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

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,
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 the Republic of Turkey lodged with the Commission under former Article 25 of the Convention by a Turkish national, 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 provided by them with the necessary medical treatment for

1. *Note by the Registry*. Protocol No. 11 came into force on 1 November 1998.

his life-threatening injuries. He also complained of a lack of effective remedy in 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 (unanimously); that there had been a violation of Article 13 (by twenty-nine votes to three); and that there had been no violation of Article 14 (unanimously)[1].

5. 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, and 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 V. Butkevych, Mr. J. Casadevall, Mrs H.S. Greve, Mr A.B. Baka, Mr R. Maruste and Mrs S. Botoucharova (Rules 24 § 3 and 100 § 4).

6. Subsequently Mr 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 Turkish Government ("the Government") appointed Mr F. 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 take part in the further consideration of the case, 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.

1. *Note by the Registry*. The report is obtainable from the Registry.

There appeared before the Court:

(a) *for the Government*
Mr M. ÖZMEN, *Agent,*
Ms 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 the further consideration of the case, was replaced by Mr L. Ferrari Bravo (Rule 24 § 5 (b)).

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 during an operation at the village of Aytepe and went to hospital for emergency medical treatment of 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. The witnesses 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, the commander of the local gendarmerie 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 with paramedical training 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 also 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 km from the town of Mardin. It came under the jurisdiction of the gendarmerie command at Mardin. The nearest gendarmerie station was at Konaklı, several villages away. The central provincial gendarmerie commander, Şeref Çakmak, knew the village. He had been informed that the İlhan family cooperated with the PKK (Workers' Party of Kurdistan) 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 to the east and west of this area.

14. On 26 December 1992, shortly before dawn, the Mardin gendarmes, under Şeref Çakmak's command and assisted by men from Konaklı station, started an operation at Aytepe village. The report by Mardin central provincial gendarmerie 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. From past experience, they feared 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 seventeen 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. They found Abdüllatif İlhan hiding nearby and gathered round him. İbrahim Karahan saw the gendarmes kick him. He also saw them raise and lower their rifles as if striking Abdüllatif İlhan with the butts. He did not, however, see any rifle butt hitting him. Abdüllatif İlhan remembered that he was kicked many

times and struck on the hip with the 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. The gendarmes doused him in the nearby river to revive him.

17. The Commission rejected as implausible and contradictory the testimony of the gendarmes concerning the apprehension of the two men. Neither Ahmet Kurt nor Şeref Çakmak witnessed the apprehension of İbrahim Karahan or Abdüllatif İlhan and their accounts lacked credibility. Selim Uz claimed that he had found Abdüllatif İlhan concealed in the bushes and that the latter had run away, falling twice near the river. The Commission, however, found that his testimony was inconsistent on a number of crucial points and that he gave his evidence in a clearly exculpatory manner. On being questioned in detail, he also admitted that he could not see exactly what had happened. The Commission therefore found that the Government had not produced a witness who could unequivocally state that he had witnessed Abdüllatif İlhan sustain 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. İbrahim Karahan and Abdüllatif İlhan were brought before the operation commander, Şeref Çakmak, who kept them outside the village until the end of the operation. A third man, Veysi 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 had a visible injury to his 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. It also bore the apparent signatures of İbrahim Karahan and Abdüllatif İlhan. However, Abdüllatif İlhan was illiterate and unable to sign his name. He generally placed his thumbprint on documents. Although the report purported to have been 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 to the events as described orally by the gendarmes.

20. After completing the operation at the village, the gendarmes returned to the Konaklı station. 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 3.30 to 4 p.m.

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 9 to 9.30 p.m., the Mardin gendarmes left in their vehicles to return to Mardin, taking İbrahim Karahan and Abdüllatif İlhan with them.

22. The gendarmes arrived in Mardin during the night, passing Mardin State Hospital on the way. Abdüllatif İlhan and İbrahim Karahan were put in the cafeteria of the Mardin central provincial gendarmerie station. İbrahim Karahan recalled that two men in civilian clothes had come to the cafeteria. One of them, who was apparently a doctor, had looked at Abdüllatif İlhan without examining him and said that he was faking his condition. Şeref Çakmak told the Commission delegates that he had called a doctor and a paramedic to examine Abdüllatif İlhan and that, after the examination, the doctor had stated that Abdüllatif İlhan was exaggerating his symptoms. The Commission asked for the doctor and the paramedic to be identified. The doctor identified by the Government failed to appear and give evidence. The paramedic appeared, but 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 had come to look at Abdüllatif İlhan. It did find that at most he had received only cursory first-aid treatment and that the purported doctor had discounted visible signs of distress, without taking any precautionary steps in respect of an evident trauma to the head.

23. Şeref Çakmak took further statements from the two men during the day of 27 December 1992, probably around 5 to 5.30 p.m. 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 as the day progressed. He could not walk, needed to be supported and, before giving his statement, lost control of his bowels.

24. At 7.10 p.m. 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 and signed by Şeref Çakmak requested that both be treated as they had fallen and hurt themselves. According to the hospital record, İbrahim Karahan was treated for trauma to the right ear. A report dated 27 December 1992 and signed by Dr Aydoğan stated that Abdüllatif İlhan's general condition was average, and that he was conscious and responsive. The report also stated that hemadermy was present in the left eye periorbital. It indicated that the life of the patient, who suffered from left hemiparesis, was threatened.

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 hemiplegia. The applicant arrived at the hospital to see his brother on 28 December 1992. He took Abdüllatif to a clinic, where he paid for 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 drugs 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 a 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. However, on the basis of the evidence of the doctors who testified before the delegates, 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 lodge any complaint with the Mardin public prosecutor, Abdulkadir Güngören. The public prosecutor had been informed, however, 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 warnings to stop. He described how both men had physically resisted the security forces and had fallen from the rocks while they were pushing the gendarmes. 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 Abdüllatif İlhan's injury resulted from an accident for which no one was at fault, either intentionally or through negligence. 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 Article 260 of the Turkish Criminal Code (TCC). 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 recorded 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. In its decision of that date, the court found that Abdüllatif İlhan had admitted that he had failed to comply with an order to stop and had thus resisted an officer contrary to Article 260 TCC. 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 courtroom 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 gendarmerie officers.

32. Abdüllatif İlhan was ordered 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 had 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. After the accident, Abdüllatif İlhan was neither in danger of losing his life 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 hurt. Dr Rahmanlı, who examined him at Mardin State Hospital, described him as responsive. 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 area where the accident occurred.

34. Abdüllatif İlhan had admitted before the Mardin Justice of the Peace Court that he had resisted the security forces and had had no difficulty 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 (TCC) 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 State employee to subject anyone 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 prosecutors' 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 national 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 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 Decree no. 430 of 16 December 1990, the last sentence of which was inspired by the provision mentioned above (see paragraph 42), 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 TCC 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 a term of imprisonment of not less than six months and not more than two years."

46. Article 260 of the TCC provides:

> "Whoever exerts influence or force to prevent the execution of any of the provisions of a statute or regulation shall be punished by a term of imprisonment of not more than one year."

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. Abdüllatif İlhan 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, p. 1547, § 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, p. 2429, § 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-A, p. 22, § 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 (see, for example, the Wassink v. the Netherlands judgment of 27 September 1990, Series A no. 185-A, p. 14, § 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 behalf of his brother who, considering his state of health, was not in a position to pursue the application himself. In these circumstances, the Court notes that it would generally be appropriate for an application to name the injured person as the applicant and for a letter of authority to be provided allowing another 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 would avoid *actio popularis* applications.

54. The Court is not persuaded, however, that in this case the fact that Nasır İlhan put 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 before the Commission

delegates to give evidence. 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 learning of his brother's injury and who took the necessary steps for obtaining the treatment he needed. While the Government asserted that Abdüllatif İlhan's state of health did not preclude him from conducting 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.

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 brother's 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, §§ 53-54).

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 36 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 (see 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 a specific, formal complaint from himself or his family. The public prosecutor chose, however, not to inquire into 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 an 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 aims 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 was an aggravating circumstance in this case.

69. The applicant submitted that the respondent State had also failed in its 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 south-east Turkey in and around 1993 resulted from the failure of the State to perform its duty of preventing and suppressing offences against the person. He relied on the judgments delivered on 28 March 2000 in the cases of *Mahmut Kaya v. Turkey* and *Kılıç v. Turkey* (no. 22535/93, ECHR 2000-III, and no. 22492/93, ECHR 2000-III).

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 there could be no violation of Article 2 since the alleged victim, Abdüllatif İlhan, was still alive. They disputed that his condition could be described as critical. 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 had been exaggerated in the testimony of İbrahim Karahan. There had been 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 play in this case, the obligation of the competent authorities to conduct an effective investigation 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, pp. 45-46, §§ 146-47).

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 (see the McCann and Others judgment cited above, p. 46, §§ 148-49).

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, pp. 3159-63, §§ 115-22), the applicant, Ahmet 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, pp. 1403-04, §§ 36-41), where the applicant, who suffered from leukaemia, 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 and Others judgment cited above, p. 51, § 173). Nonetheless, the degree and type of force used and the unequivocal intention or aim behind the use of force may, among 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 ill-treated by the 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 with 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 case, which differ from the cases of killings by unknown perpetrators cited by the applicant (see *Mahmut Kaya* and *Kılıç* cited above), 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 and 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."

A. The submissions of the parties

81. The applicant, agreeing with the unanimous opinion of the Commission, submitted that Abdüllatif İlhan was subjected 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 of 28 October 1998 in the case of Assenov and Others v. Bulgaria (*Reports* 1998-VIII, p. 3290, §§ 102-03), 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. Abdüllatif İlhan's 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 had any complaint, he could have brought it to the attention of the public prosecutor or the Mardin Justice of the Peace Court. He had not done so, however.

B. The Court's assessment

1. 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, among other authorities, the Tekin v. Turkey judgment of 9 June 1998, *Reports* 1998-IV, p. 1517, § 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 of 18 January 1978, Series A no. 25, pp. 66-67, § 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 United Nations 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 thirty-six 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 *Selmouni v. France* [GC], no. 25803/94, §§ 96-105, ECHR 1999-V).

88. The Court concludes that there has been a breach of Article 3 of the Convention in this regard.

2. Concerning the alleged lack of an effective investigation

89. In the Assenov and Others 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* [GC], no. 26772/95, § 131, ECHR 2000-IV).

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 by, *inter alios*, the security forces of the

State was for this reason implied under Article 2 which guarantees the right to life (see the McCann and Others judgment cited above, pp. 47-49, §§ 157-64). This provision does, however, include the requirement that the right to life be "protected by law". It may also 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, although 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 use of lethal force or suspicious deaths. The Court considers that the requirement under Article 13 of the Convention that a person with an arguable claim of a violation of Article 3 be provided with an effective remedy will generally provide both redress to the applicant and the necessary procedural safeguards against abuses by State officials. 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 the Aksoy 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 under Article 13 of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

94. The applicant complained that no effective remedy had been provided as required by Article 13 of the Convention, which provides:

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

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's injuries by questioning the doctors who examined him. As to the medical report by Dr Aydoğan, it was brief, failed to state the cause of the injuries and covered the minor injuries suffered by Abdüllatif İlhan.

96. The Government contended that there had been no inadequacies in the domestic investigation and that Abdüllatif İlhan had failed to lodge any complaint with 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, *Reports* 1997-VI, 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, p. 1520, § 66).

98. On the basis of the evidence adduced in the present case, the Court has found that the respondent State is 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, pp. 330-31, § 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 sustained 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 sustained 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 lapse of time between the moment Abdüllatif İlhan had sustained his injuries and his 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 gave an unreliable account. It stated that İbrahim Karahan had failed to stop at the gendarmes' warning. 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 upon Abdüllatif İlhan's arrival in the emergency ward was deficient in that it made 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 an 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 inadequate and ineffective investigations into unlawful attacks, killings and serious ill-treatment, in violation of 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 had, to date, incurred medical expenses 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 TRL 7,000,000,000. This represented 9,708.94 and 8,495.33 pounds sterling (GBP) respectively.

The applicant also submitted that prior to the incident in issue Abdüllatif İlhan had been a farmer who had owned sheep, goats and vines. Due to his injuries, he had 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 damage 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 does not award any sum in respect of alleged future medical expenses, in respect of which no supporting details have been provided and which 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, GBP 40,000 for the non-pecuniary damage suffered by Abdüllatif İlhan and GBP 2,500 for himself on account of the violation of Article 13 which he had 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 from south-east Turkey concerning these provisions (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, *Çakıcı v. Turkey* [GC], no. 23657/94, § 130, ECHR 1999-IV, and *Mahmut Kaya* 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 11,300 French francs (FRF) received from the Council of Europe by way of legal aid. 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 defined. 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 FRF 11,300 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 date of adoption of the present judgment, namely 7.5% per annum.

FOR THESE REASONS, THE COURT

1. *Dismisses* by sixteen votes to one 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) GBP 80,600 (eighty thousand six hundred pounds sterling) for pecuniary damage to be held by the applicant for his brother Abdüllatif İlhan;
      (ii) GBP 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 on these sums 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, GBP 17,000 (seventeen thousand pounds sterling) together with any value-added tax that may be chargeable, less FRF 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 on these sums 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 separate opinions are annexed to this judgment:

(a) joint partly dissenting opinion of Mr Bonello, Mrs Tulkens, Mr Casadevall, Mrs Vajić and Mrs Greve;

(b) dissenting opinion of Mr Gölcüklü.

L.W.
M. de S.

JOINT PARTLY DISSENTING 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. n 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 paragraph 76 *in fine* of the judgment). 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 paragraph 77 of the judgment, 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 paragraph 77 of the judgment). That finding, which is also not contradicted in the Commission's report (paragraph 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 (*Reports of Judgments and Decisions* 1998-VIII) and in the Yaşa v. Turkey judgment of 2 September 1998 (*Reports* 1998-VI) 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 (*Reports* 1998-III), 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 paragraph 76 of the judgment). 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 paragraph 77 of the judgment) and secondly finds, "having regard to the severity of the ill-treatment", that the applicant's brother was the victim of "very serious and cruel suffering that may be characterised as torture" (see paragraph 87 of the judgment).

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 paragraph 2 of Article 2 of the Convention.

DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

(Translation)

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 Government's *preliminary objection that the Court had no jurisdiction* ratione personae and *the application of Article 41 of the Convention*.

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 paragraph 52 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 (see paragraph 54 of the judgment).

4. What I contest is the recognition given to the notion of "victim by proxy" accepted by the Court (see paragraph 55 of the judgment).

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.

(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 Abdüllatif İlhan for the purposes of this application" (see paragraph 212 of the Commission's report). Reasoning to the effect that "it amounts to the same thing" is not legal reasoning. Abdüllatif 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 "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 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 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.

10. 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.

11. 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 (80,000 pounds sterling (GBP)). The average sum is between GBP 15,000 and GBP 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].

1. Emphasis has been added to some of the phrases and figures.

Kurt judgment of 25 May 1998
(Forced disappearance – Violation)

[A. Non-pecuniary damage]

[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)

[A. Damage]

[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)

[A. Non-pecuniary damage]

[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)

[A. Damage]

[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*." (FRF 100,000 being approximately 10,000 pounds sterling)

***Çakıcı* judgment of 8 July 1999**
(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* for non-pecuniary damage in relation to the violations of the Convention suffered by his brother ..."

[Award]

"130. The Court recalls that in the Kurt judgment (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 from south-east Turkey concerning these provisions* (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 *Oğur v. Turkey* [GC], no. 21594/93, § 98, ECHR 1999-III) 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 the time of his death and working as a doctor with a salary equivalent to GBP 1,102 per month, can be said to have sustained 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 that the applicant was in any way dependent on him. This does not exclude an award in respect 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.”

[Award]

"138. As regards the claim made by the applicant in respect of non-pecuniary damage on behalf of 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 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 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 the time of his death and working as a journalist with a salary equivalent to GBP 1,000 per month, could be said to have sustained 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 in respect 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 (see the Aksoy [v. Turkey] judgment [of 18 December 1996, *Reports* 1996-VI], pp. 2289-90, § 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 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 by the applicant in respect of non-pecuniary damage on behalf of 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**
(Violation of Article 2)

[A. Damage]

[Claim]

"146. The applicant claimed pecuniary damages amounting to *60,630.44 pounds sterling* (GBP) for loss of earnings, that sum being calculated with reference to Mehmet Ertak's estimated monthly earnings of 180,000,000 Turkish liras (TRL) at current values, to be held by the applicant on behalf of his son's widow and four children.

147. The applicant claimed a sum of *GBP 40,000* for the non-pecuniary damage arising from the violations of the Convention suffered by his son and from the alleged practice of such violations, to be held by him on behalf of his son's widow and four children, as well as a sum of GBP 2,500 for himself on account of the lack of an effective remedy. He referred to the Court's previous decisions regarding unlawful detention, torture and the lack of an effective investigation."

[Award]

"150. As regards the applicant's claims for loss of earnings, the ... Court has found (see paragraph 131 above) that it may be taken as established that Mehmet Ertak died following his arrest by the security forces and that the State's responsibility is engaged under Article 2 of the Convention. In those circumstances, there is indeed 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 (see the *Çakıcı* judgment cited above, § 127). The Court awards the applicant the sum of *GBP 15,000*, to be held by him on behalf of his son's widow and children.

151. As regards non-pecuniary damage, ... the Court has held that there has been a substantive and a procedural violation of Article 2. Noting the awards made in previous cases involving the application of the same provision in south-eastern Turkey (see the Kaya judgment cited above, p. 333, § 122; the Güleç judgment cited above, 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 *Oğur v. Turkey* [GC], no. 21594/93, § 98, ECHR 1999-III) and having regard to the circumstances of this case, the Court awards the sum of *GBP 20,000* in respect of non-pecuniary damage, to be held by the applicant on behalf of his son's widow and four children ..."

12. Lastly, I cannot accept that the legal costs awarded under Article 41 should be paid into the applicant's "*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 former Article 50 (now Article 41) as regards legal 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 v. Turkey judgment of 9 June 1998, *Reports* 1998-IV, pp. 1521-22, § 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?

13. 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.

14. 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.