CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

CASE OF TANLI v. TURKEY

(*Application no. 26129/95*)

JUDGMENT
This version was rectified under Article 81 of the Rules of Court on 28 August 2001

STRASBOURG

10 April 2001

FINAL

10/07/2001

In the case of Tanlı v. Turkey,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Mr J.-P. COSTA, *President,*
Mr W. FUHRMANN,
Mrs F. TULKENS,
Mr K. JUNGWIERT,
Sir Nicolas BRATZA,
Mr K. TRAJA, *judges,*
Mr F. GÖLCÜKLÜ, ad hoc *judge,*
and Mrs S. DOLLÉ, *Section Registrar,*

Having deliberated in private on 1 February 2000 and 20 March 2001,

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

PROCEDURE

1. The case originated in an application (no. 26129/95) against Turkey lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Mustafa Tanlı ("the applicant"), on 22 December 1994.

2. The applicant was represented by Mr P. Leach, a solicitor working with the Kurdish Human Rights Project (KHRP) in London. The Turkish Government ("the Government") were represented by their Agent, Mr Kaleli, Deputy Permanent Representative at the Council of Europe.

3. The applicant alleged that his son Mahmut Tanlı was tortured and killed in police custody. He invokes Articles 2, 3, 5, 13, 14 and 18 of the Convention.

4. The application was declared admissible by the Commission on 5 March 1996 and transmitted to the Court on 1 November 1999 in accordance with Article 5 § 3, second sentence, of Protocol No. 11 to the Convention, the Commission not having completed its examination of the case by that date.

5. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court. Mr Türmen, the judge elected in respect of Turkey, withdrew from sitting in the case (Rule 28). The Government accordingly appointed Mr Gölcüklü to sit as an *ad hoc* judge in his place (Article 27 § 2 of the Convention and Rule 29 § 1).

6. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The Chamber decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 2 *in fine*).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The facts of the case, in particular concerning what happened to Mahmut Tanlı, the applicant's son, during his detention in police custody from 27 to 28 June 1994 are in dispute between the parties. Having regard however to the length of time which had elapsed since those events and the nature of the documentary material submitted by the parties, the Court decided that a fact finding investigation, involving the hearing of witnesses, would not effectively assist in resolving the issues. It has proceeded to examine the applicant's complaints on the basis of the written submissions and documents provided by the parties.

8. The applicant's and Government's submissions concerning the facts are set out below (Sections A and B). The documents relating to the events and complaints are also summarised (Section C).

A. The applicant's submissions on the facts

9. The applicant, a Kurdish farmer born in 1933, lived in the village of Örtülü in the Doğubeyazit region in south-east Turkey. His son Mahmut was born in 1972.

10. On 27 June 1994, gendarmes from the Doğubeyazit central gendarme station arrived at the village to carry out a search. The villagers were gathered outside the mosque. The applicant's son conducted some of the gendarmes round the village as they searched. The gendarme commanders questioned the applicant about his son. The gendarmes left taking Mahmut Tanlı with them. At that time Mahmut Tanlı was in good health.

11. On 28 June 1994, the applicant sought information from the authorities about his son. They refused to let him see his son and he left.

12. On 29 June 1994, at about 5.30 a.m., a police car arrived at the applicant's son's house and took the applicant to the police station. There the security director informed him that his son had died of a heart attack while in custody. The applicant replied that his son did not suffer from any illness and that he had probably died from torture. He asked to speak to the public prosecutor, who came into the security director's office and told the

applicant that the cause of death was heart failure. The applicant maintained that his son's death had been caused by torture.

13. On 28 June 1994, an autopsy was carried out on the body by two doctors İhsan Özüu and Aydın Mazlum, one of whom was a paediatrician and the other worked in a health clinic at the Doğubeyazit Hospital.

14. Mahmut Tanlı's body was delivered to Ulusoy police station on 29 June 1994. The body was covered in bruises. There was also a large incision, which had been stitched, running down the left breast towards the upper abdomen. The police claimed that the incision was the result of an operation carried out when Mahmut Tanlı had had a heart attack. The police asked the applicant to sign a document. As he was afraid for his safety, the applicant signed without knowing what it was.

15. Mahmut Tanlı had no criminal record and was not suspected of any criminal activities. He had no known or suspected heart disease before he was taken into custody or any other medical condition. The applicant was too afraid of the risk of reprisals to request or arrange a forensic examination of his son's body.

16. On 29 June 1994, the applicant made a statement to the Doğubeyazit branch of the Human Rights Association, reporting that his son's body had shown marks and blows of force and that it was clear that he was killed under torture. The applicant's brother made a statement in similar terms.

17. On 29 June 1994, the applicant lodged a written petition with the Doğubeyazit chief public prosecutor concerning his son's death, which he said was suspicious. He also complained of the inadequacy of the post mortem examination which had not been carried out by experts. He asked that his son's body be referred to the Forensic Medical Institute. He later withdrew this request because he feared for his life.

18. On 25 July 1994, the public prosecutor took statements from the muhtar and other villagers in Örtülü, which confirmed that Mahmut Tanlı had no previous medical problems.

19. On 3 August 1994, proceedings were brought by the Agri Chief Public Prosecutor against the three police officers, Ali Gündoğdu, Murat Demirpençe and Ökkeş Aybar, who had been interrogating Mahmut Tanlı when he died. There were a series of adjournments in the proceedings. On 2 February 1995, the court ordered that the file be sent to the Forensic Medicine Institute for an opinion as to the cause of death. On 23 May 1995, it was noted that the Institute had ordered the exhumation of the body. Further adjournments followed awaiting the Institute's report. On 14 May 1996, the court found that the cause of Mahmut Tanlı's death could not be established and the three defendants were acquitted.

B. The Government's submissions of the facts

20. Ahmet Akkuş, a former member of the PKK, had informed the authorities that Mahmut Tanlı from Örtülü village was an armed militiaman in the PKK. His name was also mentioned on a list of militiamen found on a dead PKK member after a clash. Mahmut Tanlı was therefore suspected of having aided and abetted the PKK.

21. On 27 June 1994, following a search of Örtülü, the Doğubeyazit gendarmes took Mahmut Tanlı into custody. They transferred him the same day to the Uluyol police station for questioning. He arrived at about 9.30 p.m. As the police officers responsible for questioning were in pursuit of other suspects, his questioning was postponed to the next day.

22. On 28 June 1994 three police officers, Ali Gündoğdu, Murat Demirpençe and Ökkeş Aybar, started to question Mahmut Tanlı. He at first refused to admit any connection with the PKK, alleging that it was a slander. When details were put to him of his alleged connections, including Akkuş's statement, he became excited and began stammering and trembling. He went pale, his voice changed and it was clear that he was developing a kind of shock. The questioning was stopped and a doctor sent for. The doctor arrived within 5 to 10 minutes. The doctor, Yunus Ağralı, found him to be having difficulty in breathing and that he was cyanotic. He ordered an ambulance. Within three minutes, his breathing and heart had stopped. He was given artificial respiration and cardiac massage for 20 minutes by the doctor, assisted by the police officers. This was to no avail.

23. The public prosecutor, informed of the death, arrived soon after. The ambulance took the body to the Ağri State Hospital where an autopsy was carried out by İhsan Özlü and Aydın Mazlum, two doctors from the Doğubeyazit State Hospital, in the presence of the public prosecutor. According to the report, there was no trace of lesions, traumas or the use of force on the head and no fresh bruises. After the autopsy the public prosecutor suggested to the applicant that his son's body should undergo a comprehensive forensic examination at the İstanbul Forensic Medicine Institute in order to dispel any doubts. The applicant initially agreed. After consulting other members of the family, however, he withdrew his consent. The public prosecutor handed over the body to be buried by the family.

24. The public prosecutor, Halil Erdem, started an investigation into the allegation of the applicant that his son died as a result of torture in custody. He interviewed the three police officers. He also wrote to the Doğubeyazit Military Recruitment Office to obtain any military medical records. After a comprehensive investigation, an indictment was drawn up accusing the three police officers of an offence under Article 243 of the Turkish Penal Code. On 14 May 1996, having considered all the evidence, the Ağri Criminal Court acquitted the three police officers on grounds of lack of evidence. The decision of acquittal was upheld by the Court of Cassation on

11 November 1996. It also rejected the applicant's appeal as he had failed to intervene in the proceedings against the police officers.

C. The documentary evidence submitted by the parties

1. Documents submitted by the applicant in his application

Statement of the applicant undated taken by the Human Rights Association (the "HRA")

25. The applicant stated that on 26 June 1994 the Doğubeyazit gendarmes station and central commanders carried out a search in Örtülü village. They asked about his son Mahmut who was walking around with the soldiers. His son had never committed an offence. His son had been killed under torture by teams in the Uluyol district of Doğubeyazit. He had made an application. He was going to take the body to the Forensic Medicine place. He did not as he was afraid for his life. He complained against those who killed his son, whose only offence was to be a Kurd.

Statement of the applicant dated 29 June 1994 taken by the HRA

26. This was also signed by the applicant's uncle, Ahmet Tanlı. The applicant's son had been taken into custody by the Doğubeyazit Security Directorate on 27 June 1994. The applicant stated that the police claimed that his son had died of a heart attack in custody. When he went there he saw marks of blows and force on his son. His body was covered in bruises and it was clear that he had been killed under torture. The uncle said that he had seen the whole of the body covered in bruises. There was no question of a heart attack.

Photographs taken of the body of Mahmut Tanlı

27. The applicant submitted four colour photographs of the body of Mahmut Tanlı taken before the burial. These showed the chest, face and forearms. The quality was poor. Red marks and grazes appeared to be visible on the arms, body and hips. A stitched incision ran from the neck across the chest to the stomach.

2. Materials from the investigation file

Statement of Ahmet Akkuş dated 7 February 1994 taken by police officers

28. The suspect was from Örtülü village. In recounting his contacts and activities for the PKK, he named Mahmut Tanlı, son of Mustafa, as one of the villagers working for the PKK in the village.

Scene of incident report dated 28 June 1994

29. This document was signed by the public prosecutor and police superintendent Ali Gündoğdu, head of the Anti-Terror Department of the Doğubeyazit Security Directorate. It stated that at 10.30 p.m. on 28 June 1994 it had been reported on the telephone that Mahmut Tanlı, a suspected PKK member, had had an attack while under interrogation at the Uluyol police station. When he entered the police station, the public prosecutor found the body stretched out on the bench. There was nothing worthy of note at the scene. The body was dressed and there were no signs of blows.

30. Ali Gündoğdu stated, having been sworn, that Mahmut Tanlı had been handed over to the police station by the gendarmes at about 9 to 9.30 p.m. on 27 June 1994. He had the necessary medical examination by the doctor. He looked perfectly well. They did not interrogate him that day. He and two other officers, Murat Demirpençe and Ökkeş Aybar, went to the room to interrogate him. He told him that his name had been mentioned in statements taken from Ahmet Akkuş and other PKK activists. Mahmut Tanlı denied that he was involved and claimed that it was slander. He became very agitated and began to tremble. As they realised that he was unwell, they immediately sent for a doctor at the hospital. By the time the doctor arrived, he had died from the sudden shock. They tried to revive him without success. The suspect had not been subject to any blows or violence. He died of shock.

31. Dr Yunus Ağralı, from the Doğubeyazit State Hospital, stated that despite artificial respiration and cardiac massage the suspect had died.

32. The decision was taken to transport the body to the Doğubeyazit State Hospital for an autopsy to be performed.

Report of examination of body and autopsy

33. No traces of blows or lesions were found on the head. There was a graze about 2 cm below the right collarbone on which a scab had formed – it looked about two days old. No traces of blows were found on the back, arms, hands or legs. Grazes about 2x2 cm were found on the left hip, which were probably about one week old.

34. No traces of blows or violence were found on opening the thoracic cavity. The ribs and collarbones were intact, as were the bones of the chest. The heart tissue was seen to be pale in colour and a bruised area observed near the apex. Blood clotting was observed inside the blood vessels in the front section and clotted blood was detected inside heart. Black pigmented specks were found in the lungs. No abnormalities were found in the abdominal or cranial cavities. The cause of death was sudden heart failure resulting from an embolus in the blood vessels of the heart. As no further procedures were required, it was decided to issue the burial and transport licence.

35. The autopsy had been carried out by Dr İhsan Özlü, a paediatrician at the Doğubeyazit State Hospital, and Dr Aydın Mazlum, employed in the Doğubeyazit Health Clinic.

Undated petition by the applicant to the Doğubeyazit chief public prosecutor

36. This stated that his son did not have any heart condition. It was suspicious and absurd to claim that he died of a heart attack. His son had just completed his military service without the slightest health problem during or before. As far as he gathered, no traces of violence had been found. However, other forms of torture (electric shock, medication, injections, cold water treatment) were possible which left no marks but could affect the heart. He requested that the body be sent to the Forensic Medicine Institute for a full report so that the responsible persons could be punished.

Burial and transport licence dated 28 June 1994

37. It had been determined that the deceased died of a heart attack and a decision was taken to issue a licence for the applicant to transport and bury the body.

Note by the applicant dated 29 June 1994

38. The applicant withdrew his request for a report by the Forensic Medicine Institute as there was no point in doing so. The note was taken down by the public prosecutor and signed by him and the applicant.

Statement of Ali Gündoğdu dated 30 June 1994 taken by the Doğubeyazit public prosecutor

39. Mahmut Tanlı, wanted as a suspected member of the PKK militia in Örtülü, was handed over to them by the gendarmes at about 9.30 p.m. on 27 June 1994. He was not interrogated then as they had other duties on search operations the next day. He, Murat Demirpençe and Ökkeş Akbar commenced questioning Mahmut Tanlı in the interrogation room on 28 June 1994 at about 9 p.m. They told him that his name had been mentioned in statements made by Ahmet Akkuş and that documents found on the bodies of PKK members killed in operations showed that he had carried out activities as a member of the armed militia of Örtülü under the assumed name of Agır. Mahmut Tanli suddenly became agitated, his voice began to tremble and, speaking in a quavering voice, he said that he did not have the assumed name of Agir and that they had been lying. The witness repeated that his name was mentioned in documents. He suddenly was unable to speak, his colour changed and he began to shake. He lost consciousness. The witness immediately informed the relevant authorities and asked them to send a doctor. They laid Mahmut Tanlı on the floor and uncovered his chest. His breathing was difficult. Ökkeş Aybar, who had knowledge of first

aid and was attending a training course, began to give him heart massage. There was no change. They continued for about 10 minutes until the doctor arrived. Dr Yunus Ağrali immediately checked the patient's pulse as he lay on the floor and listened to his heart and said that his condition was very serious. While he gave heart massage, he told the police officers to give artificial respiration. This went on for 10 minutes but there was no change in his condition and the doctor said that he had died. During the interrogation, they had not pushed, kicked or beaten the detainee in any way. The detainee's death was not the result of any action on his part or on the part of his colleagues.

Statement of Ökkeş Aybar dated 30 June 1994 taken by the Doğubeyazit public prosecutor

40. The witness, a police officer in the Anti-Terror Branch of the Doğubeyazit Security Directorate, was with Superintendent Gündoğdu and Murat Demirpençe when they interrogated Mahmut Tanlı on 28 June 1994. They had not done so earlier due to other business. He did not carry out interrogations himself. They began to put questions to the detainee. Superintendent Gündogdu told the detainee that he was wanted by the Security Police and that they had information and documents about him. The detainee spoke calmly to begin with, but when Superintendent Gündogdu told him those things, his voice changed and he quavered and stammered. He suddenly became unwell and appeared to faint. They immediately laid him out on the floor and uncovered his chest as he was having difficulty breathing. The witness knew how to give first aid, having attended a course in first aid. Superintendent Gündogdu immediately informed the squads and the security headquarters of the situation and told an officer to take the HQ car and get a doctor urgently. Dr Yunus Ağrali arrived 10 minutes later and immediately checked the patient's pulse and heart beat and said that his condition was serious. A couple of minutes after his arrival, the doctor said that the patient had died but that it was necessary to continue with heart massage and artificial respiration. He told them to give artificial respiration, while he carried out heart massage. However, it was to no avail and the doctor then said that the patient had died. While the detainee was in the security headquarters neither the witness nor his colleagues did anything to him which would have made him faint or caused his death.

Statement of Murat Demirpençe dated 30 June 1994 taken by the Doğubeyazit public prosecutor

41. The witness, a police officer in the Anti-Terror Branch of the Doğubeyazit Security Directorate, stated that at about 9 p.m. on 28 June 1994, Superintendent Ali Gündogdu, Ökkeş Aybar and himself went to the Uluyol police station to interrogate Mahmut Tanlı. They commenced the

interrogation in the room reserved for detainees. They had not done so before as they had had other business. There were only the three officers in the interrogation room. Superintendent Ali Gündogdu first asked the detainee if he knew why he had been arrested. When he said that he did not, the Superintendent told him that he had been mentioned as a member of the armed militia in Örtülü village in the statements made by Ahmet Akkuş, and that his name had been found in notebooks found with the bodies of the 24 terrorists killed in clashes near Uzunkaya village on 9 May1994 identifying him as a member of the PKK armed militia in Örtülü village. Thereupon the detainee began to stammer and tremble. He went pale and suddenly collapsed. The Superintendent immediately reported the situation to the squads by radio and told them to get a doctor urgently. At the same time he told a police officer outside the room to take the car and fetch the doctor. Meanwhile, Ökkeş Aybar said that he knew how to give first aid and he laid the detainee out on the floor, uncovered his chest and gave him heart massage. Within ten minutes, the police officer returned with Dr Yunus Ağralı, who immediately checked the patient's pulse, listened to his heart and said that his condition was serious. The doctor told police officer Cafer to go and get medicine. The doctor told them to give artificial respiration while he gave the heart massage. They continued like that for several minutes. Then the doctor checked his pulse and listened to his heart again and said that the patient had died, but that it was necessary to continue with heart massage and artificial respiration. They continued. Then the doctor said that the patient had died and there was nothing else to be done. They reported the situation to their security headquarters by radio. Neither he nor his colleagues did anything to the detainee which would have caused his death.

Statement of Ahmet Gerez dated 30 June 1994 taken by the Doğubeyazit public prosecutor

42. The witness, a lawyer, stated that the applicant and other members of the family came to his office telling him that the death of Mahmut Tanlı was suspicious and consulting him as to what could be done legally. He suggested that the body be sent to the Forensic Medicine Institute before burial. They agreed. He wrote a petition for them to the public prosecutor, which they presented together. The prosecutor said that it was possible and he would look into it. A couple of hours later, he phoned the witness and said that he would send the body and that a special coffin had to be prepared. He said that there was no budget for this at the prosecutors' office but that assistance could be obtained through the District Governor's office. The witness told the family that once they had obtained the zinc-lined coffin the public prosecutor would send the body to the Institute. The family went away and came back an hour later. They said that they were afraid that it would be very difficult to transport the body back and forth and that

anything might happen. The witness went with them to the public prosecutors' office and the applicant declared verbally to the public prosecutor that he was waiving any further examination. The public prosecutor said that it would be of great advantage in elucidating the facts, as well as from a legal point of view, if the body were sent. The applicant went away with his family and came back half an hour later. He repeated that they were definitely waiving sending the body to the Institute and were going to bury it. The public prosecutor told them that they could. The family took the burial licence, collected the body from the morgue and took it back to the village.

Statement of Dr Yunuş Ağralı dated 30 June 1994 taken by the Doğubeyazit public prosecutor

43. While the witness was on duty at the State Hospital, a police officer came and said that there was a patient in need of urgent treatment. Taken in a police car to the Uluyol police station, he found the patient stretched out on a bench. The pulse was 200/minute, the heartbeat irregular and breathing difficult. The patient's situation was serious. He told a police officer to get some adrenaline atropine. The patient's general appearance was somnolent. His breathing stopped. He could not hear any heartbeat. He immediately performed heart massage, telling the police officers to give artificial respiration at the same time. This went on for 5 to 10 minutes. There was no trace of any vital functions. The pupils were fairly dilated and there was no light reflex. He realised the patient was dead and stopped performing first aid as there was no point. However, since heart massage and artificial respiration can continue up to half an hour, he told the police officers to continue both. It was in vain.

Statement of the applicant dated 1 July 1994 taken by the Doğubeyazit public prosecutor

44. On 27 June 1994, the gendarmes came to the village, saying that they were looking for his son Mahmut. They took him away. On 28 June the applicant went to visit his son but they would not let him speak to him. On 29 June, when he was at his son Hasan's house, a police car arrived at about 5.30 a.m. and took him to the office of the chief of police. The chief of police told him that his son had died. The applicant replied that his son had not been ill, that it was suspicious and that he could have been tortured to death. He asked to talk to the public prosecutor. The public prosecutor came into the office and said that he had carried out the autopsy procedure which showed no signs of blows or violence and that his son had died of heart failure. The applicant repeated that he could have been tortured to death.

45. The applicant went to see the lawyer Ahmet Gerez who said that the body could be sent to the Forensic Medicine Institute. He drew up a petition for this and they took it to the public prosecutor. The prosecutor said that

they needed a galvanised sheet metal coffin and asked them to have it made. Some money for this might be available from local funds. The applicant, family elders and relatives discussed the matter and decided to give up the idea as various difficulties could arise and they would be put under pressure. They told the prosecutor that. He said that it would be of great advantage to send the body to the Institute and asked them to reconsider. The family discussed it again and, accompanied by Ahmet Gerez, told the public prosecutor that they had decided not to send the body. The public prosecutor issued a burial licence and they buried the body in the village.

46. The applicant wanted an investigation concerning the persons who caused his son's death and that they should be punished.

Statement of Nihat Acar dated 1 July 1994 taken by the Doğubeyazit public prosecutor

47. The witness, a police officer, was sitting in the office of the chief of the Anti-Terror Branch when the chief, Ali Gündoğdu, as well as Ökkeş Aybar and Murat Demirpençe, went into the room for detainees. Gündoğdu asked for the statements of Ahmet Akkuş and took them with him. About 10 to 15 minutes later, he came back and said that Mahmut Tanlı had been taken ill. He asked the police driver present to get a doctor quickly. The witness went to the room to see the detainee. Ökkeş Aybar had uncovered the detainee's chest and was trying to get him to breathe. Dr Ağralı arrived a short time later. He said that he needed heart massage and artificial respiration. He told the police driver to go to the pharmacist to get a drug but a few minutes later announced that the Mahmut Tanlı had died. The witness did not see or hear that Mahmut Tanlı had been subjected to blows or violence. Only a short time passed between his colleagues going into the room and coming out again.

Statement of Cafer Yiğit dated 1 July 1994 taken by the public prosecutor

48. The witness, a police driver at the Anti-Terror Branch of Doğubeyazit Security Directorate, was on duty that evening. Superintendent Gündoğdu and officers Aybar and Demirpençe arrived at Uluyol at about 9 p.m. The superintendent was carrying a file in his hand. They went into the room where Mahmut Tanlı was being held. The witness and other officers waited in the superintendent's office. After about 10 minutes, the superintendant came out, saying that the detainee was ill and telling him to take a car to get a doctor. He drove to the hospital about 800-1000 metres away and brought back Dr Ağralı 5 to 10 minutes later. The doctor checked the detainee's pulse and heart and said that the man needed heart massage and artificial respiration. He told the witness to fetch a drug from the chemist on night call. He was about to get into the car when the doctor said that it was no longer necessary as the detainee had died. He had not seen anyone at the station subject the detainee to any blows or violence.

Statement of Ömer Güzel dated 1 July 1994 taken by the Doğubeyazit public prosecutor

49. The witness, a police officer in the intelligence unit, arrived at Uluyol police station at about 9 p.m. He was having tea with others while three colleagues went to take a statement from Mahmut Tanlı. About 10 minutes later, Superintendent Gündoğdu came out and told the police driver to get a doctor urgently as the detainee had been taken ill. The witness did not go in the room. He heard the doctor tell the driver to get a drug and then not to bother. While he was there no-one subjected the detainee to blows or violence.

Letter dated 1 July 1994 from the Doğubeyazit district gendarmes to the Doğubeyazit public prosecutor

50. This stated, with reference to an incident report of 13 May 1994, that after an armed clash between the terrorists and security forces, 24 terrorists had been arrested or killed and a number of documents found. One of these, a list of PKK members, included Mahmut Tanlı's name on page 45.

Statements of Ali Temtek, Musa Sabaş, Mahmut Ardin and Mirsevdin Timur dated 25 July 1994 taken by Doğubeyazit public prosecutor

51. These statements from villagers stated that Mahmut Tanlı had no health problems and that they had never seen or heard of him having any illness.

Letter dated 27 July 1994 from the Doğubeyazit recruitment office to the Doğubeyazit public prosecutor

52. Having examined the file of Mahmut Tanlı in response to the query as to whether he had suffered any health problems or been treated during his military service[1], they could not find any medical reports about his health.

Indictment dated 3 August 1994 drawn up by the Ağri public prosecutor for the Ağri Assize Court

53. This listed the defendants Ali Gündoğdu, Ökkeş Aybar and Murat Demirpençe as charged with the offence of causing the death of Mahmut Tanlı by ill-treatment in their capacity as police officers, contrary to Article 243/2 of the Turkish Penal Code. The evidence was summarised, including the autopsy conclusion that death had been caused by heart failure and that there were no signs of blows or violence. It concluded that it was for the court to assess the fault or negligence of the defendants in possibly causing death – such as causing the death of the deceased, allegedly tortured, by frightening him.

1. dates of service 27 January 1992 to 27 June 1993

Statement of the applicant dated 6 June 1995 taken by the Doğubeyazit public prosecutor

54. It was stated that the letter and enclosures from the Ministry of Justice (International Law and Foreign Relations Directorate) were read out to the applicant.

55. The applicant stated that he had been informed that his son had died of a heart attack in police custody. The public prosecutor said that there had been an autopsy and that this had concluded that there had been a heart attack and that there were no marks of ill-treatment. The applicant wanted the body to go to the Forensic Medicine Institute for a more definite conclusion. The prosecutor accepted this and he left to obtain a coffin. For a couple of hours, he discussed the matter with the elders in the family and finally decided that it would be very burdensome to take the corpse there and back. They went to the prosecutor's office and told him that they had given up the idea. The prosecutor said that, although the cause of death had been established, it would still be useful to send the body for a more thorough examination. They insisted however and took the body to the village.

56. He confirmed his petition and signature on the petition and letter of authority. He wanted those who killed his son found and punished.

3. Proceedings before the Ağrı Assize Court

Minutes of the Ağri Assize Court dated 12 August 1994

57. The court decided to summon the defendants to give evidence, to obtain any records of their previous convictions and to summon witnesses (the applicant, Dr Ağrali, Ahmet Gerez, Ali Temtek, Musa Sabaş, Mirsevdin Timur, Mahmut Ardin, Ömer Güzel, Cafer Yiğit, Nihat Açar and Ahmet Akkuş).

Minutes of the Ağri Assize Court dated 22 September 1994

58. The court heard evidence from a number of witnesses and two of the defendants. Murat Demirpençe did not attend.

59. Ökkeş Aybar said that they had been questioning the deceased. When Superintendent Gündoğdu told him that he was wanted as a PKK militia man, the deceased's speech and voice changed. His facial expression changed. As he said that he was unwell, they got him to lie down on a bench. Since he had difficulty breathing, they tried to help him and called a doctor. A few minutes after the doctor arrived, the doctor said that he had died. He had not tortured or ill-treated the deceased in any way.

60. Ali Gündoğdu said that he told the deceased what the allegations were and the evidence that he was in the PKK militia. The deceased suddenly became unwell, his voice began to tremble and he had difficulty

breathing. He ended the interrogation and they tried to ease his breathing. At the same time they contacted the hospital. A doctor came but after a couple of minutes said that the deceased had died. He denied the offence.

61. The applicant said that his son had no health problems whatsoever and did his military service without problem. The police had not called him after they had killed his son. He thought that the doctor who carried out the autopsy was under pressure. The defendants had tortured his son to death. In answer to a question, he said that he had not allowed his son's body to be sent to the Forensic Medicine Institute because he was afraid of reprisals. The public prosecutor had suggested it should be done but he was afraid that they would kill him on the way there. He rejected the autopsy report. He had heard that one of the doctor signatories had not in fact been there. It was impossible that his son had died of a heart attack.

62. Mirsevdin Timur from Örtülü village confirmed that Mahmut Tanlı had had no health problems.

63. Nihat Açar, a police officer, stated that he was outside the interrogation room when the defendants and deceased were in there. After a few minutes, Ali Gündoğdu came and said that that the deceased was unwell, sending the driver to fetch a doctor. When he entered the room, the police officers were trying to ease the deceased's breathing. The doctor arrived about 5 minutes later. The deceased had no marks of blows on him and he did not see him being tortured.

64. Mahmut Ardin, a villager, stated that Mahmut Tanlı had no health problems. He had been present when his body was being washed. There were marks of blows on his arms and bruises on the sides. He had not mentioned that in his previous statement as he was not asked.

65. Cafer Yiğit, a police officer, stated that he had been on duty at the police station when the defendants went in to interrogate the deceased. A short while later, Ali Gündoğdu came out and said that the deceased was unwell. He went to find a doctor. That took about 5 to 10 minutes. He did not hear or see the deceased being tortured. They had been adjacent to the room and would have heard any sounds coming from there.

66. Ömer Güzel, a police officer, had been outside the room where the deceased was being interrogated. He saw the defendants and deceased go in. After 10 minutes, Ali Gündoğdu came out and said that the deceased was unwell and asked for a doctor to be called. Cafer brought back a doctor after 5 to 10 minutes. He did not hear or see the defendants subject the deceased to any blows or violence. They would have been bound to hear if they had.

67. Ali Temtek, the muhtar from Örtülü, had not been there and did not attend the funeral.

68. The court decided *inter alia* to make a further request for the defendants' records, to subpoena Murat Demirpençe, to send letters rogatory concerning Dr Ağralı and to subpoena Ahmet Gerez, Musa Savaş and Ahmut Akkuş.

Minutes of the Ağri Assize Court dated 20 October 1994

69. The defendant Murat Demirpençe attended. He stated that he had taken the deceased into the room used for interrogation. The deceased sat down on the bench. Superintendent Gündoğdu asked if he knew why he was there. When he said that he did not know, the superintendent told him why he had been brought. The deceased began to tremble. His voice changed, he went pale and began to feel unwell. The superintendent reported this on the radio. They sent Cafer to fetch a doctor, who arrived about 10 minutes later. The doctor treated him and sent Cafer for some medicine. He and his colleagues had definitely not tortured the deceased.

70. The court adjourned to wait for the reply *inter alia* to the letters rogatory and subpoenas for the remaining witnesses.

Minutes of the Ağri Assize Court dated 17 November 1994

71. It was noted that Dr Ağralı, by reply to the letter rogatory, had maintained his previous statement.

72. Ahmut Akkuş appeared. He denied the statement of 17 February 1994. He had been blindfolded and did not know what was in it. He did not know if the deceased was in the PKK or not.

73. Musa Savaş, a villager, said that Mahmut Tanlı had no health problems and knew nothing else.

74. The court decided *inter alia* to await the response to the subpoena for Ahmet Gerez and to re-issue letters rogatory to Dr Ağralı to put a question about the autopsy report.

Minutes of the Ağri Assize Court dated 22 December 1994

75. The court adjourned pending responses to pending matters.

Minutes of the Ağri Assize Court dated 12 February 1995

76. The court decided to dispense with hearing Ahmet Gerez, whose address had not been found, and to send the entire file to the Forensic Medicine Institute, requesting their opinion on the cause of death of the deceased and asking whether he had died as the result of torture, violence or blows.

Minutes of the Ağri Assize Court dated 16 March and 13 April 1995

77. The court adjourned pending the reply from the Forensic Medicine Institute.

Minutes of the Ağri Assize Court dated 23 May 1995

78. Pursuant to the report of the 1st Specialist Committee of the Institute of Forensic Medicine, the court decided to order the exhumation of the body of Mahmut Tanlı.

Minutes of the Ağri Assize Court dated 13 July, 14 September, 24 October and 28 November 1995 and 18 January, 29 February and 26 March 1996

79. The court adjourned pending the report of the Forensic Medicine Institute. On 18 January 1996, noting the delay, it issued a writ to the prosecution department to request the opinion to be submitted.

Report dated 13 March 1996 issued by the Ist Specialist Committee of the İstanbul Forensic Medicine Institute

80. The report reviewed the evidence in the file. It stated that an autopsy had been performed on the body exhumed on 9 June 1995 and an autopsy report issued on 12 June 1995. That report indicated that the body was in an advanced state of putrefaction. The soft tissue in the head area had entirely disappeared; the radioscopy did not reveal any particular features in the skeletal system or any foreign metal objects; no lesions were found on the skull; 3-5 cm lesions were observed from the previous autopsy; the facial bones and teeth were intact; despite the putrefied and shrunken appearance of the heart, it could be seen that the ventricles had not been opened; advanced putrefaction made it impossible to assess the main veins or coronary arteries; no particular features could be distinguished in the lungs or abdomen; examination of the cervical organs revealed that the standard dissection had not been performed; the toxicological analysis disclosed no substances for which tests were done.

81. It was concluded as follows: The information given was that an autopsy including the opening of the three cavities was performed, that clotted blood was found in the heart and internal clotting in the anterior part of the coronary arteries and that death was caused by sudden heart failure due to an embolism in the cardiac vessels. However, as the autopsy after the exhumation showed, the organs had not been removed, sectioned and examined and that the heart ventricles had not been opened. The changes described therefore were of no scientific value. In cases of torture, traumatic changes might not be visible on external examination. The skin and deep muscle tissue had to be sectioned and examined to investigate deceptive traumatic changes. As regarded possible electric shocks, samples of cutaneous and subcutaneous tissue had to be taken from the usual places – the inside of the mouth, nose and ears and genital area had to be examined and samples taken from the organs for histopathological analysis. None of these tests, included in the Minnesota model autopsy protocol published by the United Nations, were performed at the time. Therefore the judicial procedure had been left incomplete.

82. The findings showed that no injury was suffered likely to cause bone fracture. However owing to advanced putrefaction, it could not be established whether or not the deceased died as a result of torture, assault or battery; nor was it possible to determine the cause of death.

Judgment dated 14 May 1996 of the Ağri Assize Court

83. The court summarised the evidence. It noted that the public prosecutor had given his opinion that there was no concrete evidence to support the allegation that the defendants had caused the death of Mahmut Tanlı. The testimonies of the witnesses who appeared before the court did not make it possible to reach the conclusion that the defendants tortured or ill-treated the deceased.

According to the documents in the file and the on-site report, the deceased was apprehended by the gendarmerie on 27 June 1994 on suspicion of being a PKK militant and was handed to the police the same day in order to be questioned. He had not been questioned the same day because they had other things to do and, when they started to question him the next day, he fell ill and subsequently died despite the first aid attempts.

According to the corpse examination and autopsy report of 28 June 1994, a copy of which is in the case file, there were no signs of ill-treatment or lesions on the head; there was a cut under his right collar bone, measuring 2 cm, which had formed a scab and which probably had been caused 2 days previously. There were no signs of ill-treatment on the back of the body, hands or arms. On the left side of the buttocks there were superficial cuts, measuring 2x2 cm, which had formed scabs and which had possibly been caused a week previously. There were no signs of ill-treatment on the legs or the feet. A full autopsy was also carried out on the deceased's body. There were no signs of ill-treatment on the chest. The collar-bones and the rib cage were intact. There were no bruises on the neck. There was no accumulation of blood in the thoracic cavity. The examination of the heart revealed an ecchymotic area on the apex cordis, near the pallor. On the front sides of the coronary arteries there were blood clots. There was also clotted blood in the heart and occasional pigment spots in the lungs. There was no blood accumulation in the thoracic or abdominal cavities. The stomach and intestines were normal. There were no signs of ill-treatment on the scalp or on the bones. No broken bones or oedema were observed. The brains were intact and there was no bleeding or discoloration on the tissue covering the brains. The cause of death was given as emboli in the blood vessels of the heart which caused the heart to stop.

The Forensic Medicine Council was contacted and their opinion was requested. The 1st Specialist Committee in their report of 13 March 1996 stated that the autopsy conducted locally on the body was inadequate. They also stated that the autopsy conducted on the remains of the body after the exhumation was not sufficient to determine conclusively whether he had been killed as a result of torture or ill-treatment, or to determine conclusively the cause of death, because the soft tissues of the body and the internal organs had seriously decomposed.

According to the summary of the documents above, and the autopsy reports, it had not been possible to determine the cause of death. The

defendants' denials had also not been disproved. It was therefore not possible to determine conclusively that the defendants had committed this crime. The cause of death had not been established and therefore there was no conclusive evidence to prove beyond reasonable doubt that the defendants had committed the crime with which they have been charged. It was therefore decided, unanimously, to acquit all the defendants.

Decision dated 11 November 1996 of the Court of Cassation

84. The court noted that on 15 May 1996 the applicant had appealed against the decision of acquittal. However, as he had not applied to join the proceedings as an intervenor, the Assize Court had refused leave to appeal. He appealed against this refusal on 15 June 1996.

85. The court decided, unanimously, that the decision of the Assize Court not to grant leave to appeal, as the applicant was not a party, was correct. The applicant's appeal was therefore rejected.

4. Miscellaneous

Forensic report dated 20 May 2000 by Dr C. Milroy

86. This report was issued on behalf of the applicant by Dr Milroy, a Reader in Forensic Pathology at the University of Sheffield and consultant pathologist to the Home Office.

87. The report recounted the findings of the autopsy. It noted that no organ weights were recorded or any indication of any material being retained for toxicology or histology. Though the cause of death was alleged to be heart failure as a result of emboli in the heart veins, there was no description of any such finding in the section on the chest organs. The further *post mortem* examination in June 1995 found that the heart had not been opened or dissected in an appropriate manner, that dissection to detect traumatic changes due to torture had not been carried out and that the neck area had not been dissected in the classical manner at the first examination (the hyoid bone and thyroid cartilage were firm). The black and white photocopies of the photographs of the body taken by the applicant were of no assistance in determining the presence of injuries.

88. The opinion was given that the *post mortem* examination after the death of Mahmut Tanlı was wholly inadequate. The conclusion of death due to heart failure appeared to have no pathological basis. It is said that there were emboli in the coronary veins but there is no description of any source for these emboli and no disorder of any organs was described. If the heart was dissected at all, and this appeared unlikely from the second examination, the so-called emboli would appear to be *post mortem* clotting of blood and not an event that had occurred in life to account for death. In any event emboli, or thrombosis, in a 22 year old man would be exceptional

and, if present, would be expected to be present in coronary arteries not veins. The cause of death given at the first *post mortem* examination could be dismissed as incorrect, based on observations of doctors who had no pathological training or as, frankly, made up as the heart did not appear to have been dissected.

89. While no fresh injuries were identified by the doctors at the first examination, in view of the incompetent nature of the examination, it had to be questioned whether subtle changes would have been detected. If such injuries were present on the skin, they would not have been visible to the pathologists carrying out the second examination a year later.

90. The possibility that Mahmut Tanlı met his death as the result of torture had to be strongly considered. Techniques such as neck holds leave subtle signs in the neck which require detailed and appropriate dissection which was not carried out. The absence of injury to the hyoid bone and thyroid cartilage were not conclusive as the structures were cartilaginous and less liable to fracture than in an older person. Another possibility was some form of restraint asphyxia or positional asphyxia where significant pathological findings were absent or minimal and needed careful consideration. *Post mortem* techniques existed for that but were not used. Another possibility was the application of electrical current, which left subtle skin changes that required careful examination for detection. The autopsy was inadequate for that purpose.

91. It was concluded that the autopsy findings did not support a natural cause of death and no other natural cause of death was identified. In the absence of a natural cause of death, unnatural causes had to be strongly considered. However, the first autopsy was inadequate to identify specifically subtle forms of torture or ill-treatment that could lead to death.

II. RELEVANT DOMESTIC LAW AND PRACTICE

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

A. Criminal prosecutions

93. Under the Criminal Code all forms of homicide (Articles 448 to 455) and attempted homicide (Articles 61 and 62) constitute criminal offences. It is also an offence for a government employee to subject someone 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).

If there is evidence to suggest that a death is not due to natural causes, members of the security forces who have been informed of that fact are required to advise the public prosecutor or a criminal court judge (Article 152). By Article 235 of the Criminal Code, any public official who fails to report to the police or a public prosecutor's office an offence of which he has become aware in the exercise of his duty is liable to imprisonment.

A public prosecutor who is informed by any means whatsoever of a situation that gives rise to the suspicion that an offence has been committed is obliged to investigate the facts in order to decide whether or not there should be a prosecution (Article 153 of the Code of Criminal Procedure).

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

95. 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.

96. By virtue of Article 4, paragraph (i), of Legislative Decree no. 285 of 10 July 1987 on the authority of the governor of a state of emergency region, the 1914 Law (see preceding paragraph) also applies to members of the security forces who come under the governor's authority.

97. 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 93 above) or with the offender's superior.

B. Civil and administrative liability arising out of criminal offences

98. 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.

99. 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.

100. Article 8 of Legislative Decree no. 430 of 16 December 1990, the last sentence of which was inspired by the provision mentioned in the preceding paragraph, 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."

101. 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. Requirements concerning *post mortem* examinations

102. Article 79 of the Turkish Code on Criminal Procedure provides:

> "Official examination of a corpse must be made in the presence of a physician. An autopsy shall be performed in the presence of a judge and in those case where it is necessary to avoid prejudicial delay, the autopsy shall be performed by two physicians in the presence of the public prosecutor, at least one of the physicians being a forensic practitioner.
>
> In an emergency situation, the operation may be conducted by one doctor only."

III. RELEVANT INTERNATIONAL REPORTS AND TEXTS

A. Investigations by the European Committee for the Prevention of Torture

103. By the end of 1999, the European Committee for the Prevention of Torture (CPT) had carried out eight visits to Turkey. The two first visits in 1990 and 1991 were *ad hoc* visits considered necessary in the light of the considerable number of reports received from a variety of sources, containing allegations of torture or other forms of ill-treatment of persons deprived of their liberty, in particular, relating to those held in police custody. A third periodic visit took place at the end of 1992. Further visits took place in October 1994, August and September 1996, October 1997 and February-March 1999. The CPT's reports on these visits, save the last two, have not been made public, such publication requiring the consent of the State concerned, which has not been forthcoming.

104. The CPT has issued two public statements.

105. In its public statement adopted on 15 December 1992, the CPT concluded that torture and other forms of severe ill-treatment were important characteristics of police custody. On its first visit in 1990, the following types of ill-treatment were constantly alleged: Palestinian hanging, electric shocks, beating of the soles of the feet ("falaka"), hosing with pressurised cold water and incarceration in very small, dark, unventilated cells. Its medical examinations disclosed clear medical signs consistent with very recent torture and other severe ill-treatment of both a

physical and psychological nature. The on-site observations in police establishments revealed extremely poor material conditions of detention.

On its second visit in 1991, it found no progress had been made in eliminating torture and ill-treatment by the police. Many persons made complaint of similar types of ill-treatment – an increasing number of allegations were heard of forcible penetration of bodily orifices with a stick or truncheon. Once again, a number of the persons making such claims were found on examination to display marks or conditions consistent with their allegations. On its third visit from 22 November to 3 December 1992, its delegation was inundated with allegations of torture and ill-treatment. Numerous persons examined by its doctors displayed marks or conditions consistent with their allegations. It listed a number of these cases. On this visit, the CPT had visited Adana, where a prisoner at Adana prison displayed haematomas on the soles of his feet and a series of vertical violet stripes (10 cm long, 2 cm wide) across the upper part of his back, consistent with his allegation that he had recently been subjected to falaka and beaten on the back with a truncheon while in police custody. In Ankara police headquarters and Diyarbakır police headquarters, it found equipment consistent with use in torture and the presence of which had no other credible explanation. The CPT concluded in its statement that "the practice of torture and other forms of severe ill-treatment of persons in police custody remains widespread in Turkey".

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

B. The United Nations Model Autopsy Protocol

107. The Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions adopted by the United Nations in 1991 includes a Model Autopsy Protocol aimed at providing authoritative guidelines for the conduct of autopsies by public prosecutors and medical personnel. In its introduction, it noted that an abridged examination or report was never appropriate in potentially controversial cases and that a systematic and comprehensive examination and report were required to prevent the omission or loss of important details:

> "It is of the utmost importance that an autopsy performed following a controversial death be thorough in scope. The documentation and recording of those findings should be equally thorough so as to permit meaningful use of the autopsy results."

108. In part 2(c), it stated that adequate photographs were crucial for thorough documentation of autopsy findings. Photographs should be comprehensive in scope and confirm the presence of all demonstrable signs of injury or disease commented upon in the autopsy report.

THE LAW

I. THE COURT'S ASSESSMENT OF THE FACTS

A. General Principles

109. In assessing evidence, the Court adopts the standard of proof "beyond reasonable doubt". Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. In this context, the conduct of the parties when evidence is being obtained has to be taken into account (Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 65, § 161).

110. The Court is sensitive to the subsidiary nature of its role and must be cautious in taking on the role of a first instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case (see e.g. *McKerr v. the United Kingdom* [decision], no. 28883/95, 4 April 2000). Where domestic proceedings have taken place, it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for those courts to assess the evidence before them (see the Klaas v. Germany judgment of 22 September 1993, Series A no. 269, p. 17, § 29). Though the Court is not bound by the

findings of domestic courts, in normal circumstances it requires cogent elements to lead it to depart from the findings of fact reached by those courts (see the Klaas judgment cited above, p. 18, § 30).

111. Where allegations are made under Articles 2 and 3 of the Convention, however, the Court must apply a particularly thorough scrutiny (see, *mutatis mutandis*, the Ribitsch v. Austria judgment of 4 December 1995, Series A no. 336, p. 24, § 32). When there have been criminal proceedings in the domestic courts concerning those same allegations, it must be borne in mind that criminal law liability is distinct from international law responsibility under the Convention. The Court's competence is confined to the latter. Responsibility under the Convention is based on its own provisions which are to be interpreted and applied on the basis of the objectives of the Convention and in the light of the relevant principles of international law. The responsibility of a State under the Convention, arising for the acts of its organs, agents and servants, is not to be confused with the domestic legal issues of individual criminal responsibility under examination in the national criminal courts. The Court is not concerned with reaching any findings as to guilt or innocence in that sense.

B. The Court's evaluation in this case

1. Background

112. On 27 June 1994, the Doğubeyazit gendarmes carried out a search at Örtülü village. At the end of the search, they left, having taken the applicant's son, 22 year old Mahmut Tanlı into custody. While the applicant's initial statements to the HRA refer to the 26 June 1994, this appears to have been an error, the applicant's later documents giving the date as 27 June 1994.

113. Mahmut Tanlı had performed his military service between 27 January 1992 and 27 June 1993. There was no entry in the military records of any health problems or treatment. The applicant and other villagers, later questioned, were unanimous that Mahmut Tanlı had not suffered from any health problems or illness. The Government have not provided any information to counter this evidence. The Court is satisfied therefore that when Mahmut Tanlı was detained he was in good health with no history of medical problems.

2. Detention of Mahmut Tanlı at the Uluyol police station

114. According to the evidence of the police officers, Mahmut Tanlı was handed over by the gendarmes to the police at the Uluyol police station at about 9.30 p.m. on 27 January 1994. He was suspected by them of

supporting the PKK as a member of their militia. The Court observes that the police statements make reference to the alleged confession of Ahmut Akkuş dated 7 February 1994 which named Mahmut Tanlı as a PKK supporter. It was also claimed that a list including Mahmut Tanlı's name had been found amongst PKK members killed during a clash. Ahmut Akkuş later retracted this confession when called before the Assize Court. The applicant strenuously denied that his son was involved in any wrongdoing. It is not for the Court, however, to resolve this issue which would have been, properly, for the domestic courts to determine during criminal proceedings. Nevertheless, it finds no reason to doubt that the reason for Mahmut Tanlı's detention was the suspicion of PKK involvement or an intention to question him to find out information about PKK activities in the area.

115. There were three police officers involved in interrogating Mahmut Tanlı – Superintendent Ali Gündoğdu, Murat Demirpençe and Ökkeş Aybar, the last of whom claimed that he did not himself participate in the questioning. According to Ali Gündoğdu (see the record of the incident at paragraph 30 and his statement of 30 June at paragraph 39 above), Mahmut Tanlı was not questioned on the day of his arrest but late the next day, shortly before he collapsed and died. The statements of Ökkeş Aybar and Murat Demirpençe were also consistent on this point (see paragraphs 40 and 41 above). The Court would note that this is not supported by any documentary records concerning events during custody. It was found in the Salman case (*Salman v. Turkey*, no. 21986/93 [GC], § 16, ECHR 2000-VII), which also concerned the death of a detainee in police custody, that no documentary records existed to record the movements of detainees from their cells, for example, noting times of interrogations. However, there is no evidence which would substantiate any suspicion that this version of events was self-serving and intended to minimise the contact which the police officers in fact had with Mahmut Tanlı.

116. According to the evidence of Ali Gündoğdu and Murat Demirpençe, the interrogation of Mahmut Tanlı commenced at about 9 p.m. No times are mentioned again, until the public prosecutor recorded in the report of the incident and the autopsy report that he had been informed of the death at about 10.30 p.m. What happened in between lay within the knowledge of the three interrogating officers. There were three other police officers in the adjacent room who witnessed some of the events, and there was Dr Ağralı who arrived to give treatment. His statement however made no reference to the time at which he arrived at the police station.

117. The account given by the three interrogating officers was that, after only a matter of minutes into the interrogation, Mahmut Tanlı reacted to the allegations put to him of PKK involvement by becoming agitated and pale, stammering and then collapsing with difficulties in breathing. The police officers Ömer Güzel, Cafer Yiğit and Nihat Acar also agreed that Ali

Gündoğdu had only been in the room about 10 to 15 minutes before coming out to request a doctor. They all agreed that within another ten or so minutes Cafer Yiğit returned with Dr Ağralı from the nearby Doğubeyazit State Hospital. Within a few minutes, however, the doctor announced that Mahmut Tanlı had stopped breathing. Cardiac massage and artificial respiration continued for about half an hour without any result. All the police officers denied that any ill-treatment, violence or torture had occurred.

118. The *post mortem* report drawn up that night recorded that there were no signs of blows or violence on the body and that death was from heart failure. The failings in that examination will be examined below. The second report drawn up almost a year later was unable to reach any conclusions as to the presence of signs of torture due to the advanced putrefaction of the body. The photographs provided by the applicant are not conclusive - they show some marks, which may or may not be the result of ill-treatment; their dating and whether they were *post mortem* changes are not established. Similarly, the statements of the applicant and his uncle Ahmet Tanlı to the HRA which referred to seeing marks on the body cannot be conclusive either. They were not apparently repeated to the public prosecutor or before the court, while the applicant's undated statement to the public prosecutor laid emphasis on the types of torture which left no visible marks (see paragraph 36 above).

119. The applicant's claim that his son was tortured to death is based largely on inference from the fact that he was perfectly healthy before he entered detention and that the likelihood of a healthy 22-year-old dying instantly of a heart attack is minimal. There is also the consideration that use of torture on PKK detainees in police custody was found by the CPT to be widespread at the time (see paragraphs 103-106 above).

120. While the cause of death was attributed to an embolus in the blood vessels of the heart which caused heart failure, this finding has come under strong criticism from the İstanbul Forensic Medicine Institute and Dr C. Milroy, a forensic pathologist whose opinion was submitted by the applicant. From these, it appears that:

– the organs were not removed or weighed;

– the heart was not dissected;

– the neck area had not been dissected;

– no histopathological samples were taken or analyses conducted which might discover signs of electrical or other forms of torture and ill-treatment;

– no toxicological analyses were undertaken;

– no photographs were taken;

– the findings of emboli were not adequately described or analysed; and

– the doctors who signed the *post mortem* report were not qualified forensic pathologists.

On their view, it was not possible on the basis of the material available to ascribe the cause of death to heart failure caused by an embolus.

121. The Court accordingly finds that the cause of death has not been medically established in the domestic proceedings. In particular, it has not been shown that Mahmut Tanlı died of natural causes.

122. The standard of proof applied by the Court is one of proof beyond reasonable doubt. It may be supplied by inferences and unrebutted presumptions of fact. The fact whether Mahmut Tanlı was subject to ill-treatment prior to his death is closely linked to issues of Government responsibility for his treatment and death while in police custody. The Court will examine together the factual and legal questions, as they are relevant to the applicant's substantive complaints under the Convention set out below.

3. The investigation

123. The investigation was conducted by the Doğubeyazit public prosecutor. He attended the *post mortem* examination, carried out by the two doctors. Its defects have been adverted to above. He took statements from the three interrogating officers, from the three officers who were nearby and partially witnessed the aftermath of events, from Dr Ağrali who administered first aid, the applicant and a number of villagers. He thought to obtain the military records of Mahmut Tanlı and made some enquiries from the Doğubeyazit gendarmes. He also took a statement from the lawyer Ahmet Gerez, who had been assisting the applicant in presenting his petition. He did not take statements from the other detainees held with Mahmut Tanlı at the Uluyol police station.

124. It is undisputed that the applicant, on the advice of his lawyer, requested the public prosecutor to send the body for further examination by the İstanbul Forensic Medicine Institute. The public prosecutor told him that it was for him to arrange, in particular, in securing the proper coffin for transport. The applicant, after discussion with other members of his family, withdrew his request and told the public prosecutor that they intended to bury the body. He maintained this view, even though the public prosecutor asked him to reconsider and said that it would be a helpful step in the investigation. The public prosecutor then released the body and the applicant took it home to be buried.

125. The reason for the withdrawal of the request were explained by the applicant in his statements: to the HRA, he stated that it was for fear of reprisals; the note of 29 June 1994 stated that it would serve no point; in his statement taken by the public prosecutor of 30 June 1994 he referred to difficulties and that they would be put under pressure; before the court on 22 September 1994 he said that it was for fear of reprisals; in the statement of 6 June 1995 taken in response to the application before the Commission, he allegedly said that it was too burdensome to undertake (see paragraphs 25, 38, 45, 55 and 61 above) .

Ahmet Gerez in his statement of 30 June (paragraph 42 above) attributed it to the difficulties in transporting the body and an unspecified anxiety as to what might happen.

126. The Court is satisfied that the applicant withdrew due to both the inherent strain of undertaking the responsibility for such an exercise and from associated anxieties as to possible adverse reactions from certain quarters.

4. The court proceedings

127. An indictment charging the three officers Ali Gündoğdu, Murat Demirpençe and Ökkeş Aybar issued on 3 August 1994, charging them with causing death by ill-treatment contrary to Article 243 of the Criminal Code. The Assize Court first sat on 12 August 1994 and gave out summonses for the witnesses to be heard. On 22 September 1994, it heard evidence from two defendants (Murat Demirpençe failed to appear), the applicant, three villagers and three police officers – Nihat Açar, Cafer Yiğit and Ömer Güzel.

128. On 20 October 1994, evidence was heard from Murat Demirpençe. On 17 November 1994, Ahmut Akkuş appeared, and another villager from Örtülü, and the reply to the letters rogatory from Dr Ağrali was received. Nothing more of substance occurred until 12 February 1995 when the court decided to send the file to the İstanbul Forensic Medicine Institute for its opinion. On 23 May 1995, following the reply of the Forensic Medicine Institute, the court ordered the exhumation of the body.

129. The body was exhumed on 9 June 1995 and a *post mortem* examination conducted on 12 June 1995. A report dated the same day issued on the findings and was referred to the 1st Specialist Committee for it to issue its report. The court proceedings were adjourned successively awaiting this report. On 18 January 1996, the court ordered the public prosecutor to contact the Institute concerning the delay. On 13 March 1996, the Institute issued its report, finding that it was not possible to establish the cause of death.

130. On 14 May 1996, the Assize Court acquitted the three officers as the cause of death of Mahmut Tanlı had not been established and there was no evidence beyond reasonable doubt that they had committed the crime charged.

131. On 15 May 1996, the applicant sought to appeal the acquittal. He was refused leave by the Assize Court as he was not a party to the proceedings. That decision was upheld by the Court of Appeal on 11 November 1996.

II. THE GOVERNMENT'S PRELIMINARY OBJECTION

132. The Government took objection to the fact that the applicant had introduced his application before the European Commission of Human Rights before the conclusion of the domestic proceedings. They referred to the reasoning of the Commission in its decision on admissibility of 5 March 1996 which criticised the delays in the proceedings and the lack of effectiveness of those proceedings and submitted that the investigation and court procedure was diligent, thorough and effective. Domestic remedies not only existed but were shown to have worked effectively.

133. The Court notes that the Government do not dispute that the proceedings have now come to a conclusion and that there is nothing more that the applicant can now do. The substance of their arguments relate to the alleged ineffectiveness of the procedures and whether they can be regarded as redressing the applicant's complaints. The Court considers that these matters fall to be examined under the substantive provisions of the Convention invoked by the applicant.

III. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

134. The applicant alleged that his son Mahmut Tanlı had died as a result of torture at the hands of police officers at the Uluyol police station. He also complained that no effective investigation had been conducted into the circumstances of the murder. 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."

A. Submissions of those who appeared before the Court

1. The applicant

135. The applicant submitted that there had been a violation of Article 2 in that Mahmut Tanlı was unlawfully killed in custody by police officers who tortured him in the course of interrogation. The evidence to that effect was compelling as *inter alia* Mahmut Tanlı was in good health when taken into custody; he had no history of illness or disease; he was wanted by the security forces as a suspected PKK member; he was questioned by at least three officers; the applicant, his brother Ahmut Tanlı and the villager Mahmut Ardin saw marks of blows on the deceased's body; the domestic investigation was totally inadequate and failed to establish that he died of a heart attack and there was overwhelming evidence that in the mid-1990's acts of torture and inhuman treatment and extra judicial killings by State agents in Turkey were widespread and systematic.

136. The applicant also submitted that there had been a violation of Article 2 because of the lack of an adequate and effective investigation into the death of Mahmut Tanlı. He argued that the autopsy carried out was wholly incomplete and inadequate, referring *inter alia* to the fact that it was not carried out by or in the presence of forensic doctors, and to the lack of any photographs. The public prosecutor failed to refer the body to the Forensic Medicine Institute, as he had the power to do, in spite of the applicant's lack of consent due to fear for his life. He also failed to take statements from all the police officers involved in the custody period or the doctor who examined Mahmut Tanlı on entry into custody. The statements taken were furthermore inadequate. For example, Dr Ağralı was not asked about any bruises on the body. The court proceedings were deficient in that there were numerous changes in the composition of the court; there was no investigation of the applicant's allegations that the doctors carrying out the *post mortem* examination had been intimidated and an exhumation was ordered almost one year after the death.

The applicant further alleged that there had been a violation of Article 2 on account of the lack of any effective State system for ensuring the protection of the right to life and on account of the inadequate protection of the right to life in domestic law. He referred in particular to the alleged failure to provide safeguards in the face of known risks of torture and death in custody and a lack of effective systems ensuring the accountability of the police for the safety of a person in detention.

2. The Government

137. The Government submitted that there was no evidence proving the allegation that the applicant's son was ill-treated and killed by agents of the State. The autopsy findings showed no signs of lesions, trauma or fresh

bruising. In the light of the information available, it was established that Mahmut Tanlı died of a heart attack. This was the result of a natural death and not torture by agents of the Government.

138. The Government submitted that the investigation into Mahmut Tanlı's death was prompt, thorough and effective. There was no covering up of facts. They drew attention to the fact that the applicant did not pursue his own complaints by intervening in the criminal proceedings against the police officers. He also objected to the body being referred to the Forensic Medicine Institute. They pointed out that the public prosecutor was satisfied by the autopsy that Mahmut Tanlı had died of a heart attack and he had recommended a referral for the sake of the applicant so that he could dispel his doubts. In those circumstances, the public prosecutor was under no obligation to refer the body himself for further autopsy examination. The applicant's failure to maintain his request cannot be imputed to the public prosecutor who acted diligently. Further, they point out that the autopsy was carried out by two doctors who were familiar with *post mortem* examination techniques and who would have withdrawn if they had considered they had insufficient competence. Pursuant to Article 79 § 2 of the Code on Criminal Procedure, an autopsy did not need to be carried out by two doctors, one of whom was a qualified forensic doctor where there was an emergency situation, when one doctor sufficed. The Government stated that no pathologist was available at the time and the autopsy had to be carried out prior to the emergence of rigor mortis where allegations of ill-treatment were concerned.

B. The Court's assessment

1. The death of Mahmut Tanlı

139. 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 (cited at paragraph 155 below), it also enshrines one of the basic values of the democratic societies making up the Council of Europe. The circumstances in which deprivation of life may be justified must therefore be strictly construed. The object and purpose of the Convention as an instrument for the protection of individual human beings also requires that Article 2 be interpreted and applied so as to make its safeguards practical and effective (see the McCann and Others v. the United Kingdom judgment of 27 September 1995, Series A no. 324, pp. 45-46, §§ 146-147).

140. The text of Article 2, read as a whole, demonstrates that it covers not only intentional killing but also situations where it is permitted to "use force" which may result, as an unintended outcome, in the deprivation of life. The deliberate or intended use of lethal force is only one factor

however to be taken into account in assessing its necessity. Any use of force must be no more than "absolutely necessary" for the achievement of one or more of the purposes set out in sub-paragraphs (a) to (c). This term indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is "necessary in a democratic society" under paragraphs 2 of Articles 8 to 11 of the Convention. Consequently, the force used must be strictly proportionate to the achievement of the permitted aims (the McCann judgment, cited above, p. 46, §§ 148-149).

141. In the light of the importance of the protection afforded by Article 2, the Court must subject deprivations of life to the most careful scrutiny, taking into consideration not only the actions of State agents but also all the surrounding circumstances. Persons in custody are in a vulnerable position and the authorities are under a duty to protect them. Consequently, where an individual is taken into police custody in good health and is found to be injured on release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused (see, amongst other authorities, *Selmouni v. France* [GC], no. 25803/94, ECHR 1999-V [28.7.99], § 87). The obligation on the authorities to account for the treatment of an individual in custody is particularly stringent when that individual dies.

142. In assessing evidence, the general principle applied in cases has been to apply the standard of proof "beyond reasonable doubt" (see the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, § 161). However, such proof may follow from the co-existence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (see the Salman case cited above, at § 100).

143. In this case, the Court recalls that Mahmut Tanlı, 22 years old, was in good health when taken into custody on 27 June 1994. There was no history of illness or disease. He had completed his military service one year before without any medical problems. However, some twenty four to thirty six hours after being taken into custody, he died during interrogation at the Uluyol police station.

144. The official cause of death in the *post mortem* examination carried out shortly afterwards was stated as being emboli in the heart and that Mahmut Tanlı had died of a heart attack. The report also stated that there were no signs of ill-treatment on the body.

145. The Court considers that the *post mortem* procedure was defective in fundamental aspects (see also paragraphs 120 above and 150 below). The İstanbul Forensic Medicine Institute which carried out a second examination of the body on 12 June 1995 noted that there had been no dissection of the heart. It concluded that in these circumstances the findings in the first report were without scientific value. The expert report provided by the applicant also considered that the alleged basis for the cause of death was insufficiently recorded or detailed to be relied on.

146. Nor did the examination of the body rebut the allegations made by the applicant that his son was tortured to death. No tests apt to establish the presence of subtle signs of torture were carried out (see paragraph 150 below). As the Court has found above (paragraph 121), the domestic *post mortem* procedures accordingly failed to provide an explanation for Mahmut Tanlı's death. It certainly cannot be considered as established, as submitted by the Government, that he died from natural causes. The authorities have failed to provide any plausible or satisfactory explanation for the death of Mahmut Tanlı, a healthy 22 year old, in police custody.

147. The Court finds therefore that the Government have not accounted for the death of Mahmut Tanlı during his detention at the Uluyol police station and that their responsibility for his death is engaged.

It follows that there has been a violation of Article 2 of the Convention in that respect.

2. Alleged inadequacy of the investigation

148. The Court reiterates that the obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see, *mutatis mutandis*, the aforementioned McCann and Others v. the United Kingdom judgment, § 161, and the Kaya v. Turkey judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I, p. 329, § 105).

149. In that connection, the Court points out that the obligation mentioned above is not confined to cases where it is apparent that the killing was caused by an agent of the State. The applicant, the father of the deceased, lodged a formal complaint about the death with the competent investigation authorities, alleging that it was the result of torture. Moreover, the mere fact that the authorities were informed of a death in custody gave rise *ipso facto* to an obligation under Article 2 to carry out an effective investigation into the circumstances surrounding the death (see, *mutatis mutandis*, the Ergi v. Turkey judgment of 28 July 1998, *Reports* 1998-IV, p. 1778, § 82, and the Yaşa v. Turkey judgment of 2 September 1998,

Reports 1998-VI, p. 2438, § 100). This involves, where appropriate, an autopsy which provides a complete and accurate record of possible signs of ill-treatment and injury and an objective analysis of clinical findings, including the cause of death.

150. Turning to the particular circumstances of the case, the Court observes that the autopsy investigation was of critical importance in determining the facts surrounding Mahmut Tanlı's death. This investigation, while launched promptly by the public prosecutor, has been shown to be defective in a number of fundamental respects. In particular, the organs were not removed or weighed; the heart was not dissected; the neck area had not been dissected; no histopathological samples were taken or analyses conducted which might discover signs of electrical or other forms of torture and ill-treatment; no toxicological analyses were undertaken; no photographs were taken and the finding of the emboli was not adequately described or analysed. It also appears that the doctors who signed the *post mortem* report were not qualified forensic pathologists, notwithstanding the provision in the Code of Criminal Procedure which required the presence of a forensic doctor. The Government have relied on the second paragraph of that provision concerning emergencies. However, the Court is not satisfied that the perceived need for the examination to take place before rigor mortis set in justified proceeding without the involvement of a forensic doctor. The importance that an effective investigation be carried out into a death, possibly resulting from ill-treatment, necessitated that a properly qualified forensic expert be involved. Even if such a doctor was not available in the immediate aftermath of the death, no explanation has been given for failing to continue the examination in the presence of such an expert within the following days.

151. Referral of the body to the İstanbul Forensic Medicine Institute within a short time of death might have remedied the shortcomings identified above. By the time of the second examination in June 1995 the body was too decomposed for any useful findings to be made about signs of possible torture or ill-treatment or the cause of death. The Government have alleged that the public prosecutor was under no obligation to obtain such an examination as the first report concluded that the death was caused naturally. They asserted that it was for the applicant to obtain such an examination and that the authorities cannot be blamed for his decision to withdraw his request for referral.

152. The Court considers that the primary responsibility for implementing the necessary investigative steps into a death in custody lies with the responsible authorities. The public prosecutor did not require the applicant's consent to obtain a referral. Where the *post mortem* examination was not carried out by a qualified forensic expert, the death was *prima facie* suspicious given the age and state of health of the deceased and the family were alleging torture, the public prosecutor should have taken steps to

secure a further examination. Since, notwithstanding the putative reliance on the first *post mortem* report, a prosecution was being prepared, the suspicious nature of the death was accepted by the public prosecutor. The indictment however referred to the death being possibly caused by fear, with no medical or expert report to support this hypothesis.

153. In the light of the defective forensic investigation, it was not surprising that the court proceedings resulted in the acquittal for lack of evidence of the three police officers who had been interrogating Mahmut Tanlı before he died. While the Government also referred to the applicant's failure to join the proceedings as an intervenor, it is not apparent that this would have altered the course of the trial in any material way. Even if he had been able to appeal to the Court of Cassation, which would have had the power to remit the case for reconsideration by the first instance court, this would have had no effective prospect of clarifying or improving the evidence available in respect of the cause of death.

154. The Court concludes that the authorities failed to carry out an effective investigation into the circumstances surrounding Mahmut Tanlı's death. It holds that there has been a violation of Article 2 of the Convention in this respect also.

IV. ALLEGED VIOLATIONS OF ARTICLE 3 OF THE CONVENTION

155. The applicant complained that his son was tortured before his death, invoking Article 3 of the Convention which provides:

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

156. The applicant submitted that his son had been tortured in custody and denied access to adequate medical treatment. He pointed out that his son was in good health when he entered custody with no history of heart disease or other illness and that he had been questioned by the police, following which he had died. He and several others had seen marks on the body. The investigation had failed to show that his son had died of natural causes and there was overwhelming evidence that acts of torture and inhuman treatment by State agents in Turkey were widespread and systematic at that time. This had to be sufficient to reach the necessary standard of proof, bearing in mind the difficulties of proving torture in police custody.

The applicant also invoked Article 3 in respect of the failure of the authorities to carry out an adequate and effective investigation into the allegations of torture and in respect of the anguish and distress suffered by the applicant in the face of the authorities' complacency in relation to his son's death (eg. *Cakıçı v. Turkey*, [GC], no. 23657/94, ECHR 1999-V, §§ 98-99).

157. The Government submitted that the allegations of torture had not been supported by any concrete evidence and that the applicant relied mainly on the fact that his son had died in custody and on the reports alleging practices of torture. The incision on the body and other marks were the result of the autopsy. If his son had been subjected to electric shock treatment or hosing, there would have been subtle marks left which the doctors at the first *post mortem* examination would have seen and recorded. All the findings from the investigation, however, pointed to death occurring from natural causes. They disputed that there were any failings in the investigation.

158. The Court observes that the Government have not provided a plausible explanation for the death of Mahmut Tanlı in custody after he had entered custody in apparent good health (see paragraph 146 above). Unlike the case of Salman v. Turkey (cited above, at paragraph 115) however, there are no records of marks or injuries on the body which are consistent with the application of torture techniques. While the applicant and other witnesses referred to seeing bruising on the body, there is no medical substantiation that this was attributable to traumatic injury rather than *post mortem* changes in the body. The forensic expert instructed by the applicant stated himself that he could draw no conclusions from the photographs of the body taken prior to the burial. There is therefore no evidence, apart from the unexplained cause of death, to support a finding that acts of torture were carried out.

159. In these circumstances, and having regard to its conclusion under Article 2 of the Convention, the Court does not find it appropriate to draw the inferences proposed by the applicant as to whether torture or ill-treatment occurred. To the extent that it is alleged that the failings in the *post mortem* examination prevented any concrete evidence of ill-treatment coming to light and thereby the identification and punishment of those responsible, the Court considers that the complaint falls to be considered in this case under Article 13 of the Convention (see *İlhan v. Turkey*, [GC], no. 22277/93, ECHR 2000-VII, §§ 89-93). As regards the applicant's submissions as to the effect which events had on himself, the Court has no doubt of the profound suffering caused by the death of his son. It finds no basis however for finding a violation of Article 3 in this context, the Court's case-law relied on by the applicant referring to the specific phenomenon of disappearances.

160. The Court finds that it has not been established that there has been a violation of Article 3 of the Convention. It consequently finds no violation of that provision.

V. ALLEGED VIOLATIONS OF ARTICLE 5 OF THE CONVENTION

161. The applicant invoked Article 5 in respect of alleged violations disclosed by the circumstances of his son's detention. Article 5 provides as relevant:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> (b) the lawful arrest or detention of a person for non- compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; ...
>
> 2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
>
> 3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
>
> 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

162. The applicant submitted that his son's detention was not carried out by a procedure prescribed by law and was without any lawful justification permitted under Article 5. The Government's failure to create, maintain and produce adequate documentation in relation to Mahmut Tanlı's arrest amounted to a violation of the "lawfulness" requirement. There was no objective, reasonable suspicion that he had been involved in any offence, Ahmut Akkuş's evidence having been obtained by inducing him to sign a statement blindfolded. The finding of a "list" on dead PKK terrorists could not form a reliable ground of suspicion either. His son had not been informed promptly of the reasons for his arrest contrary to Article 5 § 2, the Government having failed to produce any evidence that he was informed of the reason for his arrest on 27 June 1994. Nor had he been brought promptly

before a judge or other relevant officers as required by Article 5 § 3 of the Convention.

The applicant also claimed that there was a violation of Article 5 in that he was denied access to his son and his son was denied access to a lawyer while in detention. His son was furthermore denied access to adequate medical assistance and was unable to challenge the lawfulness of his detention in violation of Article 5 § 4. There was no enforceable right to compensation as required by Article 5 § 5.

163. The Government submitted that the security forces had reasonable suspicion for depriving Mahmut Tanlı of his liberty in order to question him as to his alleged involvement with the PKK and its terrorist activities. Mahmut Tanlı had been taken to the police station which was normal in such a case. There was no violation of Article 5 of the Convention in the circumstances.

164. The Court's case-law stresses the fundamental importance of the guarantees contained in Article 5 for securing the rights of individuals in a democracy to be free from arbitrary detention at the hands of the authorities. It has reiterated in that connection that any deprivation of liberty must not only have been effected in conformity with the substantive and procedural rules of national law, but must equally be in keeping with the very purpose of Article 5, namely, to protect the individual from arbitrary detention. In order to minimise the risks of arbitrary detention, Article 5 provides a corpus of substantive rights intended to ensure that the act of deprivation of liberty be amenable to independent judicial scrutiny and secures the accountability of the authorities for that measure.

165. In the present case, the Court recalls that Mahmut Tanlı was taken into custody by gendarmes on 27 June 1994 and transferred into police custody that evening. He died some 24 hours later on 28 June 1994. The statements from the police officers and materials from the gendarmes indicated that there was a statement dated 7 February 1994 by Ahmut Akkuş naming Mahmut Tanlı as being involved with the PKK and that his name appeared on a list of PKK supporters found on or about 13 May 1994 by the gendarmes on the body of a dead terrorist after a clash. While Ahmut Akkuş told the Ağrı Assize Court that he had not known what he was signing and knew nothing about Mahmut Tanlı's alleged involvement with the PPK, it has not been established which of the versions he has given is in fact true. It is possible that his testimony to the court was motivated by exculpatory intentions. Nor are there any elements which would enable the Court in this case to reject the account of the finding of a list of PKK supporters as a manifest fabrication. The Court is not satisfied therefore that the security officers acted without a reasonable suspicion that Mahmut Tanlı had committed a criminal offence. Similarly, it is not persuaded that "unlawfulness" has been made out on the grounds of a lack of proper documentation recording the detention. No request was made by the

applicant for the custody records to be provided. Indeed in this case no factual issue arose regarding when or where Mahmut Tanlı was detained.

166. As regards the allegations of breaches of Article 5 § 2, it is not possible to establish what information may have been given to Mahmut Tanlı or when prior to his death. It cannot be inferred, from the absence of written proof that reasons were given, that none were, or that he was not able, from the context, to deduce with sufficient certainty the grounds for his detention. Concerning the allegation under Article 5 § 3, the Court notes that Mahmut Tanlı was held in detention for between 24-36 hours without being brought before a judge or other properly empowered officer. It is true that there was no indication that he would have been brought before a judge if he had not died, it being possible under Turkish law at that time for a detainee to be held for up to 30 days. However, no request for an extension in custody had been made and it is speculation to assume that a violation of Article 5 § 3 would inevitably have occurred. On the same basis, the Court is not prepared to draw the conclusion that Mahmut Tanlı was denied the opportunity to challenge the lawfulness of his detention. In the absence of any established violation of the other provisions of Article 5, there is no scope for Article 5 § 5 to come into play either.

167. The Court finds that no violation of Article 5 of the Convention has been shown to have occurred in this case.

VI. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

168. The applicant asserted that he had been denied access to an effective domestic remedy and alleges a breach of Article 13, 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."

169. The applicant complained that he had taken every reasonable step possible in order to ensure that the allegations of torture and the death of his son were properly and thoroughly investigated by the State. However, the response of the authorities to his petitions was utterly inadequate. He repeated his submissions made under the procedural aspect of Article 2 of the Convention (see paragraph 136 above). The applicant further submitted that the practice of official tolerance of the lack of effective remedies aggravated the breach of Article 13 and demonstrated that there had been a practice of violating Article 13, referring to the previous findings of the Convention organs in Turkish cases.

170. The Government reaffirmed that all the necessary enquiries had been made with the required expedition. The available evidence had not, however, corroborated the applicant's allegations. The public prosecutor

had acted properly and it had been for the applicant to request a further examination of the body if he so wished.

171. 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. Article 13 thus requires the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief, although the 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 also 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 aforementioned Çakıcı judgment, *loc. cit.*, § 112, and the other authorities cited there).

Given the fundamental importance of the protection of the right to life, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life and including effective access for the complainant to the investigation procedure (see the Kaya judgment cited above, pp. 330-31, § 107).

172. On the basis of the evidence adduced in the present case, the Court has found that the Government are responsible under Article 2 of the Convention for the death in custody of the applicant's son. The applicant's complaints in this regard are therefore "arguable" for the purposes of Article 13 (see the Boyle and Rice v. the United Kingdom judgment of 27 April 1988, Series A no. 131, p. 23, § 52, and the Kaya and Yaşa judgments cited above, § 107, and p. 2442, § 113, respectively).

173. The authorities thus had an obligation to carry out an effective investigation into the circumstances of Mahmut Tanlı's death. The Court recalls its findings above concerning the defective *post mortem* examination which was carried out after the death (see paragraph 150 above). The second examination which took place almost a year later was unable to remedy these shortcomings. The domestic investigation failed thereby to provide an explanation for the death in custody and undermined the effectiveness of the criminal proceedings brought against the three police officers. For this reason, no effective criminal investigation can be considered to have been conducted in accordance with Article 13, the requirements of which may be broader than the obligation to investigate imposed by Article 2 (see the Kaya judgment cited above, pp. 330-31, § 107). The Court finds therefore that the applicant has been denied an effective remedy in respect of the death of his son and thereby access to any

other available remedies at his disposal, including a claim for compensation. It does not consider it appropriate to make any additional finding concerning the applicant's allegations of a practice of violating Article 13.

174. Consequently, there has been a violation of Article 13 of the Convention.

VII. ALLEGED VIOLATION OF ARTICLES 14 AND 18 OF THE CONVENTION

175. The applicant submitted that the death of his son in custody illustrated the discriminatory policy pursued by the authorities against Kurdish citizens and the existence of an authorised practice, in violation of Articles 14 and 18 of the Convention respectively.

Article 14 provides:

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

Article 18 provides:

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

176. The applicant submitted that the circumstances of the case disclosed a violation of Article 14 taken together with Articles 2, 3, 5, 13 and 18, relying on the substantial evidence from *inter alia* UN agencies and non-governmental organisations as to the systematic unlawful treatment of the Kurds in south-east Turkey. Further, by failing to keep adequate records of his son's detention and failing to investigate adequately his death, the authorities had subverted the domestic safeguards existing in relation to the detention of suspects. The lack of effective steps taken to end the widespread and systematic violations disclosed in this case demonstrated a breach of Article 18 of the Convention.

177. On the basis of the facts established in this case however, the Court does not find that the applicant has substantiated his allegations that his son was the deliberate target of a discriminatory policy on account of his ethnic origin or that he was the victim of restrictions contrary to the purpose of the Convention. Accordingly, there has been no violation of the Convention in these respects.

VIII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

178. 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

179. The applicant stated that his son Mahmut Tanlı had been married with a daughter, now 5 years' old. In the year and a half before his death, he had worked as a driver, chauffeuring people who had cars but no driving licences. He had worked about 5 to 6 months of the year, returning to live with his family the rest of the time. He had an average annual income of 1,625,000,000 Turkish liras (TRL). Taking into account his age and average life expectancy in Turkey, the calculation according to actuarial tables resulted in the capitalised sum of 38,754.77 pounds sterling (GBP).

180. The Government denied that any violation had been proved and asserted that there was no convincing evidence that Mahmut Tanlı was killed deliberately. There was no basis for awarding compensation. In any event, the sum claimed was excessive.

181. As regards the applicant's claims for loss of earnings, the Court's case-law establishes that there must be a clear causal connection between the damage claimed by the applicant and the violation of the Convention and that this may, in the appropriate case, include compensation in respect of loss of earnings (see, amongst other authorities, the Barberà, Messegué and Jabardo v. Spain judgment of 13 June 1994 (*Article 50*), Series A no. 285-C, pp. 57-58, §§ 16-20; Cakıcı v. Turkey judgment cited above, § 127).

182. A precise calculation of the sums necessary to make complete reparation *(restitutio in integrum*) in respect of the pecuniary losses suffered by an applicant may be prevented by the inherently uncertain character of the damage flowing from the violation (Young, James and Webster v. the United Kingdom judgment (former Article 50) of 18 October 1982, Series A no. 55, p. 7, § 11). An award may still be made notwithstanding the large number of imponderables involved in the assessment of future losses, though the greater the lapse of time involved the more uncertain the link between the breach and the damage becomes. The question to be decided in such cases is the level of just satisfaction, in respect of either past and future pecuniary loss, which it is necessary to award to an applicant, the matter to be determined by the Court at its discretion, having regard to what is equitable (Sunday Times v. the United Kingdom judgment (former Article 50) of 6 November 1989, Series A no. 38, p. 9, § 15; *Lustig-Prean*

and Beckett v. the United Kingdom (just satisfaction), nos. 31417/96 and 32377/96 [Section 3] [25.7.00], ECHR 2000, §§ 22-23).

183. The Court has found (paragraph 154 above) that the authorities were liable under Article 2 of the Convention for Mahmut Tanlı's death. In these circumstances, there was a causal link between the violation of Article 2 and the loss by his widow and child of the financial support which he provided for them. The Court notes that the Government have not queried the amount claimed by the applicant, beyond a general assertion that it was excessive. 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 Mahmut Tanlı's death, the Court awards the sum of GBP 38,754.77 to be held by the applicant for Mahmut Tanlı's widow and daughter, such sum to be converted into Turkish liras at the rate applicable at the date of payment.

B. Non-pecuniary damage

184. The applicant claimed, having regard to the severity and number of alleged violations, GBP 30,000 in respect of his son's widow and daughter and GBP 10,000 in respect of himself for non-pecuniary damage.

185. The Government considered that the amounts claimed were excessive and submitted that unjust enrichment should be avoided.

186. The Court recalls that it has found that the authorities were accountable for the death of the applicant's son on custody. In addition to the violation of Article 2 in that respect, it has also found that the authorities failed to provide an effective investigation and remedy in respect of these matters, contrary to the procedural obligation under Article 2 of the Convention and in breach of Article 13 of the Convention. In these circumstances and having regard to the awards made in comparable cases, the Court awards on an equitable basis the sum of GBP 20,000 for non-pecuniary damage to be held by the applicant for his son's widow and daughter and the sum of GBP 10,000 for non-pecuniary damage suffered by the applicant in his personal capacity, such sums to be converted into Turkish liras at the rate applicable at the date of payment.

C. Costs and expenses

187. The applicant claimed the sum of GBP 14,627 for legal fees and expenses, such sum to be paid into his representatives' bank account in the United Kingdom. This sum included GBP 1,560 for translation expenses, GBP 375 for administrative costs, professional fees for 42 hours' work at a

rate of GBP 100 for the applicant's lawyer in the United Kingdom and GBP 4,867 in respect of work done by lawyers in Turkey.[2]

188. The Government considered that sum was excessive and estimated on a fictitious basis. In particular, they submitted that the hourly sum was irrelevant where legal fees in Turkey were concerned and that the administrative expenses were insufficiently documented. They also disputed that any sums should be paid to the KHRP, whose role in the application was fictitious. The translation costs were also exaggerated.

189. The Court notes that the applicant's representative before the Court is Mr P. Leach, a solicitor working for the KHRP. Making an assessment 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 12,000 plus any value-added tax that may be chargeable, such sum to be paid into the sterling bank account in the United Kingdom as set out in the applicant's just satisfaction claim.[3]

D. Default interest

190. According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 7,5% per annum.

FOR THESE REASONS, THE COURT

1. *Dismisses* unanimously the Government's preliminary objection;

2. *Holds* by six votes to one that the Government are liable for the death of Mahmut Tanlı in violation of Article 2 of the Convention;

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[2] **Rectified on 28 August 2001. The former text reads:**
"187. The applicant claimed the sum of GBP 9,760 for legal fees and expenses, such sum to be paid into his representatives' bank account in the United Kingdom. This sum included GBP 1,560 for translation expenses and GBP 375 for administrative costs and professional fees for 42 hours' work at a rate of GBP 100."

[3] **Rectified on 28 August 2001. The former text reads:**
"189. The Court notes that the applicant's representative before the Court is Mr P. Leach, a solicitor working for the KHRP. Neither the rates and hours claimed nor the administrative and translation costs appear unreasonable and the sums claimed may be regarded as actually and necessarily incurred. Having regard to the details of the claims submitted by the applicant, it awards the applicant the sum of GBP 9,760 plus any value-added tax that may be chargeable, such sum to be paid into the sterling bank account in the United Kingdom as set out in the applicant's just satisfaction claim."

3. *Holds* unanimously that there has been a violation of Article 2 of the Convention on account of the failure of the authorities of the respondent State to conduct an effective investigation into the circumstances of the death of Mahmut Tanlı;

4. *Holds* unanimously that there has been no violation of Article 3 of the Convention;

5. *Holds* unanimously that there has been no violation of Article 5 of the Convention;

6. *Holds* by six votes to one that there has been a violation of Article 13 of the Convention;

7. *Holds* unanimously that there has been no violation of Articles 14 or 18 of the Convention;

8. *Holds* by six votes to one that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following sums, to be converted into Turkish liras at the date of settlement:

   a) by way of compensation for pecuniary damage, 38,754 (thirty eight thousand, seven hundred and fifty four) pounds sterling and 77 (seventy seven) pence, which sum is to be held by the applicant for his son's widow and child;

   b) by way of compensation for non-pecuniary damage

      (i) 20,000 (twenty thousand) pounds sterling to be held by the applicant for his son's widow and child;

      (ii) 10,000 (ten thousand) pounds sterling for the applicant in his personal capacity;

9. *Holds* unanimously that the respondent State is to pay the applicant, within the above-mentioned three months and into the bank account identified by him in the United Kingdom, 12,000 (twelve thousand) pounds sterling by way of costs and expenses, (plus any value-added tax that may be chargeable);[4]

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[4] **Rectified on 28 August 2001. The former text reads:**
"9. *Holds* unanimously that the respondent State is to pay the applicant for legal fees and expenses, within the above-mentioned three months and into the bank account identified by him in the United Kingdom, 9,760 (nine thousand seven hundred and sixty) pounds sterling plus any value-added tax that may be chargeable. "

10. *Holds* unanimously that simple interest at an annual rate of 7.5% shall be payable from the expiry of the above-mentioned three months until settlement of the above sums.

11. *Dismisses* unanimously the remainder of the applicant's claims for just satisfaction.

Done in English, and notified in writing on 10 April 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly dissenting opinion of Mr Gölcüklü is annexed to this judgment.

J.-P.C.
S.D.

PARTLY DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

(Translation)

Much to my regret, I cannot subscribe to the majority's conclusions in respect of points 2, 6 and 8a of the operative provisions, for the following reasons:

1. In the instant case there is only one material fact which must be examined and judged in the light of the Convention, as the Court rightly found in paragraph 147 of the present judgment. The Court states that "... the Government have not accounted for the death of Mahmut Tanlı during his detention at the Uluyol police station", and deduces from this that "their responsibility for his death is engaged"; it concludes that there has been a violation of Article 2 in its substantive aspect (point 2 of the operative provisions).

2. The reasoning which culminated in that conclusion can be summarised as follows: the Government's submission that Mahmut Tanlı died of a heart attack failed to convince the Court, for want of an adequate and effective investigation into the cause of his death.

3. In my opinion, the conclusions drawn by the Court from that single "material fact", namely the findings of a violation of Article 2 in its substantive aspect (paragraph 147) and of Article 13 (procedural aspect) (paragraph 174) are merely different facets of one and the same "object", corresponding in criminal law to the concept of "*concours idéal d'infractions*" (a single act fulfilling the conditions required to constitute various offences).

4. From that negative fact (the lack of thorough investigations), the Court draws a positive conclusion, as though the lack of an effective investigation had killed the individual in question, which defies all logic. There is no causal link between the "cause" and the "effect".

5. What is more, the Court did not find a violation of Article 3 (point 4 of the operative provisions), for want of convincing evidence! Its observations on the subject are as follows:

> "The Court observes that the Government have not provided a plausible explanation for the death of Mahmut Tanlı in custody after he had entered custody in apparent good health (see paragraph 146 above). Unlike the case of Salman v. Turkey (cited above, at paragraph 115) however, there are no records of marks or injuries on the body which are consistent with the application of torture techniques. While the applicant and other witnesses referred to seeing bruising on the body, there is no medical substantiation that this was attributable to traumatic injury rather than *post-mortem* changes in the body. The forensic expert instructed by the applicant stated himself that he could draw no conclusions from the photographs of the body taken prior to the burial. There is therefore no evidence, apart from the unexplained cause of death, to support a finding that acts of torture were carried out." (paragraph 158)

It adds:

> "In these circumstances, ..., the Court does not find it appropriate to draw the inferences proposed by the applicant as to whether torture or ill-treatment occurred. To the extent that it is alleged that the failings in the *post mortem* examination prevented any concrete evidence of ill-treatment coming to light and thereby the identification and punishment of those responsible, the Court considers that the complaint falls to be considered in this case under Article 13 of the Convention (see *İlhan v. Turkey*, [GC], no. 22277/93, ECHR 2000-VII, §§ 89-93). As regards the applicant's submissions as to the effect which events had on himself, the Court has no doubt of the profound suffering caused by the death of his son. It finds no basis however for finding a violation of Article 3 in this context, the Court's case-law relied on by the applicant referring to the specific phenomenon of disappearances." (paragraph 159)

Is it not contradictory to find, on the one hand, that it has not been established that Mahmut Tanlı was ill-treated and died as a result of ill-treatment and to assert, on the other hand, that the Government are responsible for the death and that there has thus been a violation of Article 2 in its substantive aspect? Moreover, the majority acknowledge implicitly, in paragraph 159 of the present judgment (ibid.), that the only issue raised by this case under the Convention relates to the procedural aspect of Article 2 and explains that the issue falls to be considered under Article 13.

6. Consequently, no separate issue arises in this case under the substantive aspect of Article 2.

I therefore consider that the lack of an effective investigation did not amount to a violation of Article 2 in its substantive aspect – even if there has been a violation of the procedural aspect of that provision.

7. With regard to a violation of Article 13, I consider that where the Court finds a violation of Article 2 in its procedural aspect, as the majority did in the instant case, no separate issue arises under Article 13, since the finding of a violation of Article 2 takes account of the fact that there has been neither an effective inquiry nor a satisfactory procedure after the incident.

For more details on that subject, I refer to my dissenting opinion in the Ergi v. Turkey judgment of 28 July 1998 (*Reports of Judgments and Decisions* 1998-IV), the Akkoç v. Turkey judgment of 10 October 2000, and the Taş v. Turkey judgment of 14 October 2000.

8. As regards an award of compensation to the applicant for pecuniary damage, there is no evidence to enable the Court to assess the type of damage sustained, and the Court's calculation on the basis of actuarial tables is purely speculative.

Since, moreover, I consider that only the procedural aspect of Article 2 has been infringed, I can only state that I am opposed to paying the heirs of the applicant's son compensation for pecuniary damage.