdüllatif /lhan be sent for treatment. They are both described as being under summons in connection with a preliminary investigation. It is to be remarked that the request is not merely for a routine examination but a request that both men be sent for treatment as they had both fallen and hurt themselves. The terms of this request are thus inconsistent with ™eref Γakmak's testimony that he saw no need to obtain medical treatment for either person and that /brahim Karahan had not been injured beyond a few scratches. Similarly, the medical report described the patient as having been referred because of trauma. Furthermore, the public prosecutor Abdülkadir Güngören did not recall that he had seen the referral request and was surprised to learn that Abdüllatif /lhan had not been sent to hospital until late on 27 December 1992.

206. The Commission is left once more with substantial doubts as to the account given by ™eref Γakmak but in the circumstances considers it unnecessary to make any findings as regards this element.

207. As regards Abdüllatif /lhan's condition prior to admission to hospital, the Commission has already noted that he was showing signs of distress and illness when he arrived at Mardin station. As the day progressed, according to /brahim Karahan's description, Abdüllatif /lhan's state did not improve. He needed to be supported, could not walk and before giving his statement, lost control of his bowels. He described Abdüllatif /lhan as talking in an incoherent fashion, as if he were semi-conscious. ™eref Γakmak stated that when he took Abdüllatif /lhan's statement he was talking in a halting fashion but could make himself understood. When not long afterwards, he was examined by Dr Aydoğan, he was described as being conscious and showing signs of semi-paralysis on the left hand side (left hemiparesis). According to the evidence of Dr Rahmanlı, a specialist in brain surgery, the clinical picture resulting from a head trauma would be expected to become clear within 24 hours to 48 hours. By the time of his examination at Mardin State Hospital, Abdüllatif /lhan's injury to his head was 36 hours old. The Commission is satisfied that during his detention at Mardin station he was showing symptoms of being seriously affected by his injuries. It recalls that ™eref Γakmak stated that he was not surprised when he was later told that Abdüllatif /lhan was very ill.

### 5. Abdüllatif Ahan's treatment in hospital and condition

208. Having been admitted to Mardin State Hospital, Abdüllatif Ahan was diagnosed as being in a life threatening condition, with signs of semi-paralysis on the left side. He was taken to Diyarbakır State Hospital, where his condition was found to be fair, though risk to life remained, with concussion and left hemiplegion. As the hospital did not have the necessary equipment, the applicant had to take his brother to a nearby clinic and pay for CAT scans. On the basis of these films, which disclosed, inter alia, cerebral oedema and left hemiparesis, Dr Rahmanlı decided that surgery was not necessary. Abdüllatif Ahan was treated with medicines and discharged from hospital on 11 January 1993. He returned for examination at approximately two monthly intervals following this. On 10 June 1993, he was diagnosed as suffering 60% loss of function on the left-hand side. Recent scans taken of his brain indicated an area of brain atrophy. When he appeared before the Delegates, a loss of function on his left-hand side was still visible.

209. The doctors who appeared before the Delegates were asked questions concerning the delay between the injury being inflicted and Abdüllatif Ahan's admittance to hospital, and as to whether this delay had had any adverse effect on his condition. Dr Aydoğan stated that treatment could not have delayed the appearance of paresis but that it was necessary for a patient to see a doctor to prevent the condition developing further. Dr Rahmanlı agreed that earlier intervention could not have prevented the paralysis and explained that the CAT scan results indicated that there was no need for surgical intervention. The internal bleeding could be resorbed spontaneously by the brain so the delay would not have had much effect on his recovery. The Commission accordingly finds that the delay in obtaining hospital treatment has not been shown to have appreciably worsened the long term effects of the head injury.

### 6. Investigation by the domestic authorities

210. Neither the applicant nor his brother Abdüllatif Ahan made any petition to the public prosecutor as a result of the injuries which he suffered. The public prosecutor Abdulkadir Güngören was aware however that Abdüllatif Ahan had been injured at the time of his apprehension by the gendarmes and the matter was under his consideration. On 11 February 1993, he issued a decision not to prosecute. This concluded that the injury resulted from an accident for which no-one was at fault, either intentionally or negligently. In reaching this decision, he did not talk to Abdüllatif Ahan or Ibrahim Karahan or to any gendarme who had witnessed the alleged accident. He did recall talking to ™eref Γakmak on the telephone but took no notes of the conversation. He did not regard there as being any cause for investigation unless some-one made a specific complaint.

## D. As regards the applicant's standing in the proceedings

211. The Government have repeated the objections, made prior to the Commission's adoption of its decision of admissibility, that the applicant is named as being Nasır Ahan and the application is therefore incompatible *ratione personae* with the Convention, since he cannot claim to be a victim of the alleged violations. They submit that, although the

Commission rejected their previous objections by stating that exceptions could be made where a victim of violation had died or was severely injured or ill, Abdüllatif Ahan was able to appear in court proceedings in March 1993 and clearly was not barred physically from acting on his own behalf.

212. The Commission recalls that both the applicant and Abdüllatif Ahan appeared before its Delegates to give oral testimony and that Abdüllatif Ahan has signed a letter of authority indicating that he wished the applicant to introduce the application on his behalf. While Abdüllatif Ahan appears to have made some recovery from the injuries suffered in December 1992, the Commission finds that he is still suffering from visible infirmity and may legitimately claim that he requires assistance in pursuing his application. He has maintained his complaints before the Delegates and the Commission perceives no element of bad faith or abuse in the fact that his brother has introduced the application on his behalf. While it would nonetheless be possible for the Commission to take the decision to replace the applicant's name by Abdüllatif Ahan's for the purposes of this application, it would observe that this would not effect any change in the substance of the complaints under examination or the way in which those complaints would be dealt with. It accordingly finds it neither necessary or appropriate to effect a change in the name of the applicant at this stage of the procedure.

## E. As regards Article 2 of the Convention

213. Article 2 of the Convention provides:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
>
> a. in defence of any person from unlawful violence;
>
> b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> c. in action lawfully taken for the purpose of quelling a riot or insurrection."

214. The applicant submits that his brother Abdüllatif Ahan suffered violation of Article 2 on account of the life-threatening attack to which he was subjected, the failure to provide him with prompt medical attention and the lack of any effective system for ensuring protection of the right to life including an effective prosecutorial system. Abdüllatif Ahan was subjected to repeated kicks and blows from rifle butts, in an attack of such severity that his life was diagnosed as being in danger at Mardin State Hospital. Despite the fact that he suffered this injury when being apprehended by the security

forces, he was not taken to a hospital. Though he had a swollen left eye, a cut above the right eye, an injury to his leg and other cuts and bruises - all visible injuries - he was kept with the gendarmes, in circumstances which disclose a wilful denial of treatment and aggravated the situation. While the protection of the right to life includes an effective investigation leading to the identification and punishment of those responsible, there was the complete absence of an enquiry into how Abdüllatif Ahan's life-threatening injuries occurred. The applicants further submit that there is substantial, cumulative evidence to establish that the failure to investigate violations of the right to life is both systemic and systematic, disclosing a practice.

215. The Government submit that any bodily injury suffered by Abdüllatif Ahan was the outcome of a fall in an environment where even soldiers slipped and fell. Since the beginning of terrorist activity in the area, even subjects who injured themselves were being advised to direct their complaints against the State. They state that his complaints are factually and legally unfounded.

216. The Commission recalls that generally Article 2 has been applied to cases where a person has been deprived of his or her life. Nonetheless, in at least two cases, complaints by an applicant have been considered under the ambit of this article, where that applicant was subject to a life-threatening attack but survived (see Osman v. the United Kingdom judgment of 28 October 1998, to be published in Reports 1998, where the child applicant was shot during an attack in which his father died, and Yaþa v. Turkey judgment of 2 September 1998 to be published in Reports 1998, where the applicant was hit by eight bullets when a gunman attempted to kill him in the street). In the present case, Abdüllatif Ahan received an injury to his head, which caused partial paralysis and which was described by two doctors as presenting a risk to his life. The Commission finds that the seriousness of the injury is such that it may be appropriately considered as falling within the scope of Article 2's guarantee of the protection of the right to life.

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

218. Article 2 not only protects the right to life but sets out, in its second paragraph, the limited circumstances in which the deprivation of life may be justified. These exceptions are to be strictly construed and cover not only intentional killing, but also those situations where it is permitted to use force which may result, as an unintended outcome, in the deprivation of life. The use of force must be no more than "absolutely necessary" for the achievement of one of the permitted purposes set out in sub-paragraphs (a), (b) and (c) and this term indicates that a stricter and more compelling test of necessity must be employed than that normally applicable when determining whether State action is "necessary in a democratic society" under paragraph 2 of Articles 8 to 11 of the Convention. In particular, the force used must be strictly proportionate to the achievement of the aims set out in the

sub-paragraphs of Article 2 para. 2 (McCann and others v. the United Kingdom judgment, op. cit., p. 46, paras. 148-149).

219. The Commission recalls its finding that Abdüllatif Ilhan was beaten by one or more soldiers, and that he was struck at least once by a rifle butt on the head. The gendarme witnesses described Abdüllatif Ilhan as having pushed Selim Uz and having tried to escape. The Commission has not accepted this evidence. It has however noted Selim Uz's references to the fear which he experienced and recalls that he, as presumably were others in his unit, was a young man (only 19) on his military service. However, even assuming that Abdüllatif Ilhan was injured in a situation where he was mistakenly thought to be a dangerous, escaping PKK terrorist, this does not provide in the circumstances any justification for the infliction of a life-threatening blow to the head from a rifle butt, such force being disproportionate to any permitted aim under the second paragraph of Article 2 of the Convention.

220. The Commission further notes that, although Abdüllatif Ilhan had received serious and visible injury to the head on being apprehended by the gendarmes, there was a lapse of 36 hours before he was admitted to hospital. There was some debate in the hearing before the Delegates as to whether any civilian or doctor would have realised the seriousness of his injury during this period. Dr Rahmanlı was of the opinion that it would have taken a proper neurological examination to establish the injury to the brain but agreed that injuries to the head had to be treated with caution as they were unpredictable and the clinical picture took time to develop. By the time Abdüllatif Ilhan was seen by Dr Aydoğan at Mardin State Hospital, hemiparesis was apparent. The Commission has found that prior to this he was already showing signs of physical distress and incapacity. Since he was injured while being apprehended and was detained by the gendarmes throughout this period, the Commission considers that the authorities were under a responsibility for his welfare. This responsibility was not discharged by the apparent fact that a military doctor, called out in the early hours of the morning at Mardin central station, had a brief look at Abdüllatif Ilhan and decided that he was faking. The Commission is not satisfied that there was any reasonable basis on which a doctor could come to that conclusion. It remained the case that he had a visible head injury and no reasonable explanation has been provided for failing to take the precaution of sending him immediately on arrival in Mardin to the nearby Mardin State Hospital for examination. Even though the delay has not been established as affecting the long-term development of the injury, the Commission considers that this is irrelevant to the responsibility of the authorities to obtain prompt and appropriate medical treatment for a detained person with serious injuries.

221. The Commission concludes that the infliction of injury on Abdüllatif Ilhan and the delay in sending him to hospital disclose a failure to respect his right to life.

222. The Commission further recalls that Article 2 imposes a requirement that, in the cases of the use of lethal force, an effective investigation be undertaken:

> "The obligation to protect the right to life under this provision, read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to

everyone within their jurisdiction the rights and freedoms defined in [the] Convention', requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State." (Eur. Court HR, McCann and others v. the United Kingdom, op. cit., p. 49, para. 161)

223. The Commission finds that this principle applies equally to the present case. It recalls that the public prosecutor was aware that Abdüllatif Ahan had suffered injuries at the time of his apprehension by the gendarmes. On 11 February 1993, he issued a decision not to prosecute, finding that Abdüllatif Ahan had fallen and injured himself through carelessness while fleeing from the security forces and that no-one had acted deliberately or negligently. In the proceedings before the Delegates, the public prosecutor was questioned as to the evidential basis on which he reached this decision. It appeared that he relied on the investigation documents, which included the incident report and the statements of 26 December 1992 of Ibrahim Karahan and Abdüllatif Ahan. He also recalled having talked about the incident on the phone with ™eref Çakmak. He did not interview either Abdüllatif Ahan or Ibrahim Karahan himself, nor take any statement from a gendarme who witnessed the alleged injury occurring. He did not make notes of his conversation with ™eref Çakmak, though he appears to have relied on the information provided by him in concluding that no problems arose. He assumed that ™eref Çakmak had witnessed the arrest himself and claimed to be unaware of the statements taken on 27 December 1992 and that Abdüllatif Ahan was not transferred to hospital until 27 December 1992.

224. The Commission notes that the public prosecutor took the view that the incident report and statements were consistent and that since no-one made any claims to the contrary there was nothing to arouse suspicion. He acknowledged nonetheless that he was concerned that Abdüllatif Ahan had received injuries on arrest. It is also evident that he considered it his duty to consider whether or not to prosecute. However, since he relied wholly on what he was told, and the information was provided by the gendarmes concerned in the arrest, this decision appears to have been little more than a formality. Since he took no independent investigative steps himself to verify the account of the gendarmes, it was also not surprising that he failed to identify any contradictory elements in the file. However, it would appear that he should have been put on notice that the documents were not entirely accurate, since he decided not to issue charges against Ibrahim Karahan even though the incident report stated that he had failed to stop when ordered. He explained that on this point he relied on ™eref Çakmak's oral explanations instead. Further, while the public prosecutor claimed to be unaware that there was any delay in transferring Abdüllatif Ahan to hospital, it would appear that the contents of the file before him should have alerted him. The incident occurred on the morning of 26 December 1992 but the conversation with ™eref Çakmak during which the transfer to hospital was mentioned occurred on 27 December 1992. If he was provided with a copy of Dr Aydoğan's report, to which he appeared to refer when commenting that he knew that Abdüllatif Ahan was conscious when making his statement, this was clearly marked with the date and time of 19.15 hours, 27 December 1992. If he did not in fact see any medical report, as he seemed to claim at another point, it seems remarkable that he did not take steps to find out the exact extent of Abdüllatif Ahan's injuries by asking for one.

225. In these circumstances, the Commission finds that there has been a failure to provide an adequate and effective investigation into the circumstances in which Abdüllatif Ahan was injured. Having regard to its findings above and the scope of the evidence taken in this case, it finds it unnecessary to decide whether there has been a practice of failure to investigate violations of the right to life.

**CONCLUSION**

226. The Commission concludes, unanimously, by 27 votes to 5, that there has been a violation of Article 2 of the Convention in respect of the injury inflicted on Abdüllatif Ahan, the delay in sending him to hospital and the lack of effective investigation.

## F. As regards Article 3 of the Convention

227. Article 3 of the Convention provides as follows:

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

228. The applicant submits that his brother, Abdüllatif Ahan, was subjected to a violation of Article 3 on three separate counts. Firstly, his initial treatment - the beating with rifle butts and kicking- amounted to torture due to the severity of the injuries caused. Secondly, the failure to bring him to a hospital despite his obvious injuries amounted to treatment contrary to Article 3. Thirdly, the failure of the public prosecutor to investigate the case was a further blatant violation of Article 3, which required that there be an effective, official investigation into the infliction of serious ill-treatment, in which respect they rely on the Court's judgment in the Assenov case (Eur. Court HR, Assenov and others v. Bulgaria judgment of 28 October 1998, para. 106). While the applicant originally submitted that his brother had been tortured while in Mardin gendarme station, he has not provided any substantiation and has not pursued this complaint in his observations on the merits. The applicant also submits that he is the victim of a practice of torture which exists in Turkey and of a practice of failure to conduct effective investigations into, and to combat, the incidence of torture.

229. The Government submit that any bodily injury suffered by Abdüllatif Ahan resulted from a fall in a slippery environment.

230. The Commission recalls its finding (para. 196 above) that Abdüllatif Ahan was beaten by one or more soldiers, with at least one blow to the head from a rifle butt. This resulted in Abdüllatif Ahan suffering a serious injury to the right side of the head which caused semi-paralysis on the left side, severe bruising round the right eye, and bruising to the left hip and leg.

231. The Commission has had regard to the strict standards applied in the interpretation of Article 3 of the Convention, according to which ill-treatment must attain a certain minimum level of severity to fall within the provision's scope. The practice of the Convention organs has been to require compliance with a standard of proof "beyond reasonable doubt" that ill-treatment of such severity has occurred (see Eur. Court HR, Ireland v. United Kingdom judgment, op. cit., p. 65, paras. 161-162).

232. The Commission has had regard to both the physical injuries inflicted on Abdüllatif Ahan and the delay in providing him with medical treatment. In the latter context, it recalls that Abdüllatif Ahan has little recollection of events which occurred after he received the blow to his head, in particular the process by which he was transported from Aytepe to Konak from there to Mardin, where he waited for over fourteen hours without more than cursory first aid. The Commission deplores the failure to act speedily in the circumstances when Abdüllatif Ahan was reduced to an extremity of physical weakness and incapacity. However, it is not persuaded that this treatment, characterised by indifference and negligence rather than intentional infliction of pain for

the purposes of coercion or punishment, falls within the special stigma of "torture" under Article 3 of the Convention (see Ireland v. the United Kingdom judgment, op. cit. p. 66, para. 167; also the definition of torture contained in Article 1 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on 10 December 1984) as argued by the applicant. There is however no doubt that his treatment may be described as inhuman and degrading for the purposes of Article 3.

233. Furthermore, referring to its findings in the context of Article 2 of the Convention (paras. 223-225 above), the Commission finds that the inadequate investigation by the public prosecutor into the treatment of Abdüllatif Ihan on, and subsequent to, his arrest discloses a breach of the obligation imposed on the authorities by Article 3 to provide an effective official investigation into suspected cases of ill-treatment. It notes the Court's statement of principle in the Assenov case (Eur. Court HR, Assenov and others v. Bulgaria judgment, op. cit., paras. 102-103):

> "The Court considers that, in these circumstances, where an individual raises an arguable claim that he has been seriously ill-treated by the police, or such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms in [the] Convention", requires by implication that there should be an effective official investigation. This obligation, as with that under Article 2, should be capable of leading to the identification and punishment of those responsible (see in relation to Article 2 of the Convention, the McCann and others v. the United Kingdom judgment ..... para. 86, the Kaya v. Turkey judgment of 19 February 1998, <to be published in Reports 1998> para. 86 and the Ya∏a v. Turkey judgment of 2 September 1998, <to be published in Reports 1998> para. 98). If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance ..., would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity."

234. Having regard to its findings above and the scope of the evidence taken in this application, the Commission finds it unnecessary to examine in the present case whether there was a practice of torture existing in Turkey at that time or a failure to conduct effective investigations to combat the incidence of torture.

**CONCLUSION**

235. The Commission concludes, unanimously, that there has been a violation of Article 3 of the Convention.

## G. As regards Articles 6 and/or 13 of the Convention

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

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

237. 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."

238. The applicant complained in his application of both a lack of access to court contrary to Article 6 of the Convention and a lack of effective remedies under Article 13 of the Convention in respect of the life-threatening attack on, and torture of, Abdüllatif Ilhan. In his observations on the merits, the applicant's submissions regarding redress for this treatment concern solely Article 13. He argues that the behaviour of the public prosecutor denied them a remedy, in that there was a complete absence of an effective investigation, the prosecutor failing to question in any way the gendarmes' account of events. He submits that the numerous cases before the Convention organs establish beyond reasonable doubt that there are systematic and systemic violations of the right to an effective remedy which amount to a practice in violation of the Convention.

239. The Government have denied that there is any problem with remedies. They point out that the applicant did not make any complaint to the public prosecutor, nor make use of any other avenues of redress, referring to the possibility of instituting civil and administrative proceedings.

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

241. The Commission recalls that Article 13 of the Convention, together with Article 1 of the Convention, reflect the fact that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights and that it is first and foremost for Contracting States to secure to every individual within their jurisdiction their rights and freedoms under the Convention (see eg. Eur. Court HR, Handyside v. the United Kingdom judgment of 7 December 1976, p. 22, para. 48). Article 13 in particular plays an indispensable role in preventing abuse of power and the infringement of Convention rights by requiring Contracting States to provide the mechanisms whereby arguable claims of violations of guaranteed rights and freedoms may receive proper investigation, with the possibility of redress (see eg. Aksoy v. Turkey

judgment of 18 December 1996, Reports 1996-VI, p. 2260, para. 95, Boyle and Rice v. the United Kingdom, Comm. Rep. 7.5.86, Series A no. 131, p. 40, para. 73). It would emphasise that a failure to provide effectively-functioning mechanisms of redress seriously undermines the protection to be afforded by the Convention, since the Convention organs cannot, and should not be required to act as a first instance tribunal, a role which the national authorities are in the best position to fulfill.

242. In the present case, the Government have argued that in fact the applicant did not make any complaint to the public prosecutor or avail himself of any other avenue of redress. The Commission recalls that in its decision on admissibility it stated that his brother Abdüllatif Ahan, when questioned at the village by the commander of the gendarmes, complained to him that he had been beaten up. It observed that pursuant to the provisions of the Criminal Code, civil servants, which included gendarme officers, were under an obligation to report to the competent authorities any alleged crime which came to their knowledge in the course of their duties. The Commission has accepted the evidence of Abrahim Karahan who told the Delegates that Abdüllatif Ahan complained to the commander Tmeref Takmak. It would further note that the fact that Abdüllatif Ahan was injured during his arrest was reported to the public prosecutor, who considered whether or not to prosecute. In these circumstances, the Commission is satisfied that the matter was sufficiently brought to the attention of the relevant authorities and that the responsibility of the Contracting State to provide effective and adequate redress was engaged.

243. In that context, the Commission recalls that it has investigated over 50 cases concerning allegations of serious human rights violations occurring in south-east Turkey, all of which have involved complaints that the applicants were deprived of an effective remedy. [4] In particular, the Commission observes that there have been a number of findings by itself and the Court of violations of the procedural obligations under Article 2 and/or Article 13 in respect of allegations concerning deaths for which the security forces or police were alleged to be responsible[5] and findings of violations of Article 3 in respect of ill-

[4] Of these, the following have been subject to judgments by the Court, which has largely upheld the Commission's findings in substance: Eur. Court HR, Akdivar and others v. Turkey judgment of 16 September 1996, Reports 1996-IV, p. 1192; Aksoy v. Turkey judgment of 18 December 1996, Reports 1996-VI, p. 2260; Aydın v. Turkey judgment of 25 September 1997, Reports 1997-VI, p. 1866; Mentes and others v. Turkey judgment of 28 November 1997, Reports 1997-VIII, p. 2689; Kaya v. Turkey judgment of 19 February 1998, Reports 1998-I, p. 297; Selçuk and Asker v. Turkey judgment of 24 April 1998, Reports 1998-II, p. 891; Gündem v. Turkey judgment of 25 May 1998, Reports 1998-III; Kurt v. Turkey judgment of 25 May 1998, Reports 1998-III, p. 1152; Tekin v. Turkey judgment of 9 June 1998, Reports 1998-IV, p. 1504; Guleç v. Turkey judgment of 27 July 1998, Reports 1998-IV; Ergi v. Turkey judgment of 28 July 1998, to be published in Reports 1998-IV. Additionally, there have been judgments in the cases of Ya a v. Turkey (judgment of 2 September 1998, to be published in Reports 1998) and Aytekin v. Turkey (judgment of 23 September 1998, to be published in Reports 1998). In the latter case however, the Court rejected the case for non-exhaustion, where there had been a prosecution and conviction of a gendarme, with pending appeal proceedings, in relation to the shooting of the applicant's husband at a road checkpoint.

[5] Eur. Court HR, Kaya v. Turkey, op. cit.; Güleç v. Turkey, op. cit.; Ergı v. Turkey, op. cit.; Ya a v. Turkey, op. cit.; see also the cases pending before the Court :Oğur v. Turkey, No. 21594/93, Comm. Rep. 30.10.97, Tanrikulu v. Turkey, No. 23657/94, Comm. Rep. 15.4.98, Takıcı v. Turkey, No. 23657/94, Comm. Rep. 12.3.98, Ertak v. Turkey, No. 20764/92, Comm. Rep. 4.12.98, Mahmut Kaya v. Turkey, No. 22535/93, Comm. Rep. 23.10.98, Kiliç v. Turkey, No. 22492/93, Comm. Rep. 23.10.98, Salman v. Turkey, No. 21986/93, Comm. Rep. 1.3.99 and Akkoç v. Turkey Nos. 22947-8/93, Comm. Rep. 23.4.99.

treatment of persons held in custody by police or security forces, accompanied by violations of Article 13.[6]

244. These cases have disclosed that investigations into deaths or alleged ill-treatment involving the security forces or police have frequently been superficial and inadequate, undermined by failures to seek evidence or witnesses, flawed forensic and medical examinations and a reluctance to pursue any lines of enquiry into any alleged wrongdoing by members of the security forces or police force. The following defects in practices and procedures have been commonly found:

(a) a failure by public prosecutors to question, or take statements from members of the security forces or police with regard to allegations of misconduct (see eg. Aydin v. Turkey judgment, op. cit., p. 1896, para. 106, Comm. Rep., para. 199; Kaya v. Turkey judgment, op. cit., p. 325, para. 89, Ergi v. Turkey judgment, op. cit., para. 83; Tekin v. Turkey, Comm. Rep., para. 194);

(b) a failure by public prosecutors to verify documentary materials eg. custody records or to pursue any contradictions, inconsistencies or gaps in the information provided by the police or security forces (see eg. Eur. Court HR, Aydin v. Turkey judgment, op. cit., p. 1896, para. 106, Comm. Rep., para. 199; Kaya v. Turkey judgment, op. cit., p. 326, para. 90, Comm. Rep., para. 168; Гakıcı v. Turkey, Comm. Rep., paras. 283-284);

(c) a failure by public prosecutors, police or gendarmes to seek evidence, including eye-witnesses or forensic evidence at the scene of the incident such as fingerprints, testing for gunpowder traces (see eg. Aydin v. Turkey judgment op. cit. para. 106, Comm. Rep., para. 199, Kaya v. Turkey judgment, op. cit. p. 325, para. 89; Ergi v. Turkey judgment, op. cit. para. 83, Comm. Rep., para. 151; Güleç v. Turkey judgment, op. cit., para. 79; Oğur v. Turkey, Comm. Rep., para. 138; Cakıcı v. Turkey, Comm. Rep., para. 283; Mahmut Kaya v. Turkey, Comm. Rep., para. 364; Ertak v. Turkey, Comm. Rep., para. 187);

(d) a failure by police or security forces properly to record evidence or take photographs at the scenes of incidents (see eg. Tanrıkulu v. Turkey, Comm. Rep., paras. 227-228, Ergi v. Turkey, Comm. Rep., para. 130);

(e) delays in seeking for evidence, or statements from applicants or witnesses (see eg. Cakıcı v. Turkey, Comm. Rep., para. 282; Tanrıkulu v. Turkey, Comm. Rep., para. 232; Mahmut Kaya v. Turkey, Comm. Rep., para. 365);

(f) the making of reports which do not identify the source of the alleged facts contained therein, signed by persons who are not able to confirm the accuracy of such facts (see eg. Eur. Court HR, Ergi v. Turkey judgment, op. cit., para. 83, Comm. Rep., para. 153; Tanrıkulu v. Turkey, Comm. Rep., para. 233);

(g) an assumption by public prosecutors and the authorities that any unlawful acts must be the responsibility of terrorist groups (see eg. Eur. Court HR, Ergi v. Turkey judgment, op. cit. para. 83, Comm. Rep., para. 152; Güleç v. Turkey judgment, op. cit., para. 79; Ya∏a v. Turkey judgment, para. 105; Mahmut Kaya v. Turkey, Comm. Rep., and Kiliç v. Turkey, Comm. Rep., where the killings of the victims by unknown perpetrators were investigated as being terrorist crimes);

(h) a failure by public prosecutors to react to visible signs of ill-treatment or complaints of ill-treatment (see eg. Eur. Court HR, Aksoy v. Turkey judgment, op. cit.,

[6] Eur. Court HR, Aksoy v. Turkey, op. cit.; Aydın v. Turkey, op. cit.; Tekin v. Turkey, op. cit.; see also cases pending before the Court : Гakıcı v. Turkey, No. 23657/93, Comm. Rep. 12.3.98, No. 21986/93, Salman v. Turkey, Comm. Rep., op. cit.

p. 2287, para. 99, Tekin v. Turkey, op. cit., p. 1520, para. 67, Comm. Rep., para. 238; Akkoç v. Turkey, Comm. Rep. 23.4.99 pending before the Court);

(i) the lack of jurisdiction of public prosecutors to prosecute certain categories of offences committed by State officials, jurisdiction being vested in administrative councils which are non-legal, administrative bodies, subject to the authority of the executive and consequently not independent, and the lack of effective investigative measures instigated by the administrative councils (see eg. Tekin v. Turkey, Comm. Rep., para. 196; Eur. Court HR, Güleç v. Turkey judgment, op. cit., para. 82, Comm. Rep., paras. 226-227; Oğur v. Turkey, Comm. Rep., paras. 136-7, 140; Ertak v. Turkey, Comm.Rep., paras. 183-184). The Commission has noted a tendency in public prosecutors to show no interest in pursuing the investigations in these cases and instead to prosecute the apparent victim of the misconduct (see eg. Ya∏a v. Turkey, where the applicant who was shot seven times was prosecuted for carrying an unlicensed weapon; Kiliç v. Turkey, where the applicant's brother who had complained about official inaction to threats made to newspaper workers was charged with insulting the Governor; the present case, where Abdüllatif Ihan, injured on arrest, was prosecuted for failing to stop on order of the security forces);

(j) a deferential or blinkered attitude by the public prosecutors towards members of the security forces, with a tendency to ignore or discount allegations of wrongdoing on their part (see eg. Eur. Court HR, Aydin v. Turkey judgment, op. cit. para. 106; Aksoy v. Turkey, Comm. Rep., op. cit., para. 189; Cakıcı v. Turkey, Comm. Rep., para. 284); a failure to widen investigations to include possible wrongdoing by State agents is also disclosed by gendarmes and police officers conducting investigations (see. eg. Kiliç v. Turkey, Comm. Rep., para. 197);

(k) inadequate forensic medical examinations of detainees, including lack of examination by appropriately qualified medical professionals (see eg. Aydin v. Turkey judgment, op. cit., para. 107); brief, undetailed medical reports and certificates which do not include a description of the applicant's allegations or any conclusions (see eg. Aydin v. Turkey judgment, op. cit. para. 107, Comm. Rep., para. 201); failure to provide thorough examinations (see eg. Akkoç v. Turkey, Comm. Rep., op. cit.); the practice of taking groups of detainees for collective examination to public hospitals (see eg. Akkoç v. Turkey, Comm. Rep., op. cit.); the practise of handing over an open report to the police officers (see eg. Akkoç v. Turkey, op. cit.);[7]

(l) inadequate forensic examinations of deceased persons, including reports which do not include thorough descriptions of injuries; failure to take photographs or make analyses of marks on the body or examinations carried out by doctors with insufficient expertise (see eg. Eur. Court HR, Kaya v. Turkey judgment, op. cit., p. 325, para. 89; Tanrikulu v. Turkey, Comm. Rep. paras. 234-235; Mahmut Kaya v. Turkey, Comm. Rep., op. cit., para. 364, Salman v. Turkey, Comm. Rep., op. cit. para. 319);

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[7] See also in this context the findings and concerns of the European Committee for the Prevention of Torture (CPT) relating to the failure by the medical profession properly to document injuries, and the pressure placed on them by the police and security forces (First Public Statement adopted on 15 December 1992, Second Public Statement adopted on 6 December 1996 and the CPT report on its visit to Turkey from 5 to 17 October 1997.. See regarding non-governmental organisations eg. Amnesty International reports, South-East Turkey: The Health professions in the Emergency Zone (Eur. 44/146/94); Turkey:Human Rights and the Health Professions (Eur. 44/159/96) referred to in the Tanrikulu v. Turkey case, op. cit, Comm. Rep., para. 50 and the applicant's memorial to the Court, Appendix 3.

(m) the issuing of decisions not to prosecute or non-jurisdiction without waiting for all the evidence to be received (Eur.Court HR, Kaya v. Turkey judgment, op. cit., p. 325, para. 89; Ergi v. Turkey, Comm. Rep., para. 137);

(n) a lack of accessibility of applicants or the relatives of alleged victims to the structures of remedies, including a failure to give information as to the progress of any proceedings or the results of investigations (see eg., Eur. Court HR, Güleç v. Turkey judgment, op. cit., para. 82, Comm. Rep., para. 231; Oğur v. Turkey, Comm. Rep., para. 141; Гakıcı v. Turkey, Comm. Rep., para. 239; Kiliç v. Turkey, Comm. Rep., paras. 129 and 203; Ertak v. Turkey, Comm. Rep., para. 188) and a lack of information, or delay in information, being passed on to relatives of persons involved in incidents (see eg., Salman v. Turkey, Comm. Rep., para. 305).

245. In the present application, the Commission finds that similar features may be identified. It notes that the public prosecutor was under a duty under Turkish law to carry out an investigation into signs of possible torture or ill-treatment, whether or not the person concerned made an explicit complaint. Nonetheless, the public prosecutor, in reaching his decision not to prosecute, relied exclusively and unquestioningly upon the documents and information submitted by the gendarmes, in particular upon the incident report which the Commission has found to present numerous difficulties eg. uncertainty as to where report was drawn up and signed, the circumstances in which the purported signature of Abdüllatif Ilhan came to appear on the report, the report's failure to coincide with the individual recollections of eye-witnesses or the oral explanations of ™eref Гakmak and the inability to derive from the report the source of the various items of information contained in it. The public prosecutor took no steps to interview Abdüllatif Ilhan or Ibrahim Karahan or any of the gendarmes who might have witnessed their apprehension. The Commission also has noted that the medical report issued in respect of Abdüllatif Ilhan's injuries by Dr Aydoğan was brief, failing to give an unequivocal account of the stated cause of the injuries or to detail the minor injuries which Abdüllatif Ilhan had suffered. While this brevity may be explained by the urgency of the case, the public prosecutor took no steps to remedy these shortcomings after Abdüllatif Ilhan had been admitted to hospital.

246. The Commission has concluded above that there was a violation of Articles 2 and 3 of the Convention. It has already found under those provisions that the investigation into the circumstances in which Abdüllatif Ilhan received a life-threatening injury was inadequate. It recalls however that the Court has held that the requirements of Article 13 are broader than the procedural requirements of Article 2 to conduct an effective investigation (Eur. Court HR, Kaya v. Turkey judgment, op. cit., para. 107). Further, where an individual has an arguable claim that he has been tortured or seriously ill-treated by agents of the State, the notion of Article 13 entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure (see also, Eur. Court HR, Aksoy v. Turkey judgment, op. cit., p. 2287, para. 98).

247. Having regard to the defective investigation described above (para. 245), the Commission finds that Abdüllatif Ilhan has been denied an effective remedy against the authorities in respect of his ill-treatment and thereby access to any other available remedies

at his disposal, including a claim for compensation. Notwithstanding the Government's submissions as to the availability of civil and administrative proceedings, there is no indication that in light of the public prosecutor's findings any practical purpose would have been served by such proceedings.

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

**CONCLUSION**

249. The Commission concludes, by 29 votes to 3, that there has been a violation of Article 13 of the Convention.

## H. As regards Article 14 of the Convention

250. Article 14 of the Convention provides as follows:

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

251. The applicant maintains that because of Abdüllatif Âhan's ethnic and cultural identity as a Kurd he has been the victim of violations of the Convention in a disproportionate manner such as to amount to discrimination. He submits that the attitude of the gendarmes and public prosecutor indicates that Abdüllatif Âhan was treated as "guilty" and refers to their refusal to recognise his mother tongue and to accept that he cannot speak Turkish.

252. The Government have denied the factual basis of the substantive complaints and that there has been any discrimination.

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

**CONCLUSION**

254. The Commission concludes, unanimously, that there has been no violation of Article 14 of the Convention.

## I. Recapitulation

255. The Commission concludes, by 27 votes to 5, that there has been a violation of Article 2 of the Convention (see para. 226 above).

256. The Commission concludes, unanimously, that there has been a violation of Article 3 of the Convention (see para. 235 above).

257. The Commission concludes, by 29 votes to 3, that there has been a violation of Article 13 of the Convention (see para. 249 above).

258. The Commission concludes, unanimously, that there has been no violation of Article 14 of the Convention. (see para. 254 above).

M.-T. SCHOEPFER
Secretary
to the Commission

S. TRECHSEL
President
of the Commission

(Or. English)

## SEPARATE OPINION OF MR M. PELLONPÄÄ

I have voted with the majority on all points. My conclusion of the finding of a violation of Article 3 (para. 235), however, is based on narrower grounds than those invoked by the majority. While I agree that Abdüllatif Ilhan was subjected to inhuman and degrading treatment (para. 232), I consider it neither necessary nor correct to base the violation also on the "procedural ground" of inadequate investigation (para. 233). In my view, Article 3 does not contain the kind of procedural obligation read into it by the (old) Court in the Assenov v. Bulgaria case relied on in the present report (para. 233).

The starting point in the interpretation of the various Convention articles is the ordinary meaning to be given to their terms in their context, having regard also to the object and purpose of the Convention.

The terms of Article 3 are clear. By prescribing that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment" Article 3 appears to be limited to obligations of a substantive nature. In this respect, Article 3 is different from Article 2. The last-mentioned provision contains - in addition to the prohibition of killing - in its first sentence a general obligation ("Everyone's right to life shall be protected by law.") which is broad enough to encompass also procedural requirements. So far as Article 3 is concerned, ordinary interpretation would lead to the conclusion that the procedural obligations are contained in Article 13 requiring an effective remedy, among other things, with regard to allegedly inhuman treatment.

The question, however, remains whether considerations related to the object and purpose of the Convention and its Article 3 should lead to a different conclusion. The Convention "is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective" (Eur. Court HR, Airey v. Ireland judgment of 9 October 1979, Series A no. 32, p. 12, para. 24). The Court in Assenov indeed seems to be guided by the "principle of effectiveness" when it emphasizes that without a duty to carry out an effective investigation "capable of leading to the identification and punishment of those responsible ... the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance ... would be ineffective in practice and it would be possible in some cases for agents of the State to abuse he rights of those within their control with virtual impunity" (the Assenov v. Bulgaria judgment as quoted in para. 233 above).

If this indeed was the case, there would be much to say in favour of reading a procedural obligation into Article 3. I, however, doubt whether an interpretation of Article 3 along these lines adds decisively to the obligations arising from Article 13. As reminded by the Commission, Article 13 entails in cases of torture or serious ill-treatment, among other things, "a thorough an 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 para. 246 and the Aksoy v. Turkey judgment cited therein).

In light of this obligation based on Article 13, I consider it unnecessary to read what appears to a more or less identical procedural obligation into Article 3 as well. In my view, departure from the ordinary interpretation of the Convention provisions based on their wording in their context is called for only for important reasons, especially such as arise from the principle of effectiveness. Due to the role played by Article 13 there are no convincing reasons for such a departure in this case or similar cases.

(Or. English)

## SEPARATE OPINION OF SIR NICOLAS BRATZA

Although I have voted with the majority of the Commission on all points, like Mr Pellonpää my conclusion that there was in the present case a violation of Article 3 of the Convention is based exclusively on the fact that the applicant was subjected to inhuman and degrading treatment and not on the further ground that the authorities failed to carry out an effective official investigation into the applicant's complaints of ill-treatment.

I see considerable force in Mr Pellonpää's argument that, in contrast to Article 2 of the Convention, Article 3 is limited to obligations of a substantive nature and that any procedural obligations relating to the proper investigation of arguable claims of ill-treatment in breach of that Article are to be found in Article 13 of the Convention.

However, I do not find it essential finally to decide this point in the present case, since the reasoning in paragraph 233 of this Report is in my view unnecessary in any event.

In the Assenov case (Eur. Court HR, Assenov and others v. Bulgaria judgment of 28 October 1998 to be reported in Reports 1998) neither the Commission nor the Court found it possible to establish on the basis of the evidence before them whether or not the applicant's injuries were caused by the police as he alleged. Accordingly any breach of Article 3 could only be based (as the Court but not the Commission found) on a failure on the part of the authorities to investigate where there existed a reasonable suspicion that the applicant's injuries had been caused by the police.

In the present case, there is no need to resort to such reasoning. The applicant has established to the required standard of proof that he was seriously assaulted by one or more soldiers and that the severity of his ill-treatment reached the threshold required under Article 3 of the Convention. In these circumstances, it was in my view neither necessary nor appropriate for the Commission to go further in finding a breach of that Article or to depart from the consistent approach adopted by the Court and Commission in other cases involving findings of violations of Article 3 in south-east Turkey (see eg., Eur. Court HR, Aksoy v. Turkey judgment of 18 December 1996, Reports 1996-VI; Aydin v. Turkey judgment of 25 September 1997, Reports 1997-VI; and Commission Reports in Tekin v. Turkey; Salman v. Turkey; and Akkoç v. Turkey).

(Or. English)

**PARTLY DISSENTING OPINION OF MR S. TRECHSEL JOINED BY MM A.™. GÖZÜBÜYÜK AND A. WEITZEL**

I fully agree with the majority's finding according to which there has been a violation of Article 3 in the present case, *inter alia*, in view of the inadequate efforts to establish the facts and to prosecute the person who used grossly disproportionate violence on the applicant. However, I disagree on the two issues raised under Articles 2 and 13.

As far as Article 2 is concerned, I cannot find that there has been a violation. I do agree with two points made by the majority: I accept that Article 2 can be violated even in the absence of any death having been caused on the one hand, and in the absence of intent on the other hand. However, in my view a combination of both is not possible.

I shall not hide the fact that my thinking is influenced by teachings of penal law. There, we usually find (various forms of) intentional killing, attempted killing and causing death by negligence. An attempt would, however, always require the intent to achieve the aim, i. e. to cause death.

This distinction is in no way arbitrary. The fact that attempted murder is punished at all, finds various justifications in criminal doctrine - on the one hand, it is justified by reference to the evil intent of the author, on the other hand by the danger incurred by the (almost-)victim. However, that danger again has its roots essentially in the evil intent of the author. Negligent behaviour which does not cause death need not necessarily remain unpunished, but will often constitute an offence of endangering the life of others, e.g. by driving under the influence of alcohol, exceeding the speed-limits, undertaking construction work without the necessary safeguards etc.

In the present case, the Commission has found that one or several persons, engaging by their acts the responsibility of the respondent Government, have inflicted severe wounds upon the applicant. However, there is no hint of any intention to take his life. In fact, he has survived the incident, albeit not without remaining impaired in his movement.

I cannot find that, in these circumstances, that there has been a violation of his right to life under Article 2 of the Convention and have not been convinced by the arguments put forward in the Report. It is true that Article 2 speaks of Aforce which is no more than absolutely necessary≅, but the initial words of para. 2 are: A*Deprivation of life shall* not be regarded as inflicted in contravention of this article ...≅ In the present case there has been no deprivation of life. Article 2 cannot, in my view, be interpreted in such a broad way that any disproportionate use of force in one of the three eventualities set out in sub-paras. a. to c. of Article 2 constitutes a violation of the right to life, irrespective of the results of such use of force.

With regard to Article 13, I have voted against the finding of a violation, although I fully agree with the considerations set out in paras. 240-245 of the Report. In my view, no further issue arises, because the finding on Article 3 already takes into account that there has been no serious investigation nor any adaequate proceedings after the incident.

(Or. English)

## PARTLY DISSENTING OPINION OF MM K. HERNDL AND E.A. ALKEMA

As we do not share the majority's conclusion in para. 226 of the report that in the present case there has been a violation of Article 2 of the Convention in respect of the injury inflicted on Abdüllah Ilhan, the delay in sending him to hospital and the lack of effective investigation, we wish to state that our reasons for not agreeing with the majority on this point are identical with those so convincingly set out by Mr Trechsel in his opinion. We fully agree with Mr Trechsel's argument as to the interpretation which has to be given to Article 2 in the present context.

On the other hand, as far as Article 13 is concerned, we are of the opinion that the failure of the Turkish authorities, notorious as it is, to investigate such cases and, if necessary, to proceed to prosecute any perpetrator, merits a separate finding under Article 14 (see para. 249 of the report) which also in our view has been breached.

# Appendix D

Ilhan v Turkey: Judgment of the European Court of Human Rights

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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



**CASE OF İLHAN v. TURKEY**

(Application no. 22277/93)

JUDGMENT

STRASBOURG

27 June 2000

This judgment is subject to editorial revision before its reproduction in final form in the official reports of selected judgments and decisions of the Court.

**In the case of İLHAN v. Turkey,**

The European Court of Human Rights, sitting as a Grand Chamber composed of the following judges:

Mr L. WILDHABER, *President*,
Mr J.-P. COSTA,
Mr A. PASTOR RIDRUEJO,
Mr L. FERRARI BRAVO,
Mr G. BONELLO,
Mr J. MAKARCZYK,
Mr P. KŪRIS,
Mrs F. TULKENS,
Mr V. BUTKEVYCH,
Mr J. CASADEVALL,
Mrs N. VAJIĆ,
Mrs H.S. GREVE,
Mr A.B. BAKA,
Mr R. MARUSTE,
Mrs S. BOTOUCHAROVA,
Mr M. UGREKHELIDZE, *judges*
Mr F. GÖLCÜKLÜ, ad hoc *judge*,

and also of Mr M. DE SALVIA, *Registrar*,

Having deliberated in private on 2 February, 29 March and 30 May 2000,

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

## PROCEDURE

1. The case was referred to the Court in accordance with the provisions applicable prior to the entry into force of Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention")[1] by the European Commission of Human Rights ("the Commission") (Article 5 § 4 of Protocol No. 11 and former Articles 47 and 48 of the Convention).

2. The case originated in an application (no. 22277/93) against Turkey lodged with the Commission under former Article 25 by the applicant, a Turkish citizen, Mr Nasır İlhan ("the applicant"), on 24 June 1993.

3. The applicant alleged that his brother Abdüllatif İlhan had been severely beaten by gendarmes when they apprehended him at his village and that he was not given necessary medical treatment by them for his life-threatening injuries. He also complained of a lack of effective remedy in

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*Notes by the Registry*

1. Protocol No. 11 came into force on 1 November 1998.

respect of these matters and of discrimination on the basis of his brother's Kurdish origin.

4. The Commission declared the application admissible on 22 May 1995. In its report of 23 April 1999 (former Article 31 of the Convention), it expressed the opinion that there had been a violation of Article 2 of the Convention (by twenty seven votes to five); that there had been a violation of Article 3 of the Convention (unanimously); that there had been a violation of Article 13 of the Convention (by twenty nine votes to three); and that there had been no violation of Article 14 of the Convention (unanimously)[1].

5. Before the Court the applicant was represented by Ms Hampson, a lawyer practising in London. The Government ("the Government") were represented by their Agent, Mr Özmen.

6. On 20 September 1999, a Panel of the Grand Chamber decided that the case would be examined by the Grand Chamber of the Court (Article 5 § 4 of Protocol No. 11 and Rules 100 § 1 and 24 § 6 of the Rules of Court. The Grand Chamber included *ex officio* Mr R. Türmen, the judge elected in respect of Turkey (Article 27 § 2 of the Convention and Rule 24 § 4), Mr L. Wildhaber, the President of the Court, Mrs E. Palm, Vice-President of the Court, together with Mr J.-P. Costa and Mr M. Fischbach, Vice-Presidents of Sections (Article 27 § 3 of the Convention and Rule 24 §§ 3 and 5 (a)). The other members appointed to complete the Grand Chamber were Mr A. Pastor Ridruejo, Mr G. Bonello, Mr J. Makarczyk, Mr P. Kūris, Mrs F. Tulkens, Mrs V. Strážnická, Mr P. Lorenzen, Mr. J. Casadevall, Mr V. Butkevych, Mr A.B. Baka, Mr R. Maruste and Mrs S. Botoucharova (Rules 24 § 3 and 100 § 4).

Subsequently, Mr R. Türmen, who had taken part in the Commission's examination of the case, withdrew from sitting in the Grand Chamber (Rule 28). On 22 October 1999, the Government appointed Mr Gölcüklü to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1). Mr Fischbach and Mrs Strážnická who were unable to attend the hearing were replaced by Mrs N. Vajić and Mr M. Ugrekhelidze, substitute judges (Rule 24 § 5 (b)).

7. The applicant and the Government each filed a memorial. In his memorial, the applicant no longer maintained his complaints under Article 14 of the Convention.

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 2 February 2000.

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1. The full text of the Commission's opinion and of the separate opinions contained in the report will be reproduced as an annex to the final printed version of the judgment (in the official reports of selected judgments and decisions of the Court), but in the meantime a copy of the Commission's report is obtainable from the Registry.

There appeared before the Court:

(a) *for the Government*
Mr M. ÖZMEN, *Agent*,
Mrs Y. KAYAALP,
Mr O. ZEYREK,
Ms M. GÜLSEN,
Mr H. ÇETINKAYA, *Advisers*;

(b) *for the applicant*
Ms F. HAMPSON, *Counsel*,
Ms A. REIDY,
Mr O. BAYDEMIR,
Ms R. YALÇINDAĞ,
Mr M. KILAVUZ, *Advisers*;

The Court heard addresses by Ms Hampson and Mr Özmen.

9. On 31 May 2000, Mrs Palm, who was unable to take part in further consideration of the case, was replaced by Mr Ferrari Bravo (Rules 24 § 5 (b) and 28).

# AS TO THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

10. The facts of the case, particularly concerning events on 26 and 27 December 1992 when Abdüllatif İlhan, the applicant's brother, was apprehended by gendarmes at the village of Aytepe and entered hospital for emergency medical treatment for a serious head injury, were disputed by the parties. The Commission, pursuant to former Article 28 § 1(a) of the Convention, conducted an investigation with the assistance of the parties.

The Commission delegates heard witnesses in Ankara from 29 to 30 September 1997 and on 4 May 1998. These included the applicant; his brother Abdüllatif İlhan; İbrahim Karahan, the villager who was apprehended during the same operation; Şeref Çakmak, the commander of the Mardin central gendarmerie, in charge of the operation at Aytepe; Ahmet Kurt, commander of the local gendarme station at Konaklı; Selim Uz, a gendarme doing his military service at Konaklı; Dr Mehmet Aydoğan, the doctor who examined Abdüllatif İlhan at Mardin State Hospital; Dr Ömer Rahmanlı, who treated Abdüllatif İlhan at Diyarbakır State Hospital; Dr Selahattin Varol from Diyarbakır State Hospital; Abdülkadir

Güngören, the Mardin public prosecutor; and Nuri Ay, a soldier trained as a paramedic, who had served at Mardin.

11. The Commission's findings of fact, which are accepted by the applicant, are set out in its report of 1 March 1999 and summarised below (Section A). The relevant domestic proceedings and the Government's submissions concerning the facts are summarised below (Sections B and C).

## A. The Commission's findings of fact

12. Abdüllatif İlhan lived in the village of Aytepe, located in the south-east region of Turkey, about 60 to 70 kilometres from the town of Mardin. It came under the jurisdiction of the gendarme command at Mardin. The nearest gendarme station was at Konaklı, several villages away. The central provincial gendarme commander, Şeref Çakmak, knew the village. He had been informed that the İlhan family co-operated with the PKK (the Kurdish Workers' Party) who were very active in the region at this time. He also suspected the villager İbrahim Karahan of involvement with the PKK.

13. Aytepe village was located on high ground in a hilly area. There was a garden area below the village to the south, described as containing fruit trees and bushes. The descriptions of this area given by witnesses before the Commission's Delegates varied. It was common ground that there were stone walls in the garden which were in places quite high. There were rivers or streams on the east and west of this area.

14. On 26 December 1992, shortly before dawn, the Mardin gendarmes, under Şeref Çakmak's command, assisted by men from Konaklı station, commenced an operation at Aytepe village. The report issued by Mardin central provincial gendarme command stated that a villager, Mehmet Koca, was wanted for harbouring two persons wanted for aiding and abetting the PKK. The weather was very cold, with snow on the ground.

15. Abdüllatif İlhan and İbrahim Karahan saw the soldiers approaching the village from the surrounding hills. They were afraid from past experiences that they might be beaten. They ran to hide in the gardens south of the village. They did not hear anyone shouting after them to stop. Ahmet Kurt, the Konaklı station commander, saw the two men running away through binoculars. He was ordered by the operation commander, Şeref Çakmak, to apprehend them. He took a team of 17 men and went to the gardens.

16. The gendarmes found both men hiding under the bushes and trees in the garden area. İbrahim Karahan did not try to run away when he was found. He was beaten and kicked by the gendarmes. The gendarmes found Abdüllatif İlhan hiding nearby and gathered round him. İbrahim Karahan saw the gendarmes kick him. He also saw gendarmes raise and lower their rifles as if striking Abdüllatif İlhan with the butts. He did not see however where any rifle butt struck. Abdüllatif İlhan remembered that he was kicked many times and struck on the hip with a barrel of a G3 rifle which tore his skin all the way down. He was also struck on the right side of the head with a rifle butt. He lost consciousness and remembered little after that for about a week. He was doused in the nearby river to revive him by the gendarmes.

17. The Commission rejected as implausible and contradictory the evidence of the gendarme witnesses concerning the apprehension of the two men. Neither Ahmet Kurt nor Şeref Çakmak witnessed the apprehension of Ibrahim Karahan or Abdüllatif İlhan and their accounts lacked credibility. Selim Uz had claimed that he found Abdüllatif İlhan concealed in the bushes and that Abdüllatif İlhan had run away, falling twice near the river. The Commission however found that his testimony was on crucial points inconsistent and that he gave his evidence in a distinctive, exculpatory manner. On being questioned in detail, he also admitted that he could not exactly see what had happened. It therefore found that the Government had not produced a witness who could equivocally state that he had witnessed Abdüllatif İlhan receive injuries as a result of a fall. It accepted the testimony of Abdüllatif İlhan and İbrahim Karahan, which it found to be credible and convincing.

18. The two men, İbrahim Karahan and Abdüllatif İlhan, were brought to the operation commander, Şeref Çakmak, who kept them outside the village until the end of the operation. A third man, Veysu Aksoy, was also apprehended for aiding and abetting the PKK. The Commission did not accept as credible testimony that a fire was lit to warm Abdüllatif İlhan. Nor were any dry clothes brought for him from the village. At this point, Abdüllatif İlhan was visibly injured on the head, with bruising around the left eye and a mark on the right hand side of his head, which had bled. He was limping, showing an injury to the left leg. There were also noticeable irregularities in his manner of speaking, when Şeref Çakmak questioned him at this time.

19. An incident report was drawn up by the gendarmes dated 26 December 1992. It stated that İbrahim Karahan and Abdüllatif İlhan had failed to stop when ordered and that Abdüllatif İlhan had fallen down a slope, injuring his left eye and leg. The report was signed by Şeref Çakmak,

Ahmet Kurt and Selim Uz. There were also apparent signatures from İbrahim Karahan and Abdüllatif İlhan. Abdüllatif İlhan was however illiterate and was unable to sign his name. He generally placed his thumbprint on documents. Though the report purported to be drawn up and signed at the scene by the persons present, the Commission noted that Ahmet Kurt and Selim Uz recollected signing it later. It also found that it was an unreliable and misleading document, which did not correspond with the events as described orally by the gendarmes.

20. The gendarmes returned to the Konaklı station after completing the operation at the village. Abdüllatif İlhan was unable to walk. İbrahim Karahan carried him to the next village, Ahmetlı, where a donkey was obtained. Abdüllatif İlhan rode on the donkey to Konaklı, with İbrahim Karahan helping to keep him in the saddle. They arrived at about 15.30 to 16.00 hours.

21. At the station, Ahmet Kurt took the statements of both men. Abdüllatif İlhan was otherwise kept in the canteen while İbrahim Karahan was placed in the custody area. No custody record recording their detention was provided by the Government. At about 21.00 to 21.30 hours, the Mardin gendarmes left in their vehicles to return to Mardin, taking with them İbrahim Karahan and Abdüllatif İlhan.

22. The gendarmes arrived in Mardin during the night, passing Mardin State Hospital on the way. Abdüllatif İlhan and İbrahim Karahan were placed in the cafeteria of the Mardin central provincial gendarme station. İbrahim Karahan recalled that two men came to the cafeteria in civilian dress, one of whom was apparently a doctor. He looked at Abdüllatif İlhan without examining him and said that he was faking his condition. Şeref Çakmak gave evidence to the Commission Delegates that he called a doctor and paramedic to examine Abdüllatif İlhan and that after an examination the doctor stated that Abdüllatif İlhan was exaggerating his symptoms. The Commission asked for the doctor and paramedic to be identified. The doctor identified by the Government failed to appear to give evidence. The paramedic appeared and could not remember ever being called out to examine a detainee in the circumstances described. No infirmary or medical records were produced to substantiate that treatment was given. The Commission did not make any findings as to who came to look at Abdüllatif İlhan. It did find that at most he received only cursory first aid treatment and that the purported doctor discounted visible signs of distress, without taking any precautionary steps in respect of an evident trauma to the head.

23. Şeref Çakmak took two further statements from the two men during the day of 27 December 1992, probably at around 17.00 to 17.30 hours. Abdüllatif İlhan's statement bore his thumbprint and the explanation that he did not have a signature. İbrahim Karahan described Abdüllatif İlhan's condition as worsening at the day progressed. He could not walk, needed to be supported and before giving his statement, lost control of his bowels.

24. At 19.10 hours on 27 December 1992, some thirty-six hours after their apprehension, Abdüllatif İlhan and İbrahim Karahan were admitted for treatment at Mardin State Hospital. A document dated 27 December 1992 signed by Şeref Çakmak requested that both be treated as they had fallen and hurt themselves. The hospital record records that İbrahim Karahan was treated for trauma to the right ear. A report dated 27 December 1992 signed by Dr Aydoğan stated that Abdüllatif İlhan's general condition was average, conscious and responsive. Hemadermy was present in the left eye periorbital. It indicated that the patient, who had left hemiparesis, was in a life threatening situation.

25. Abdüllatif İlhan was taken to Diyarbakır State Hospital, where his condition was found to be fair, though risk to life remained, with symptoms of concussion and left hemiplegion. The applicant arrived at the hospital to see his brother on 28 December 1992. He took Abdüllatif to a clinic where he paid for CAT scans to be taken. On the basis of these films, which disclosed, *inter alia*, cerebral oedema and left hemiparesis, Dr Rahmanlı decided that surgery was not necessary. Abdüllatif İlhan was treated with medicine and discharged from hospital on 11 January 1993.

26. Abdüllatif İlhan returned to the hospital for examination at about two monthly intervals. On 11 June 1993, a report from Dr Rahmanlı and Dr Varol stated that he was suffering from 60% loss of function on the left side. The applicant submitted to the Commission recent scans of his brain showing an area of brain atrophy. The Commission's Delegates who saw Abdüllatif İlhan on 29 September 1997 noted that a loss of function on the left hand side was still visible. On the basis of the evidence of the doctors who gave evidence to the Delegates however, the Commission found that the delay in treatment had not been shown to have appreciably worsened the long term effects of the head injury.

## B. The domestic proceedings

27. The applicant and his brother did not make any complaint to the Mardin public prosecutor, Abdulkadir Güngören. The public prosecutor had however been informed that Abdüllatif İlhan had been injured at the time of his apprehension by Şeref Çakmak and he had received documents prepared by the gendarmes concerning the apprehension of Abdüllatif İlhan and İbrahim Karahan. In a written report dated 27 December 1992 to the public prosecutor, Şeref Çakmak had stated that both Abdüllatif İlhan and İbrahim Karahan had run away despite numerous stop warnings. He described that both men had physically resisted the security forces and had fallen from the rocks while they were pushing members of the security forces. The public prosecutor had also spoken on the telephone with Şeref Çakmak and received oral explanations, *inter alia*, that İbrahim Karahan had in fact hidden without running away.

28. On 11 February 1993, the public prosecutor issued a decision not to prosecute, which concluded that the injury resulted from an accident for which no-one was at fault, either intentionally or negligently. He did not interview Abdüllatif İlhan or İbrahim Karahan or any gendarme who had witnessed the alleged accident before issuing his decision.

29. On the same day, the public prosecutor drew up an indictment charging Abdüllatif İlhan with the offence of resistance to officers contrary to Art. 260 of the Turkish Penal Code (TPC). It stated that during an operation Abdüllatif İlhan had run away from the security forces, ignoring their orders to stop. He told the Delegates that he did not charge İbrahim Karahan with any offence due to the oral explanations given by Şeref Çakmak.

30. On 30 March 1993, Abdüllatif İlhan appeared before the Mardin Justice of the Peace Court. The minutes recorded that he accepted that the charge was true. He was recording as stating that, on the day of the incident, he did not understand the security forces' warning. Although he understood it afterwards, he ran away fearing that they would harm him. The court in its decision of that date found that Abdüllatif İlhan had admitted that he had failed to comply with an order to stop and had thus resisted the officer contrary to Art. 260 of the TPC. He was sentenced to a fine of 35,000 Turkish lira (TRL), which was suspended. The applicant stated to the Commission that he had not been allowed to accompany his brother into the court room and that his brother who spoke Kurdish was not provided with an interpreter. The court minutes made no reference to an interpreter being provided.

### C. The Government's submissions on the facts

31. The Government relied on the incident report drawn up by the gendarmes and the statements taken from Abdüllatif İlhan and İbrahim Karahan by the gendarmes, as well as the oral testimony of the gendarme officers.

32. Abdüllatif İlhan was given an order to stop by the gendarmes conducting an operation at his village. He ran away and due to the slippery terrain, fell and injured himself. İbrahim Karahan's evidence that Abdüllatif İlhan was beaten by the soldiers was unreliable and inconsistent, *inter alia*, as his son had joined the PKK. Both men signed the incident report and statements drawn up by the gendarmes. The fact that Abdüllatif İlhan was illiterate did not mean that he was unable to sign documents if he wished.

33. Following the accident, Abdüllatif İlhan was neither in a life threatening situation nor in a coma. He did not lose consciousness as alleged. He was able to make statements to the gendarmes and so did not appear to Şeref Çakmak to be seriously affected. He was described as responsive by Dr Rahmanlı who examined him at Mardin State Hospital. In any event, Abdüllatif İlhan was not neglected but received medical treatment for his injuries in hospital. Such treatment was not available in the rural areas where the accident occurred.

34. Abdüllatif İlhan had admitted that he had resisted the security forces before the Mardin Justice of the Peace Court and had no difficulties in giving evidence.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

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

### A. Criminal prosecutions

36. Under the Turkish Criminal Code (TPC) all forms of homicide (Articles 448 to 455) and attempted homicide (Articles 61 and 62) constitute criminal offences. It is also an offence for a government employee to subject some-one to torture or ill-treatment (Article 243 in respect of torture and Article 245 in respect of ill-treatment). The authorities' obligations in respect of conducting a preliminary investigation into acts or omissions capable of constituting such offences that have been brought to their attention are governed by Articles 151 to 153 of the Code of Criminal

Procedure. Offences may be reported to the authorities or the security forces as well as to public prosecutor's offices. The complaint may be made in writing or orally. If it is made orally, the authority must make a record of it (Article 151).

By Article 235 of the Criminal Code, any public official who fails to report to the police or a public prosecutor's office an offence of which he has become aware in the exercise of his duty is liable to imprisonment.

A public prosecutor who is informed by any means whatsoever of a situation that gives rise to the suspicion that an offence has been committed is obliged to investigate the facts in order to decide whether or not there should be a prosecution (Article 153 of the Code of Criminal Procedure).

37. 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.

38. If the suspected offender is a civil servant and if the offence was committed during the performance of his duties, the preliminary investigation of the case is governed by the Law of 1914 on the prosecution of civil servants, which restricts the public prosecutor's jurisdiction *ratione personae* at that stage of the proceedings. In such cases it is for the relevant local administrative council (for the district or province, depending on the suspect's status) to conduct the preliminary investigation and, consequently, to decide whether to prosecute. Once a decision to prosecute has been taken, it is for the public prosecutor to investigate the case.

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

39. By virtue of Article 4, paragraph (i), of Legislative Decree no. 285 of 10 July 1987 on the authority of the governor of a state of emergency region, the 1914 Law (see paragraph 38 above) also applies to members of the security forces who come under the governor's authority.

40. If the suspect is a member of the armed forces, the applicable law is determined by the nature of the offence. Thus, if it is a "military offence" under the Military Criminal Code (Law no. 1632), the criminal proceedings are in principle conducted in accordance with Law no. 353 on the establishment of courts martial and their rules of procedure. Where a member of the armed forces has been accused of an ordinary offence, it is normally the provisions of the Code of Criminal Procedure which apply (see Article 145 § 1 of the Constitution and sections 9 to 14 of Law no. 353).

The Military Criminal Code makes it a military offence for a member of the armed forces to endanger a person's life by disobeying an order (Article 89). In such cases civilian complainants may lodge their complaints with the authorities referred to in the Code of Criminal Procedure (see paragraph 36 above) or with the offender's superior.

### B. Civil and administrative liability arising out of criminal offences

41. Under section 13 of Law no. 2577 on administrative procedure, anyone who sustains damage as a result of an act by the authorities may, within one year after the alleged act was committed, claim compensation from them. If the claim is rejected in whole or in part or if no reply is received within sixty days, the victim may bring administrative proceedings.

42. Article 125 §§ 1 and 7 of the Constitution provides:

> "All acts or decisions of the authorities are subject to judicial review ...
>
> The authorities shall be liable to make reparation for all damage caused by their acts or measures."

That provision establishes the State's strict liability, which comes into play if it is shown that in the circumstances of a particular case the State has failed in its obligation to maintain public order, ensure public safety or protect people's lives or property, without it being necessary to show a tortious act attributable to the authorities. Under these rules, the authorities may therefore be held liable to compensate anyone who has sustained loss as a result of acts committed by unidentified persons.

43. 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 42 above), provides:

> "No criminal, financial or legal liability may be asserted against ... the governor of a state of emergency region or by provincial governors in that region in respect of decisions taken, or acts performed, by them in the exercise of the powers conferred on them by this legislative decree, and no application shall be made to any judicial authority to that end. This is without prejudice to the rights of individuals to claim reparation from the State for damage which they have been caused without justification."

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

However, under section 13 of Law no. 657 on State employees, anyone who has sustained loss as a result of an act done in the performance of duties governed by public law may, in principle, only bring an action against the authority by whom the civil servant concerned is employed and not directly against the civil servant (see Article 129 § 5 of the Constitution

and Articles 55 and 100 of the Code of Obligations). That is not, however, an absolute rule. When an act is found to be illegal or tortious and, consequently, is no longer an "administrative act" or deed, the civil courts may allow a claim for damages to be made against the official concerned, without prejudice to the victim's right to bring an action against the authority on the basis of its joint liability as the official's employer (Article 50 of the Code of Obligations).

### C. Offences of resistance to officers

45. Article 258 of the TPC provides in its first paragraph:

> "Whoever, by force or threat, resists a public officer or his assistants during the performance of their official duties, shall be punished by imprisonment for not less than six months nor more than two years."

46. Article 260 of the TPC provides:

> "Whoever exerts any influence or force to prevent the execution of any of the provisions of law or regulations, shall be punished by imprisonment for not more than one year."

## AS TO THE LAW

### I. THE COURT'S ASSESSMENT OF THE FACTS

47. The Court reiterates its settled case-law that under the Convention system prior to 1 November 1998 the establishment and verification of the facts was primarily a matter for the Commission (former Articles 28 § 1 and 31). While the Court is not bound by the Commission's findings of fact and remains free to make its own assessment in the light of all the material before it, it is however only in exceptional circumstances that it will exercise its powers in this area (see, among other authorities, the Akdivar and Others v. Turkey judgment of 16 September 1996, *Reports of Judgments and Decisions*, 1996-IV, p. 1214, § 78).

48. The Government argued that the Commission gave undue weight to the evidence of Abdüllatif İlhan and, in particular, İbrahim Karahan, whose evidence was in their view unreliable and inconsistent. The Court observes that the Government's points concerning these witnesses were taken into consideration by the Commission in its report, which approached its task of assessing the evidence with the requisite caution, giving detailed consideration to the elements which supported the applicant's claims and those which cast doubt on their credibility. It does not find that the

criticisms made by the Government raise any matter of substance which might warrant the exercise of its own powers of verifying the facts. In these circumstances, the Court accepts the facts as established by the Commission (see paragraphs 10-30 above).

## II. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

### A. Incompatibility *ratione personae*

49. The Government submitted that the application should be dismissed as incompatible *ratione personae* as the applicant, Nasır İlhan, could not claim to be a victim under the Convention of the violations alleged. Nor could the applicant claim to be a representative of his brother Abdüllatif İlhan as there were legal representatives conducting the proceedings before the Convention organs. Abdüllatif İlhan was also capable, in their view, of pursuing his own legal affairs. To allow the applicant to pursue this application would unjustifiably widen the category of persons, relatives and friends of victims, who could lodge applications claiming compensation for themselves. Accordingly, the application was invalid and should be rejected.

50. The Commission, with whom the applicant agreed, found that the applicant had introduced the application on behalf of his brother, who was in a seriously incapacitated and vulnerable state. He had given evidence before the Delegates showing that he supported the application and there was no element of abuse of the Convention system in allowing the applicant to bring the application.

51. The Court has previously held in the context of Article 35 § 1 (former Article 26) of the Convention that the rules of admissibility must be applied with some degree of flexibility and without excessive formalism (see the Cardot v. France judgment of 19 March 1991, Series A no. 200, p. 18, § 34). Regard must also be had to the object and purpose of those rules (see, for example, the Worm v. Austria judgment of 29 August 1997, *Reports* 1997-V, § 33) and of the Convention generally, which, as a treaty for the collective enforcement of human rights and fundamental freedoms, must be interpreted and applied so as to make its safeguards practical and effective (see, for example, the Yaşa v. Turkey judgment of 2 September 1998, *Reports* 1998-VI, § 64).

52. The system of individual petition provided under Article 34 (former Article 25) of the Convention excludes applications by way of *actio popularis*. Complaints must therefore be brought by or on behalf of persons who claim to be victims of a violation of one or more of the provisions of

the Convention. Such persons must be able to show that they were "directly affected" by the measure complained of (see, for example, the Open Door and Dublin Well Woman v. Ireland judgment of 29 October 1992, Series A no. 246, § 44). Further, victim status may exist even where there is no damage, such an issue being relevant under Article 41 (former Article 50) of the Convention, where pecuniary or non-pecuniary damage flowing from the breach must be established (e.g. the Wassink v. the Netherlands judgment of 27 September 1990, Series A no. 185, § 38).

53. In the light of the above considerations, the Court notes that whether or not the applicant can claim damages in his own right is separate from the consideration of whether he may validly introduce the application. In the present case, Abdüllatif İlhan was the immediate victim of the alleged assault and ill-treatment. The application introduced by the applicant also made it clear that he was complaining on the behalf of his brother and that his brother due to his health was not in a position to pursue the application himself. In these circumstances, the Court notes that generally it would be appropriate for an application to name the injured person as the applicant and for a letter of authority to be provided allowing the other member of the family to act on his or her behalf. This would ensure that the application was brought with the consent of the victim of the alleged breach and avoid any application *actio popularis*.

54. The Court is not persuaded however that in this case the fact that Nasır İlhan placed his own name as that of the applicant rather than that of his brother discloses an abuse of the Convention system. Abdüllatif İlhan consented to the proceedings and appeared to give evidence before the Convention Delegates. Nor was there any apparent conflict of interest arising from the applicant's involvement on behalf of his brother. Indeed, the applicant may claim to have been closely concerned with the incident. He was the member of the family who came immediately to the hospital on news of his brother's injury and took responsibility for obtaining the necessary treatment. While the Government asserted that Abdüllatif İlhan's state of health did not preclude him from being responsible for his own legal affairs, the Court considers that special considerations may arise where a victim of an alleged violation of Articles 2 and 3 of the Convention at the hands of the security forces is still suffering from serious after-effects to his health.

55. Having regard therefore to the special circumstances of this case, where Abdüllatif İlhan may claim to have been in a particularly vulnerable position, the Court finds that the applicant may be regarded as having validly introduced the application on his behalf. Accordingly, it dismisses the Government's preliminary objection in this respect.

## B. Exhaustion of domestic remedies

56. The Government objected that the applicant had not exhausted domestic remedies, as required by Article 35 of the Convention, by making proper use of the available redress through the instituting of criminal proceedings, or by bringing claims in the civil or administrative courts. They referred in particular to the fact that neither Abdüllatif İlhan nor the applicant complained to the public prosecutor and that Abdüllatif İlhan made no complaint when he appeared before the Mardin Justice of the Peace Court on 30 March 1993.

57. The applicant's counsel submitted at the hearing before the Court that the Mardin public prosecutor had been informed that both Abdüllatif İlhan and İbrahim Karahan had been injured when the gendarmes apprehended them. The public prosecutor had informed the Commission's Delegates that he had been concerned that Abdüllatif İlhan had suffered such serious injuries. His decision not to prosecute of 11 February 1993 also described Abdüllatif İlhan as the injured party.

58. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 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 35 § 1 also requires that the complaints intended to be brought subsequently before the Court 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, and the Akdivar and Others judgment cited above, p. 1210, §§ 65-67).

59. The Court emphasises that the application of the rule of exhaustion of domestic remedies 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 States have agreed to set up. Accordingly, it has recognised that Article 35 § 1 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 State 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 or her to exhaust domestic remedies (see the Akdivar and Others judgment cited above, p. 1211, § 69, and the Aksoy judgment cited above, p. 2276, §§ 53 and 54).

60. The Court notes that Turkish law provides administrative, civil and criminal remedies against illegal and criminal acts attributable to the State or its agents (see paragraphs 57 et seq. above).

61. With respect to an action in administrative law under Article 125 of the Constitution based on the authorities' strict liability (see paragraphs 41-42 above), the Court recalls that a Contracting State's obligation under Articles 2 and 13 of the Convention to conduct an investigation capable of leading to the identification and punishment of those responsible in cases of fatal assault might be rendered illusory if in respect of complaints under those Articles an applicant were to be required to exhaust an administrative-law action leading only to an award of damages (see the Yaşa judgment cited above, p. 2431, § 74). This consideration applies equally under Article 3 of the Convention to cases of torture or serious ill-treatment, where the complainant has cause to feel vulnerable, powerless and apprehensive of the representatives of the State (see the Aksoy judgment, cited above, p. 2277, § 56).

Consequently, the applicant was not required to bring the administrative proceedings in question and the preliminary objection is in this respect unfounded.

62. 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 44 above), the Court notes that a plaintiff in such an action must, in addition to establishing a causal link between the tort and the damage he or she has sustained, identify the person believed to have committed the tort. In the instant case, the public prosecutor took no steps to identify who was present when Abdüllatif İlhan was apprehended or when his injuries were incurred. None of the documents provided by the gendarmes enabled such persons to be identified. The identity of the perpetrators or possible witnesses was therefore unknown to the applicant. Furthermore, the public prosecutor had taken no steps to find any evidence confirming or contradicting the account given by the gendarmes as to the allegedly accidental nature of the injuries. In this situation, it is not apparent that there was any basis on which Abdüllatif İlhan could have pursued a civil claim with any reasonable prospect of success.

63. With regard to the criminal-law remedies (paragraphs 36-40 above), the Court notes that the Mardin public prosecutor had been informed that Abdüllatif İlhan had suffered serious injuries when he was apprehended by the gendarmes at his village. He was accordingly under the duty, imposed by Article 153 of the Code of Criminal Procedure, to investigate whether an

offence had been committed. The Court is satisfied in these circumstances that the matter was sufficiently drawn to the attention of the relevant domestic authority. Given that Abdüllatif İlhan's circumstances would have caused him to feel vulnerable, powerless and apprehensive of the representatives of the State, he could legitimately have expected that the necessary investigation would have been conducted without specific, formal complaint from himself or his family. The public prosecutor chose however not to make any enquiry as to the circumstances in which those injuries were caused.

64. Consequently, the Court also dismisses the Government's preliminary objections as regards civil and criminal law remedies.

## III. ALLEGED VIOLATIONS OF ARTICLE 2 OF THE CONVENTION

65. The applicant alleged that his brother, Abdüllatif İlhan, was unlawfully subjected to a life-threatening attack by gendarmes and that the authorities failed to carry out an adequate and effective investigation into the attack. He argued that 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."

66. The Government disputed those allegations. The Commission expressed the majority opinion that Article 2 had been infringed in respect of the injury inflicted on Abdüllatif İlhan, the delay in sending him to hospital and the lack of effective investigation. A minority of the Commission found that Article 2 could not be violated where death had not been caused and there was, at the same time, the absence of the intention to cause death.

## A. Submissions of those who appeared before the Court

### *1. The applicant*

67. The applicant submitted that Abdüllatif İlhan had been unlawfully subjected to a life-threatening attack. In his view, Article 2 was not confined to the use of lethal force but included also the use of potentially lethal force, namely, force which could foreseeably result in death. Article 2 required also that such force should only be used where "no more than absolutely necessary" for the attainment of one of the objects listed in paragraph 2 of Article 2. In this case, Abdüllatif İlhan was beaten on the head at least once with a rifle butt, in a deliberate assault carried out with considerable force. Such a blow to the head, which is a vulnerable part of the body, was a foreseeably life-threatening assault and showed a reckless disregard for the life of the victim. There was no justification however for any use of force as Abdüllatif İlhan did not resist arrest.

68. As the Convention concerned the civil liability of States and not the criminal liability of the individual perpetrator, the issue of the *mens rea* of the perpetrator was irrelevant. The lack of prompt medical treatment aggravated the wrong in this case.

69. The applicant submitted that Government had also failed in their obligation under Article 2 to protect his brother through the criminal-law framework and the effective enforcement of its sanctions. The cases previously examined before the Convention organs showed that the attitude and conduct of the security forces and public prosecutors in the south-east region in and around 1993 resulted from the failure of the State to carry out its duty to prevent and suppress offences against the person. He relies on the cases of Mahmut Kaya v. Turkey and Kılıç v. Turkey (judgments of 28 March 2000, to be published in the Court's official reports).

70. Further, the applicant claimed that the authorities had failed to fulfil their obligation under Article 2 to carry out an investigation into the potentially lethal use of force. He referred to the Commission's findings that the public prosecutor was aware that Abdüllatif İlhan had suffered injuries at the time of his apprehension by the gendarmes but relied wholly on the documents submitted by the gendarmes in reaching the conclusion that they resulted from an accident. His decision not to prosecute was largely a

formal exercise taken without any effort to obtain information from Abdüllatif İlhan or İbrahim Karahan as to what had occurred.

*2. The Government*

71. The Government contended that Article 2 could not be violated where the alleged victim, Abdüllatif İlhan, was still alive. They disputed that his condition could be described as life-threatening. Nor was he in a coma or near to death, as the medical reports indicated that he could still talk and hear people. His condition was exaggerated in the testimony of İbrahim Karahan. There was no element of negligence or oversight in the way in which Abdüllatif İlhan was treated by the gendarmes or hospital staff. In any event, Abdüllatif İlhan had not substantiated that he had been ill-treated by the gendarmes.

72. As Article 2 did not come into question in this case, the obligation of the competent authorities to conduct effective investigations could not be examined in this context.

## B. The Court's assessment

*1. Concerning the injuries inflicted on Abdüllatif İlhan*

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

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

"necessary in a democratic society" under paragraphs 2 of Articles 8 to 11 of the Convention. Consequently, the force used must be strictly proportionate to the achievement of the permitted aims (the McCann judgment, cited above, §§ 148-149).

75. The Court recalls that in the present case the force used against Abdüllatif İlhan was not in the event lethal. This does not exclude an examination of the applicant's complaints under Article 2. It may be observed that in three previous cases the Court has examined complaints under this provision where the alleged victim had not died as a result of the impugned conduct.

In Osman v. the United Kingdom (judgment of 28 October 1998, *Reports* 1998-VIII, §§ 115-122), the applicant, Ahmed Osman, had been shot and seriously injured when a man fired a shotgun at close range at him and his father. His father had died. The Court concluded on the facts of that case that the United Kingdom authorities had not failed in any positive obligation under Article 2 to provide protection of their right to life within the meaning of the first sentence of Article 2. In the Yaşa case (judgment cited above, pp. 2436-41, §§ 92-108), the applicant was shot in the street by an unknown gunman, receiving eight bullet wounds but surviving. The Court, finding that the authorities had not failed to protect the applicant's life, held nonetheless that they had failed to comply with the procedural obligation under Article 2 to conduct an effective investigation into the attack. In L.C.B. v. the United Kingdom (judgment of 9 June 1998, *Reports* 1998-III, p. 1403-1404, §§ 36-41), where the applicant, a leukaemia sufferer, was the daughter of a soldier who had been on Christmas Island during the United Kingdom's nuclear tests, the Court noted that it was not suggested that the State had intentionally sought to deprive her of her life but examined under Article 2 whether the State had done all that could have been required of it to prevent the applicant's life from being avoidably put at risk. It found that the State had not failed in this regard.

76. The Court observes that these three cases concerned the positive obligation on the State to protect the life of the individual from third parties or from the risk of illness under the first sentence of Article 2 § 1. It considers however that it is only in exceptional circumstances that physical ill-treatment by State officials which does not result in death may disclose a breach of Article 2 of the Convention. It is correct that the criminal responsibility of those concerned in the use of force is not in issue in the proceedings under the Convention (see the McCann judgment cited above § 173). Nonetheless, the degree and type of force used and the unequivocal intention or aim behind the use of force may, amongst other factors, be relevant in assessing whether in a particular case the State agents' actions in

inflicting injury short of death must be regarded as incompatible with the object and purpose of Article 2 of the Convention. In almost all cases where a person is assaulted or maltreated by police or soldiers, their complaints will fall to be examined rather under Article 3 of the Convention.

77. The Court recalls that Abdüllatif İlhan suffered brain damage following at least one blow to the head by a rifle butt inflicted by gendarmes who had been ordered to apprehend him during an operation and who kicked and beat him when they found him hiding in some bushes. Two contemporaneous medical reports identified the head injury as being of a life-threatening character. This has left him with a long-term loss of function. The seriousness of his injury is therefore not in doubt.

However, the Court is not persuaded in the circumstances of this case that the use of force applied by the gendarmes when they apprehended Abdüllatif İlhan was of such a nature or degree as to breach Article 2 of the Convention. Nor does any separate issue arise in this context concerning the alleged lack of prompt medical treatment for his injuries. It will however examine these aspects further under Article 3 of the Convention below.

78. It follows that there has been no violation of Article 2 of the Convention concerning the infliction of injuries on Abdüllatif İlhan.

*2. Concerning the positive and procedural obligations under Article 2 of the Convention*

79. In the light of its finding above, and having regard to the facts of this application which differ from the cases of unknown perpetrator killings cited by the applicant (see the above-mentioned Kaya and Kılıç judgments), the Court finds it unnecessary to examine the allegations under Article 2 of the Convention that there was a failure on the part of the authorities to protect Abdüllatif İlhan's right to life or to conduct an effective investigation into the use of force.

## IV. ALLEGED VIOLATIONS OF ARTICLE 3 OF THE CONVENTION

80. The applicant complained that Abdüllatif İlhan was subjected to torture, inhuman and degrading treatment and that there was no adequate or effective investigation of this ill-treatment. He invoked Article 3 of the Convention which provides:

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

*1. The submissions of the parties*

81. The applicant, agreeing with unanimous opinion of the Commission, submitted that Abdüllatif İlhan was subject to treatment in violation of Article 3. He referred both to the severity of the injuries caused to Abdüllatif İlhan by being beaten with rifle butts and kicked and to the failure to bring him promptly to the hospital despite his obvious injuries.

82. The applicant also argued, referring to the Court's judgment in Assenov v. Bulgaria (judgment of 28 October 1998, *Reports* 1998-VIII, §§ 102-103) that the authorities failed to conduct any effective or adequate investigation into the ill-treatment to which his brother was subjected. This disclosed a separate breach of Article 3, as found by a majority of the Commission in its report.

83. The Government submitted that the applicant's complaints were wholly unfounded. His injuries were caused by his accidental fall while trying to run away from the security forces. There was no failure on the part of the public prosecutor in investigating the incident. If Abdüllatif İlhan had any complaint, he could have brought this to the attention of the public prosecutor or the Mardin Justices of the Peace Court. He did not do so however.

*2. The Court's assessment*

**(a) Concerning the alleged ill-treatment**

84. 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, amongst other authorities, the Tekin v. Turkey judgment of 9 June 1998, *Reports* 1998-IV, § 52).

85. Further, in determining whether a particular form of ill-treatment should be qualified as torture, consideration must be given to the distinction, embodied in Article 3, between this notion and that of inhuman or degrading treatment. As noted in previous cases, it appears that it was the intention that the Convention should, by means of this distinction, attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering (see the Ireland v. the United Kingdom judgment cited above, p. 66, § 167). In addition to the severity of the treatment, there is a purposive element as recognised in the United Nations Convention against

Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which came into force on 26 June 1987, which defines torture in terms of the intentional infliction of severe pain or suffering with the aim, *inter alia*, of obtaining information, inflicting punishment or intimidating (Article 1 of the UN Convention).

86. The Court has accepted the findings of the Commission concerning the injuries inflicted upon Abdüllatif İlhan, namely, that he was kicked and beaten and struck at least once on the head with a G3 rifle. This resulted in severe bruising and two injuries to the head, which caused brain damage and long term impairment of function. Notwithstanding the visible injuries to his head and the evident difficulties which Abdüllatif İlhan had in walking and talking, there was a delay of some 36 hours in bringing him to a hospital.

87. Having regard to the severity of the ill-treatment suffered by Abdüllatif İlhan and the surrounding circumstances, including the significant lapse in time before he received proper medical attention, the Court finds that he was a victim of very serious and cruel suffering that may be characterised as torture (see also the Selmouni v. France judgment of 28 July 1999, to be published in the Court's official reports, §§ 96-105).

88. The Court concludes that there has been a breach of Article 3 of the Convention in this regard.

**(b) Concerning the alleged lack of an effective investigation**

89. In the Assenov case (Assenov v. Bulgaria judgment, cited above) the Court made a finding of a procedural breach of Article 3 due to the inadequate investigation made by the authorities into the applicant's complaints that he had been severely ill-treated by the police. It had regard, in doing so, to the importance of ensuring that the fundamental prohibition against torture and inhuman and degrading treatment and punishment be effectively secured in the domestic system.

90. However, in that case, the Court had been unable to reach any conclusion as to whether the applicant's injuries had in fact been caused by the police as he alleged. The inability to make any conclusive findings of fact in that regard derived at least in part from the failure of the authorities to react effectively to those complaints at the relevant time (see also Labita v. Italy judgment of 6 April 2000, to be published in the Court's official reports, § 131).

91. Procedural obligations have been implied in varying contexts under the Convention, where this has been perceived as necessary to ensure that the rights guaranteed under the Convention are not theoretical or illusory but practical and effective. The obligation to provide an effective investigation into the death caused, *inter alios*, by the security forces of the

State was for this reason implied under Article 2 which guarantees the right to life (see McCann and Others v. the United Kingdom judgment, cited above, §§ 157-164). This provision does however include the requirement that the right to life be "protected by law". It also may concern situations where the initiative must rest on the State for the practical reason that the victim is deceased and the circumstances of the death may be largely confined within the knowledge of state officials.

92. Article 3 however is phrased in substantive terms. Furthermore, though the victim of an alleged breach of this provision may be in a vulnerable position, the practical exigencies of the situation will often differ from cases of the use of lethal force or suspicious deaths. The Court considers that the requirement under Article 13 of the Convention for a person with an arguable claim of a violation of Article 3 to be provided with an effective remedy will generally provide both redress to the applicant and the necessary procedural safeguards against abuses by state officers. The Court's case-law establishes that the notion of effective remedy in this context includes the duty to carry out a thorough and effective investigation capable of leading to the identification and punishment of those responsible for any ill-treatment and permitting effective access for the complainant to the investigatory procedure, (see Aksoy v. Turkey judgment, cited above, p. 2287, § 98). Whether it is appropriate or necessary to find a procedural breach of Article 3 will therefore depend on the circumstances of the particular case.

93. In the present case, the Court has found that the applicant has suffered torture at the hands of the security forces. His complaints concerning the lack of any effective investigation by the authorities into the cause of his injuries fall to be dealt with in this case under Article 13 of the Convention.

## V. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

94. The applicant complained that no effective remedy has been provided as required by Article 13 of the Convention, which provides:

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

95. The applicant submitted, relying on the Commission's report, that the fundamental flaws in the investigation into his brother's injuries gave rise to a violation of Article 13. The public prosecutor relied exclusively and unquestioningly on the unsatisfactory and conflicting documents and information submitted by the gendarmes, without seeking to interview

Abdüllatif İlhan, İbrahim Karahan or any gendarme who might have witnessed their apprehension. He did not take any steps to discover the cause or extent of Abdüllatif İlhan' injuries by questioning the doctors who examined him. The medical report by Dr Aydoğan was also brief, failing to give the stated cause of the injuries or covering the minor injuries suffered by Abdüllatif İlhan.

96. The Government contended that there were no inadequacies in the domestic investigation and that Abdüllatif İlhan failed to make any complaint to the public prosecutor or the Mardin Justice of the Peace Court about any alleged ill-treatment.

97. The Court reiterates that Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State (see the Aksoy judgment cited above, p. 2286, § 95; the Aydın v. Turkey judgment of 25 September 1997, pp. 1895-96, § 103; and the Kaya v. Turkey judgment of 19 February 1998, *Reports* 1998-I, pp. 329-30, § 106).

Where an individual has an arguable claim that he has been tortured or subjected to serious ill-treatment by the State, the notion of "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 investigation procedure (see the Tekin judgment cited above, § 66).

98. On the basis of the evidence adduced in the present case, the Court has found that the Government are responsible under Article 3 for ill-treatment of the applicant amounting to torture. The applicant's complaints in this regard are therefore "arguable" for the purposes of Article 13 (see the Boyle and Rice v. the United Kingdom judgment of 27 April 1988, Series A no. 131, p. 23, § 52, and the Kaya and Yaşa judgments cited above, § 107 and p. 2442, § 113 respectively).

99. The authorities thus had an obligation to carry out an effective investigation into the circumstances in which Abdüllatif İlhan received his injuries.

100. The public prosecutor was aware that Abdüllatif İlhan had suffered injuries which had required hospitalisation. The life-threatening nature of these injuries was also apparent from the medical report issued by Dr Aydoğan. The incident report and the statements which were taken by the gendarmes alleged that Abdüllatif İlhan's injuries were received when he fell, trying to run away. There were however a number of features about these documents which should have alerted the prosecutor to the need to investigate further, besides the mere fact that such serious injuries were caused on apprehension by the security forces. These included the delay between the injuries being caused and Abdüllatif İlhan's admission to Mardin State Hospital and the appearance of Abdüllatif İlhan's signature on the incident report whereas his statement of 27 December 1992 bore a thumbprint and the explanation that he could not sign. It was also apparent that the incident report was an unreliable account. It stated that İbrahim Karahan had failed to stop on warning by the gendarmes. However, the public prosecutor did not bring this charge against him as well as Abdüllatif İlhan as Şeref Çakmak had orally informed him that in fact İbrahim Karahan had not tried to run away. A further significant inconsistency was disclosed by the incident report's failure to mention that İbrahim Karahan had been injured on apprehension. Şeref Çakmak's written referral to hospital stated that İbrahim Karahan had also fallen and hurt himself when being apprehended, as had his written report to the public prosecutor of 27 December 1992. The latter document had also made the claim, not recorded in the allegedly contemporaneous incident report, that both men had physically resisted the gendarmes and that it was while pushing members of the security forces that they fell from the rocks. Indeed, each version of the incident produced by the gendarmes differed in significant details.

101. Notwithstanding these troubling elements, the public prosecutor took no independent investigative step. He did not seek to hear Abdüllatif İlhan's or İbrahim Karahan's version of events nor did he obtain clarification from the relevant doctors about the extent and nature of the injuries. He also did not seek any eyewitness evidence as to how the alleged accident took place but relied on the oral explanations of Şeref Çakmak and the incident report which had been signed by Şeref Çakmak, Ahmet Kurt and Selim Uz who, before the Commission delegates, were themselves unable to state that they had seen Abdüllatif İlhan fall.

102. Furthermore, the medical report issued by Dr Aydoğan on Abdüllatif İlhan's arrival in the emergency ward was deficient in that it gave no reference to the cause of the injuries as explained by the victim and did not refer to the other injuries and marks on his body. The Court is not persuaded that this is satisfactorily explained by the perceived need for urgent referral to specialist care in Diyarbakır. In any event, it highlights the importance of adequate follow-up by the public prosecutor in ascertaining the cause and extent of Abdüllatif İlhan's injuries.

103. For these reasons, no effective criminal investigation can be considered to have been conducted in accordance with Article 13. The Court finds therefore that no effective remedy has been provided in respect of Abdüllatif İlhan's injuries and thereby access to any other available remedies, including a claim for compensation, has also been denied.

Consequently, there has been a violation of Article 13 of the Convention.

## VI. ALLEGED PRACTICE BY THE AUTHORITIES OF INFRINGING ARTICLES 2, 3 AND 13 OF THE CONVENTION

104. The applicant maintained that there existed in Turkey an officially tolerated practice of the inadequate and ineffective investigations of unlawful attacks, killings and serious ill-treatment, violating Articles 2, 3 and 13 of the Convention. He referred to other cases concerning events in south-east Turkey in which the Commission and the Court had also found breaches of these provisions.

105. Having regard to its findings under Articles 2, 3 and 13 above, the Court does not find it necessary to determine whether the failings identified in this case are part of a practice adopted by the authorities.

## VII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

106. Article 41 of the Convention provides:

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

### A. Pecuniary damage

107. The applicant submitted that as a result of his injuries Abdüllatif İlhan has incurred medical expenses to date of 8,000,000,000 Turkish liras (TRL) assessed at 1999 values. He also claimed future medical expenses, on the basis of medical advice totalling 7,000,000,000 TRL. This represented 9,708.94 and 8,495.33 Pounds sterling (GBP) respectively.

The applicant also submitted that prior to this incident Abdüllatif İlhan had been a farmer with sheep, goats and vines. Due to his injuries, he had to leave his village, sell off his livestock quickly to pay for his medical expenses and was rendered permanently unable to resume his previous occupation. Taking into account that he was aged 36 at the time of the incident and the average male life expectancy in Turkey and that as a farmer he earned GBP 339.81 (TRL 280,000,000) per month at 1999 values, he claimed for loss of earnings the capitalised sum of GBP 70,952.32.

His overall claim for pecuniary damages totalled GBP 89,156.59.

108. The Government submitted that there was no violation to be compensated. Any just satisfaction should not exceed reasonable limits or lead to unjust enrichment.

109. The Court observes that there is a direct causal link between the injuries which it has found were inflicted on Abdüllatif İlhan in breach of Article 3 and the past medical expenses and loss of earnings which the applicant claims on his behalf. The Government have not queried the amount claimed by the applicant, beyond submitting that such sums should not be unreasonable. Having regard therefore to the detailed submissions by the applicant concerning these elements, which included the actuarial basis of calculation of the appropriate capital sum to reflect the loss of income due to Abdüllatif İlhan's injuries, the Court awards the sum of GBP 80,600, such sum to be paid to the applicant to be held on behalf of Abdüllatif İlhan. It has not awarded any sum in respect of alleged future medical expenses, in respect of which no supporting details have been provided and which claim must therefore be regarded as largely speculative.

### B. Non-pecuniary damage

110. The applicant claimed, referring *inter alia* to the severity of the violations and the need for an inducement to observe legal standards to give effective expression to the function of the Court in upholding the public order of Europe, 40,000 GBP for non-pecuniary damage suffered by Abdüllatif İlhan and 2,500 GBP for himself on account of the violation of Article 13 which he has suffered.

111. The Government submitted that any just satisfaction should not exceed reasonable limits or lead to unjust enrichment.

112. The Court has found above that the applicant suffered severe, life-threatening injury at the hands of gendarmes which amounted to torture contrary to Article 3 of the Convention. It also found that there had been a failure to provide an effective remedy in this respect. Noting the awards made in previous cases concerning these provisions from cases in south-east Turkey (see, for example, concerning Article 3, the Aksoy judgment cited above, pp. 2289-90, § 113, the Aydın judgment cited above, p. 1903, § 131, the Tekin judgment cited above, pp. 1521-22, § 77, the Çakıcı v. Turkey judgment of 8 July 1999, to be published in the Court's official reports, § 130, the Mahmut Kaya judgment cited above, § 138) and having regard to the circumstances of this case, the Court has decided to award the sum of GBP 25,000 in total in respect of non-pecuniary damage to be held by the applicant for his brother Abdüllatif İlhan.

113. As regards the applicant, the Court recalls that the application was brought by him on behalf of his brother. The violations found by the Court, under Articles 3 and 13 concerned Abdüllatif İlhan as victim. It does not consider that there is any basis in the present case to make an award to the applicant himself as "injured party" and accordingly grants no non-pecuniary damage to the applicant in his personal capacity.

### C. Costs and expenses

114. The applicant claimed a total of GBP 23,922.61 less legal aid received from the Council of Europe of 11,300 French francs (FRF). This included fees and costs incurred in respect of attendance at the taking of evidence before Commission delegates at two hearings in Ankara and attendance at the hearing before the Court in Strasbourg. A sum of GBP 5,750 was listed as incurred fees and administrative costs in respect of the Kurdish Human Rights Project (KHRP) in its role as liaison between the

legal team in the United Kingdom and the lawyers and the applicant in Turkey, as well as a sum of GBP 1,425 for translation work from Turkish to English.

115. The Government submitted that only documented claims should be reimbursed and that there was no ground for paying any sum in respect of the KHRP, whose function was insufficiently elaborated. They contested the appropriateness of awarding high fees and costs in respect of lawyers from outside Turkey.

116. Save as regards the translation costs, the Court is not persuaded that the fees claimed in respect of the KHRP were necessarily incurred. Deciding on an equitable basis and having regard to the details of the claims submitted by the applicant, it awards the applicant the sum of GBP 17,000, together with any value-added tax that may be chargeable, less the 11,300 French francs received by way of legal aid from the Council of Europe, such sum to be paid into the applicant's sterling bank account in the United Kingdom as set out in his just satisfaction claim.

### D. Default interest

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

## FOR THESE REASONS, THE COURT

1. *Dismisses* unanimously the Government's preliminary objections;

2. *Holds* by twelve votes to five that there has been no violation of Article 2 of the Convention;

3. *Holds* unanimously that there has been a violation of Article 3 of the Convention;

4. *Holds* unanimously that there has been a violation of Article 13 of the Convention;

5. *Holds* by sixteen votes to one
   (a) that the respondent State is to pay the applicant, within three months, the following sums, to be converted into Turkish liras at the rate applicable at the date of settlement:

(i) 80,600 (eighty thousand, six hundred) pounds sterling for pecuniary damage to be held by the applicant for his brother Abdüllatif İlhan;

(ii) 25,000 (twenty-five thousand) pounds sterling for non-pecuniary damage, which sum is to be held by the applicant for his brother Abdüllatif İlhan;

(b) that simple interest at an annual rate of 7.5% shall be payable from the expiry of the above-mentioned three months until settlement;

6. *Holds* by sixteen votes to one

(a) that the respondent State is to pay the applicant, within three months and into the latter's bank account in the United Kingdom, in respect of costs and expenses, 17,000 (seventeen thousand) pounds sterling together with any value-added tax that may be chargeable, less 11,300 (eleven thousand, three hundred) French francs to be converted into pounds sterling at the rate applicable at the date of delivery of this judgment;

(b) that simple interest at an annual rate of 7.5% shall be payable from the expiry of the above-mentioned three months until settlement;

7. *Dismisses* unanimously the remainder of the applicant's claims for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 27 June 2000.

Luzius WILDHABER
President

Michele DE SALVIA
Registrar

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

(a) partly dissenting joint opinion of Mr Bonello, Mrs Tulkens, Mr Casadevall, Mrs Vajić and Mrs Greve;

(b) dissenting opinion of Mr Gölcüklü.

L.W.
M.S.

# PARTLY DISSENTING JOINT OPINION OF JUDGES BONELLO, TULKENS, CASADEVALL, VAJIĆ AND GREVE

For the following reasons, we do not share the majority's opinion that there has been no violation of Article 2 of the Convention in this case.

1. In its examination of the alleged violation of Article 2 of the Convention, the Court found that "in almost all cases where a person is assaulted or maltreated ... their complaints will fall to be examined rather under Article 3 of the Convention" (see § 76 *in fine*). That being so, the Court is not persuaded in the circumstances of this case "that the use of force applied by the gendarmes when they apprehended Abdüllatif İlhan was of such a nature or degree as to breach Article 2 of the Convention" (see § 76, second sub-paragraph).

In so saying, the Court suggests that Articles 2 and 3 of the Convention are part of a continuum or, more precisely, that only a difference in severity separates them.

Even if there may be interference or even overlap between those two provisions, we think that Articles 2 and 3 of the Convention also have objects which are different and distinct – life in the former, integrity of the person in the latter – which must be examined as such.

2. In the judgment in the instant case the Court finds on the basis of medical reports drawn up immediately after the events, that the injury inflicted on Abdüllatif İlhan – who suffered brain damage following blows to the head inflicted by gendarmes – was identified as being of a "life-threatening character" (see § 76). That finding, which is also not contradicted in the Commission's report (see § 219), was in our opinion not only necessary but also sufficient for a decision that there had been a violation of Article 2 of the Convention.

3. In the Osman v. the United Kingdom judgment of 28 October 1998 and in the Yaşa v. Turkey judgment of 2 September 1998 the Court has already held that Article 2 of the Convention applies where an applicant has been the victim of an assault which put his or her life in danger, even if, by chance, he or she survived.

Referring to those cases and also to the L.C.B. v. the United Kingdom judgment of 9 June 1998, the Court notes "the positive obligation on the State to protect the life of the individual from third parties or from the risk of illness under the first sentence of Article 2 § 1". It considers, however, that "it is only in exceptional circumstances that physical ill-treatment by State officials which does not result in death may disclose a breach of Article 2 of the Convention" (see § 75). We wonder what those "exceptional circumstances" might be when the Court firstly accepts that "two contemporaneous medical reports identified the head injury as being of a life-threatening character", that "this has left him with a long-term loss of function" and that "the seriousness of his injury is therefore not in

doubt" (see § 76) and secondly finds, "having regard to the severity of the ill-treatment", that the applicant's brother was a victim of "very serious and cruel suffering that may be characterised as torture" (see § 86).

4. In conclusion, we think that Article 2 of the Convention imposes an obligation on the States to protect the right to life against acts capable of endangering it, no matter who is responsible for those acts and irrespective of whether they result from intention, recklessness or negligence. In this case Abdüllatif İlhan received blows to the head which were identified by doctors at the time of the events as being of a "life-threatening character", without it having been shown that such use of force was absolutely necessary within the meaning of § 2 of Article 2 of the Convention.

# DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

1. To my great regret, I am unable to share the opinion of the majority of the Court, in particular regarding the dismissal of the respondent Government's preliminary objection that the Court had no jurisdiction *ratione personae* and the application of Article 41 of the Convention.[1]

2. I wholly agree with the majority that the system of individual petition provided under Article 34 of the European Convention on Human Rights excludes applications by way of *actio popularis* (see § 51 of the judgment in the instant case). However, the Court has accepted that persons (especially close relatives) who are very close to the real victim within the meaning of Article 34 may exceptionally be regarded as a "victim" if, for practical purposes, it was impossible for the real victim to exercise his right of individual petition, for instance because he is dead or suffering from some other incapacity.

3. In the instant case, the applicant's brother, that is to say the victim within the meaning of Article 34, was neither dead nor incapable of exercising his right of individual petition, as he was able to express his consent to being replaced by his brother and that consent was considered valid by the Court (§ 53).

4. What I contest is the recognition given to the notion of "victim by proxy" accepted by the Court (§ 54).

5. The Court has clearly defined, on more than one occasion, the notion of victim for the purposes of Article 34 (former Article 25) of the Convention, given its importance in the system of supervision that has been established. "According to the Court's established case-law, the word 'victim' in the context of Article 25 denotes the person directly affected by the act or omission in issue..." (see the Amuur v. France judgment of 25 June 1996, *Reports of Judgments and Decisions* 1996-III, p. 846, § 36; see also, among many other authorities, the Lüdi v. Switzerland judgment of 15 June 1992, Series A no. 238, p. 18, § 34). Logical conclusions flow from that definition:

(a) firstly, only "victims" within the meaning of Article 34 have standing to set in motion the system of supervision under the Convention. The Convention does not give "victims" power to delegate that standing to anyone else, no matter how closely connected;

(b) therefore, the fact that the real victim's consent has been obtained cannot have any effect in law. In other words, the real victim cannot by his consent or will transfer his standing as a victim to a third party. All he can do is to appoint a legal representative once he has lodged a complaint in due form with the Court as a victim within the meaning of Article 34.

1. Emphasis added to some of the phrases and figures.

(c) The issue is not (as the Commission reasoned and the Court accepted) whether "the name of the applicant should be replaced by the name Abdullatil İlhan for the purposes of this application" (§ 212). Reasoning to the effect that "it amounts to the same thing" is not legal reasoning. Abdullatil İlhan could have appointed his brother Nasır İlhan as his legal representative before the Convention institutions after duly lodging his application as a victim of a violation.

6. Nor do I regard the Court's conclusion on this subject as being an interpretation of the notion of a "victim" under Article 34. I consider that interpreting a provision or a notion (as in the instant case) in such a way as to widen its scope of application must not amount to adding a new provision to the Convention.

7. In conclusion, as the Convention does not recognise the notion of "victim by proxy", the Court had no alternative but to declare the application in the present case inadmissible.

8. As to the application of Article 41 of the Convention, I also dissent from the majority judgment, firstly, as regards just satisfaction and, secondly, as regards the manner of reimbursing costs, for the following reasons.

9. To begin with, the compensation. In the great majority of cases the Court has pointed out and clearly identified the speculative and fictitious nature of pecuniary damage where what was entailed was essentially "actuarial calculations". Claims under that head are consequently dismissed.

10. In the rare cases in which it did award the applicant a specified sum for pecuniary damage, it determined the amount on an equitable basis, without ever going beyond what was reasonable, thereby avoiding speculative calculations.

11. In the instant case the Court – ignoring its settled case-law – has not only undertaken speculative "actuarial calculations" but has also considered it just and reasonable to award the applicant an amount that is both unprecedented and more than exorbitant (£80,000). It is around £15,000 to £20,000. I consider that the credibility and persuasive force of judicial decisions comes from established case-law that is consistent and adhered to; that requires avoiding extremes.

By way of justifying what has just been said, I will refer to earlier judgments of the Court, as illustrations. I set out the relevant paragraphs in full below.

## *Kurt* judgment of 25 May 1998
## (forced disappearance – violation)

**Claim**

"171. The applicant maintained that both she and her son had been victims of specific violations of the Convention as well as a practice of such violations. She requested the Court to award a total amount of 70,000 pounds sterling (GBP) which she justified as follows: GBP 30,000 for her son in respect of his disappearance and the absence of safeguards and effective investigative mechanisms in that regard; GBP 10,000 for herself to compensate for the suffering to which she had been subjected on account of her son's disappearance and the denial of an effective remedy with respect to his disappearance; and GBP 30,000 to compensate both of them on account of the fact that they were victims of a practice of 'disappearances' in south-east Turkey."

**Award**

"174. The Court recalls that it has found the respondent State in breach of Article 5 in respect of the applicant's son. It considers that an award of compensation should be made in his favour having regard to the gravity of the breach in question. It awards the sum of GBP 15,000, which amount is to be paid to the applicant and held by her for her son and his heirs."

## *Tekin* judgment of 9 June 1998
## (violation of Article 3)

**Claim and award**

"75. The applicant claimed compensation in respect of non-pecuniary damage of 25,000 pounds sterling (GBP) and aggravated damages of GBP 25,000."

...

"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. 917, § 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. 918, § 119)."

## *Ergi* judgment of 28 July 1998
## (violation of Articles 3 and 13)

**Claim**

"107. The applicant submitted that he, his deceased sister and the latter's daughter had been the victims both of individual violations and of a practice of such violations. He claimed 30,000 pounds sterling ("GBP") in compensation for non-pecuniary damage. In addition, he sought GBP 10,000 for aggravated damages resulting from the existence of a practice of violation of Article 2 and of a denial of effective remedies in south-east Turkey in aggravated violation of Article 13."

**Award**

"110. The Court observes from the outset that the initial application to the Commission was brought by the applicant not only on his own and his sister's behalf but also on behalf of his niece, Havva Ergi's daughter. ... Having regard to the gravity of the violations (see paragraphs 86 and 98 above) and to equitable considerations, it awards the applicant GBP 1,000 and Havva Ergi's daughter GBP 5,000, which amount is to be paid to the applicant's niece or her guardian to be held on her behalf.

111. On the other hand, it dismisses the claim for aggravated damages."

## *Oğur* judgment of 20 May 1999
## (violation of Article 2)

**Claim**

"95. In respect of the damage she had sustained, the applicant claimed 500,000 French francs (FRF), of which FRF 400,000 was for pecuniary damage and FRF 100,000 for non-pecuniary damage. She pointed out that she had had no means of support since the death of her son, who had maintained the family by working as a night-watchman."

**Award**

"98. ... Having regard to its conclusions as to compliance with Article 2 and to the fact that the events complained of took place more than eight years ago, the Court considers that it is required to rule on the applicant's claim for just satisfaction.

As regards pecuniary damage, the file contains no information on the applicant's son's income from his work as a night-watchman, the amount of financial assistance he gave the applicant, the composition of her family or any other relevant circumstances. That being so, the Court cannot allow the compensation claim submitted under this head (Rule 60 § 2).

As to non-pecuniary damage, the Court considers that the applicant undoubtedly suffered considerably from the consequences of the double violation of Article 2. ... On an equitable basis, the Court assesses that non-pecuniary damage at FRF 100,000."

## *Çakıcı* judgment of 8 July 1999
## (Grand Chamber)
## (violation of Articles 2, 3, 5 and 13)

### *A. Pecuniary damage*

**Claim**

"123. The applicant requested that pecuniary damages be paid for the benefit of his brother's surviving spouse and children. He claimed a sum of 282.47 pounds sterling (GBP) representing 4,700,000 Turkish liras (TRL), which it is alleged was taken from Ahmet Çakıcı on his apprehension by a first lieutenant and GBP 11,534.29 for loss of earnings, this capital sum being calculated with reference to Ahmet Çakıcı's estimated monthly earnings of TRL 30,000,000."

**Award**

"125. The Court observes that the applicant introduced this application on his own behalf and on behalf of his brother. In these circumstances, the Court may, if it considers it appropriate, make awards to the applicant to be held by him for his brother's heirs (see the Kurt judgment cited above, p. 1195, § 174).

...

127. As regards the applicant's claims for loss of earnings, the Court's case-law establishes that there must be a clear causal connection between the damage claimed by the applicant and the violation of the Convention and that this may, in the appropriate case, include compensation in respect of loss of earnings (see, amongst other authorities, the Barberà, Messegué and Jabardo v. Spain judgment of 13 June 1994 (*Article 50*), Series A no. 285-C, pp. 57-58, §§ 16-20). The Court has found (paragraph 85 above) that it may be taken as established that Ahmet Çakıcı died following his apprehension by the security forces and that the State's responsibility is engaged under Article 2 of the Convention. In these circumstances, there is a direct causal link between the violation of Article 2 and the loss by his widow and children of the financial support which he provided for them. The Court notes that the Government have not queried the amount claimed by the applicant. Having regard therefore to the detailed submissions by the applicant concerning the actuarial basis of calculation of the appropriate capital sum to reflect the loss of income due to Ahmet Çakıcı's death, the Court awards the sum of GBP 11,534.29 to be held by the applicant on behalf of his brother's surviving spouse and children."

## *B. Non-pecuniary damage*

**Claim**

"128. The applicant claimed GBP 40,000 by way of non-pecuniary damages in relation to the violations of the Convention suffered by his brother..."

**Award**

"130. The Court recalls that in the case of Kurt v. Turkey (cited above, p. 1195, §§ 174-75) the sum of GBP 15,000 was awarded for violations of the Convention under Articles 5 and 13 in respect of the disappearance of the applicant's son while in custody, which sum was to be held by the applicant for her son and his heirs, while the applicant received an award of GBP 10,000 in her own favour, due to the circumstances of the case which had led the Court to find a breach of Articles 3 and 13. In the present case, the Court has held, in addition to breaches of Articles 5 and 13, that there has been a violation of the right to respect for life guaranteed under Article 2 and torture contrary to Article 3. Noting the awards made in previous cases concerning these provisions from cases in south-east Turkey (see, concerning Article 3, the Aksoy judgment cited above, pp. 2289-90, § 113, the Aydın judgment cited above, p. 1903, § 131, the Tekin judgment cited above, pp. 1521-22, § 77; and, concerning Article 2, the Kaya judgment cited above, p. 333, § 122, the Güleç v. Turkey judgment of 27 July 1998, *Reports* 1998-IV, p. 1734, § 88, the Ergi v. Turkey judgment of 28 July 1998, *Reports* 1998-IV, p. 1785, § 110, the Yaşa judgment cited above, pp. 2444-45, § 124, and the Oğur v. Turkey judgment of 20 May 1999, to be published in the Court's official reports, p. ..., § 98) and having regard to the circumstances of this case, the Court has decided to award the sum of GBP 25,000 in total in respect of non-pecuniary damage to be held by the applicant for his brother's heirs. ..."

## ***Mahmut Kaya* judgment of 28 March 2000 (violation of Articles 2, 3 and 13)**

### *A. Pecuniary damage*

**Claim**

"133. The applicant claimed 42,000 pounds sterling (GBP) in respect of the pecuniary damage suffered by his brother who is now dead. He submitted that his brother, aged 27 at his death and working as a doctor with a salary of the equivalent of GBP 1,102 per month, can be calculated as having a capitalised loss of earnings of GBP 253,900.80. However, in order to avoid any unjust enrichment, the applicant claimed the lower sum of GBP 42,000."

**Award**

"135. The Court notes that the applicant's brother was unmarried and had no children. It is not claimed the applicant was in any way dependent on him. This does not exclude an award of pecuniary damage being made to an applicant who has established that a close member of the family has suffered a violation of the Convention. ... In the present case however, the claims for pecuniary damage relate to alleged losses accruing subsequent to the death of the applicant's brother. They do not represent losses actually incurred either by the applicant's brother before his death or by the applicant after his brother's death. The Court does not find it appropriate in the circumstances of this case to make any award to the applicant under this head."

### *B. Non-pecuniary damage*

**Claim**

"136. The applicant claimed, having regard to the severity and number of violations, GBP 50,000 in respect of his brother and GBP 2,500 in respect of himself for non-pecuniary damage."

**Award**

"138. As regards the claim made on behalf of non-pecuniary damage for his deceased brother, the Court notes that awards have previously been made to surviving spouses and children and where appropriate, to applicants who were surviving parents or siblings. ... The Court notes that there have been findings of violation of Articles 2, 3 and 13 in respect of the failure to protect the life of Hasan Kaya. ... It finds it appropriate in the circumstances of the present case to award GBP 15,000, which is to be paid to the applicant and held by him for his brother's heirs.

139. The Court accepts that the applicant has himself suffered non-pecuniary damage which cannot be compensated solely by the findings of violations. Making its assessment on an equitable basis, the Court awards the sum of GBP 2,500 to the applicant, such sum to be converted into Turkish liras at the rate applicable at the date of payment."

## ***Kılıç* judgment of 28 March 2000**
## **(violation of Article 2)**

### *A. Pecuniary damage*

**Claim**

"100. The applicant claimed 30,000 pounds sterling (GBP) in respect of the pecuniary damage suffered by his brother who is now dead. He submitted that his brother, aged 30 at his death and working as a journalist with a salary of the equivalent of GBP 1,000 per month, can be calculated as having a capitalised loss of earnings of GBP 182,000. However, in order to avoid any unjust enrichment, the applicant claimed the lower sum of GBP 30,000."

**Award**

"102. The Court notes that the applicant's brother was unmarried and had no children. It is not claimed the applicant was in any way dependent on him. This does not exclude an award of pecuniary damages being made to an applicant who has established that a close member of the family has suffered a violation of the Convention (see Aksoy v. Turkey judgment of 18 December 1996, *Reports* 1996-VI, § 113, where the pecuniary claims made by the applicant prior to his death for loss of earnings and medical expenses arising out of detention and torture were taken into account by the Court in making an award of damages to the applicant's father who had continued the application). In the present case however, the claims for pecuniary damage relate to alleged losses accruing subsequent to the death of the applicant's brother. They do not represent losses actually incurred either by the applicant's brother before his death or by the applicant after his brother's death. The Court does not find it appropriate in the circumstances of this case to make any award to the applicant under this head.

### *B. Non-pecuniary damage*

**Claim**

103. The applicant claimed, having regard to the severity and number of violations, GBP 40,000 in respect of his brother and GBP 2,500 in respect of himself."

**Award**

"105. As regards the claim made on behalf of non-pecuniary damage for his deceased brother, the Court notes that awards have previously been made to surviving spouses and children and where appropriate, to applicants who were surviving parents or siblings. ... The Court notes that there have been findings of violations of Article 2 and 13 in respect of failure to protect the life of Kemal Kılıç, who died instantaneously, after a brief scuffle with unknown gunmen. It finds it appropriate in the circumstances of the present case to award GBP 15,000, which amount is to be paid to the applicant and held by him for his brother's heirs."

**_Ertak_ judgment of 9 May 2000 [French only]**
**(violation of Article 2)**

*Damage*

**Claim**

"146. Le requérant demande une réparation pécuniaire de 60 630,44 GBP pour pertes de revenus, montant calculé par référence aux revenus mensuels estimés de Mehmet Ertak, soit 180 000 000 TRL, en valeur actuelle, qu'il détiendra pour la veuve et les quatre enfants de celui-ci.

147. Le requérant réclame 40 000 GBP en réparation du dommage moral lié aux violations de la Convention subies par son fils ainsi que d'une pratique de telles violations, comme qu'il détiendra pour la veuve et les quatre enfants de celui-ci, plus 2 500 GBP pour lui-même en raison de l'absence d'un recours effectif. Il invoque les précédentes décisions de la Cour rendues pour détention illégale, torture et absence d'enquête effective."

**Award**

"150. Pour ce qui est de la demande du requérant concernant la perte de revenus, ... la Cour a constaté (paragraphe 155 ci-dessus) qu'elle peut tenir pour établi que Mehmet Ertak est décédé à la suite de son arrestation par les forces de l'ordre et que la responsabilité de l'Etat est engagée au regard de l'article 2 de la Convention. Dans ces conditions, il existe bien un lien de causalité directe entre la violation de l'article 2 et la perte par la veuve et les orphelins de Mehmet Ertak du soutien financier qu'il leur fournissait (voir arrêt Çakici précité, § 127). La Cour alloue au requérant, qui la détiendra pour le compte de la veuve et des orphelins de son fils, la somme de 15 000 GBP.

151. Quant au dommage moral, ... en l'espèce, la Cour a constaté une violation substantielle et procedurale de l'article 2. Prenant acte des sommes précédemment octroyées dans des affaires concernant l'application de cette même disposition dans le sud-est de la Turquie (voir les arrêts Kaya (précité), p. 333, § 122, Güleç c. Turquie du 27 juillet 1998, *Recueil* 1998-IV, p. 1734, § 88, Ergi c. Turquie du 28 juillet 1998, *Recueil* 1998-IV, p. 1785, §110, Yaşa (précité), pp. 2444-2445, § 124, et *Oğur c. Turquie* du 20 mai 1999, à paraître dans le recueil officiel de la Cour, p. ..., § 98) et tenant compte des circonstances de l'affaire, la Cour décide d'accorder, en réparation du dommage moral, une somme de 20 000 GBP, que le requérant détiendra pour la veuve et les quatre enfants de son fils. ..."

12. Lastly, I cannot accept that the costs awarded under Article 41 should be paid to the applicant in his "bank account in the United Kingdom".

This point is an aspect of the general issue of payment of "costs and expenses". To make clear what I mean, I must go back to certain earlier facts and arguments.

The manner of implementing Article 50 (now Article 41) as regards costs (including counsel's fees) was discussed in depth by the old Court, because some applicants' lawyers (always the same ones) always sought, very

insistently, to have the costs paid to them direct into their bank account abroad in foreign currency. The Court always dismissed those applications except in one or two cases in which it agreed to payment in foreign currency (but always in the country of the respondent State). After deliberating, the Court decided that costs would be paid (1) to the applicant, (2) in the country of the respondent State, and (3) in the currency of the respondent State (if expressed in a foreign currency on account of the high rate of inflation in the respondent State, it would be converted into that State's currency at the date of payment: see the Tekin judgment of 9 June 1998, § 77). In accordance with that decision, all other types of application have been categorically rejected. Whereupon, counsel for the applicant have again sought to have costs paid to the applicant, a national of the respondent State who is resident in its territory, in his bank account abroad and in foreign currency, although such applications have consistently been dismissed by the Court.

Despite numerous applications of this kind (always by the same counsel), not a single decision has yet been taken allowing such an application.

Is it not astonishing that almost all the applicants living in very humble circumstances in a small village or hamlet in a remote corner of south-eastern Anatolia should have bank accounts in a town in a European State?

13. If certain counsel have problems with their clients, that is no concern of the respondent State, since the contract between the lawyer and his client is a private one involving only them, and the respondent State is not a party to disputes between them.

14. I must point out that in the system established by the Convention the Court has no jurisdiction to give orders to the Contracting States as to the manner in which its judgments are to be executed.

In my opinion, any payment under Article 41 must be made to the applicant as before, in the currency of the country and in the country concerned.

# Appendix E

The European Court of Human Rights: System and Procedure

# THE EUROPEAN COURT OF HUMAN RIGHTS:

# SYSTEM AND PROCEDURE

As from 1 November 1998, Protocol 11 to the European Convention on Human Rights abolished the former two-tier system of the European Commission and Court, and created a single full-time permanent Court. This note briefly summarises the main points of the new system in Strasbourg and sets out how a case will progress through the system.

## The new system under Protocol 11

- There are no changes to the substantive human rights protected by the Convention (Articles 1-18).
- The amended Convention created a new Court functioning on a permanent basis (Article 19). One judge is elected by the Parliamentary Assembly for each state party, holds office for six years and may be re-elected (Article 23).
- The Court may establish Committees of three judges which will be able unanimously to declare cases inadmissible (Article 28). Chambers of seven judges will determine the remainder of the cases (Articles 27 & 29). The national judge will be an *ex officio* member of the chamber. There is no right of appeal from an admissibility decision.
- The pre-existing admissibility criteria have been retained (Article 35). The most important of these are the requirement to exhaust all available, effective domestic remedies and the requirement to lodge a case at the European Court within six months of the final decision of the domestic courts (or within six months of the incident complained of, if there are no effective domestic remedies).
- The President of the Court may permit any Convention state or "any person concerned" (including human rights organisations) to submit written comments or take part in hearings as a 'third party' (i.e. even if the organisation is not acting for the applicant).
- New rules of the Court were adopted on 4 November 1998. The rules specify the procedure and internal workings of the Court.

## How a case is handled by the European Court of Human Rights

*Lodging the application with the Court*

- An application can initially lodged simply by letter. There is no Court fee.

*Registration and examination of the case*

- The Court will open a provisional file. A Court Registry lawyer will respond with an application form and a form of authority (which should be signed by the applicant and which authorises the lawyer to act on his/her behalf).

- The application form and form of authority should be completed and returned to the Court within six weeks. Copies of all relevant documents should be lodged at the Court with the application form.

- The application is registered on receipt of the completed application form. Following registration, all documents lodged with the Court are accessible to the public (unless the Court decides otherwise).

- Once registered, an application is assigned to a Judge Rapporteur (whose identity is not disclosed to the applicant) to consider admissibility.

- The Court (in Committees of three or Chambers of seven) may declare an application inadmissible or the application may be sent to the respondent Government for a reply.

*Communication of a case*

- If a case is sent to the Government, the Government will be asked to reply to specific questions (copies of which are sent to the applicant) within a stipulated time.

*Legal Aid*

- When a case is sent to the Government, the applicant is then invited to apply for legal aid. The assessment of the applicant's financial situation is carried out by the appropriate domestic body (in Turkey, this is usually the muhtar or the local municipal authorities). The Court will send an application for legal aid to the Government to comment on.

*Government's Observations*

- A copy of the Government's written Observations will be sent to the applicant. The applicant may submit further written Observations in reply (within a stipulated time).

*Interim Measures*

- In very urgent cases, where there is an imminent threat to life or of serious injury, the Court may ask the Government to take particular action or to stop from taking certain action. For example, 'interim measures' may be applied where an applicant is threatened with expulsion to a country where there is a danger of torture or death. In that situation, the Court may ask the Government not to deport the applicant whilst the case is pending at the European Court.

*Decision on admissibility*

- An application may be declared inadmissible by a Committee of three judges (if unanimous). The remainder of the cases are dealt with by a Chamber of seven judges.

- The Court may hold an oral hearing to decide admissibility, although this is now rare and usually only if the case raises difficult or new issues. An application may be declared admissible/inadmissible in part.

*Friendly settlement*

- The friendly settlement procedure provides the Government and the applicant with an opportunity to resolve the dispute. The Court will write to the parties asking for any proposals as to settlement. The case is struck off the Court's list of cases if settlement is agreed.

*Consideration of the merits*

- The parties are invited to lodge final written submissions (commonly referred to as the 'Memorial'). Details of any costs or compensation which are being claimed should either be included with the Memorial or should be submitted to the Court within two months of the admissibility decision (or other stipulated time).

- The Court now decides most cases without holding a hearing. However, if there is a hearing, it takes place in public (unless there are particular reasons for the hearing to be held in private). The hearings usually take no more than two hours in total. Applicants' representatives are usually given 30 minutes to make their initial oral arguments, followed by the same period for the government's representatives. If the Court asks questions of the parties there may be a 15-20 minute adjournment, then each party may have 15-20 minutes to answer questions and reply to the other side.

*Judgment*

- Most judgments are issued by chambers of seven judges, but the most significant cases will be heard by a Grand Chamber of 17 judges. The Court's judgment is published several months after any hearing or after the parties' final written submissions. The Court may reach a decision unanimously or by a majority. In either case, full reasons are provided in the judgment. Individual judges may also add their dissenting judgment to the majority judgment. Within three months of a chamber judgment, any party may ask for the case to be referred to the Grand Chamber of 17 judges for a final judgment. The request is considered by a panel of five judges from the Grand Chamber. Once final, judgments are legally binding on the Government (Article 46(1)).

- The Court's primary remedy is a declaration that there has been a violation of one or more Convention rights.

- The judgment may include an award for 'just satisfaction' under Article 41 (previously Article 50). This may include compensation for both pecuniary and non-pecuniary loss, legal costs and expenses. Awards for just satisfaction may be reserved in order for the Court to receive further submissions.

- The Court will not quash decisions of the domestic authorities or courts, strike down domestic legislation or otherwise require a Government to take particular measures.

- There is no provision in the Convention for costs to be awarded against an applicant.

*Supervision of enforcement of Court judgments*

- Judgments are sent to the Committee of Ministers which will review at regular intervals whether the Government has complied with it (Article 46(2)).

**How long will the case take?**

European Court cases are still taking several years to progress through the system. A case will be registered shortly after the application is lodged, but it may take more than a year for the Court even to decide whether to refer the case to the Government to reply.

Usually, it takes at least two to three years for admissibility decisions to be taken (unless there are clear reasons why the case should be declared inadmissible at the outset).

Where a case is declared admissible it is likely to take at least four to five years (from the initial introduction of the case) before the Court will produce a final judgment.

# Appendix F

List of judgments in KHRP-assisted cases at the European Court of Human Rights

## JUDGMENTS IN KHRP-ASSISTED CASES AT THE EUROPEAN COURT OF HUMAN RIGHTS

| Case name | Case number | Date of Decision | Nature |
|---|---|---|---|
| 1. ***Akdivar and Others*** *(merits)* | 99/1995/605/693 | 16 September 1996 | Village Destruction |
| 2. ***Aksoy*** | 100/1995/606/694 | 18 December 1996 | Torture |
| 3. ***Aydin*** | 57/1996/676/866 | 25 September 1997 | Rape and Torture |
| 4. ***Mentes and Others*** *(merits)* | 58/1996/677/867 | 27 November 1997 | Village Destruction |
| 5. ***Kaya*** | 158/1996/777/978 | 19 February 1998 | Killing |
| 6. ***Selcuk and Asker*** | 12/1997/796/998-999 | 24 April 1998 | Village Destruction |
| 7. ***Gundem*** | 139/1996/758/957 | 25 May 1998 | Village Destruction |
| 8. ***Kurt*** | 15/1997/799/1002 | 25 May 1998 | Disappearance |
| 9. ***Tekin*** | 52/1997/836/1042 | 9 June 1998 | Torture and ill-treatment |
| 10. ***Ergi*** | 66/1997/850/1057 | 28 July 1998 | Killing |
| 11. ***Yasa*** | 63/1997/847/1054 | 2 September 1998 | Killing |
| 12. ***Aytekin*** | 102/1997/886/1098 | 23 September 1998 | Killing |
| 13. ***Tanrikulu*** | 23763/94 | 8 July 1999 | Extra-judicial killing |

| | | | |
|---|---|---|---|
| **14.** ***Cakici*** | 23657/94 | 8 July 1999 | Disappearance |
| **15.** ***Özgür Gündem*** | 23144/93 | 16 March 2000 | Freedom of expression |
| **16.** ***Kaya*** | 22535/93 | 28 March 2000 | Killing |
| **17.** ***Kilic*** | 22492/93 | 28 March 2000 | Killing |
| **18.** ***Ertak*** | 20764/92 | 9 May 2000 | Disappearance |
| **19.** ***Timurta*** | 23531/94 | 13 June 2000 | Disappearance |
| **20.** ***Salman*** | 21986/93 | 26 June 2000 | Torture; death in custody |
| **21.** ***Ilhan*** | 22277/93 | 26 June 2000 | Torture |
| **22.** ***Aksoy**** | 28635/95<br>30171/96<br>34535/97 | 10 October 2000 | Freedom of expression |
| **23.** ***Akkoç*** | 22947/93 | 10 October 2000 | Killing and torture |
| **24.** ***Tas*** | 24396/94 | 14 November 2000 | Killing and torture |
| **25.** ***Bilgin*** | 23819/94 | 16 November 2000 | Village destruction |
| **26.** ***Gül*** | 22676/93 | 14 December 2000 | Extra-judicial killing |
| **27.** ***Dulas*** | 25801/94 | 30 January 2001 | Village destruction |
| **28.** ***Çiçek*** | 25704/94 | 27 February 2001 | Disappearance |

| | | | |
|---|---|---|---|
| **29.** ***Berktay*** | 22493/93 | 1 March 2001 | Torture |
| **30.** ***Tanli*** | 26129/95 | 10 April 2001 | Death in custody |
| **31.** ***Sarli*** | 24490/94 | 22 May 2001 | Disappearance |
| **32.** ***Akdeniz*** | 23954/94 | 31 May 2001 | Disappearance/ Torture |
| **33.** ***Akman*** | 37453/97 | 26 June 2001 | Extra-judicial killing |
| **34.** ***Aydin & others*** | 28293/95<br>29494/95<br>30219/96 | 10 July 2001 | Extra-judicial killing/Inhuman treatment |
| **35.** ***Avsar*** | 25557/94 | 10 July 2001 | Extra-judicial killing |
| | | | |

# Relevant Articles of the European Convention on Human Rights

(Note the changes made following the coming into force of Protocol 11).

**Convention**

Article 2: Right to life.
Article 3: Prohibition of torture or inhuman or degrading treatment or punishment.
Article 4: Prohibition of slavery and forced labour.
Article 5: Right to liberty and security.
Article 6: Right to a fair trial.
Article 7: No punishment without law.
Article 8: Right to respect for private and family life.
Article 9: Freedom of thought, conscience and religion.
Article 10: Freedom of expression.
Article 11: Freedom of assembly and association.
Article 12: Right to marry.
Article 13: Right to an effective remedy.
Article 14: Prohibition of discrimination.
Article 15: Derogation in time of emergency.
Article 16: Restrictions on political activity of aliens.
Article 17: Prohibition of abuse of rights.
Article 18: Restrictions under Convention shall only be applied for prescribed purpose.
Article 34: Application by person, non-governmental organisations or groups of individuals (formerly Article 25).
Article 38: Examination of the case and friendly settlement proceedings (formerly Article 28).
Article 41: Just satisfaction to injured party in event of breach of Convention (formerly Article 50).

**Protocol No. 1**

Article 1: Protection of property.
Article 2: Right to education.
Article 3: Right to free elections.

**Protocol No. 2**

Article 1: Prohibition of imprisonment for debt.
Article 2: Freedom of movement.
Article 3: Prohibition of expulsion of nationals.
Article 4: Prohibition of collective expulsion of aliens.

**Protocol No. 6**

Article 1: Abolition of the death penalty.

**Protocol No. 7**

Article 1: Procedural safeguards relating to expulsion of aliens.
Article 2: Right to appeal in criminal matters.
Article 3: Compensation for wrongful conviction.
Article 4: Right not to be tried or punished twice.
Article 5: Equality between spouses.

**To date, Turkey has only ratified the Convention and Protocol No. 1.**

# The Kurdish Human Rights Project

The Kurdish Human Rights Project (KHRP) is an independent, non-political, non-governmental human rights organisation founded and based in London, England. KHRP is a registered charity and is committed to the promotion and protection of the human rights of all persons living within the Kurdish regions, irrespective of race, religion, sex, political persuasion or other belief or opinion. Its supporters include both Kurdish and non-Kurdish people.

## AIMS

- To promote awareness of the situation of the Kurds in Iran, Iraq, Syria, Turkey and the countries of the former Soviet Union
- To bring an end to the violation of the rights of the Kurds in these countries
- To promote the protection of human rights of Kurdish people everywhere

## METHODS

- Monitoring legislation including emergency legislation and its application
- Conducting investigations and producing reports on the human rights situation of Kurds in Iran, Iraq, Syria, Turkey, and in the countries of the former Soviet Union by, amongst other methods, sending trial observers and engaging in fact-finding missions
- Using such reports to promote awareness of the plight of the Kurds on the part of committees established under human rights treaties to monitor compliance of states
- Using such reports to promote awareness of the plight of the Kurds on the part of the European Parliament, the Parliamentary Assembly of the Council of Europe, the national parliamentary bodies and inter-governmental organisations including the United Nations
- Liaison with other independent human rights organisations working in the same field and co-operating with lawyers, journalists and others concerned with human rights
- Assisting individuals with their applications before the European Court of Human Rights
- Offering assistance to indigenous human rights groups and lawyers in the form of advice and training seminars on international human rights mechanisms



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