

Caso de Aytekin contra Turquía, de 23/09/1998 [ENG]

Judgment (Preliminary obj Preliminary objection

EUROPEAN COURT OF HUMAN RIGHTS

ARRÊT/JUDGMENT

STRASBOURG

23 septembre/September 1998

Cet arrêt peut subir des retouches de forme avant la parution de sa version définitive dans le *Recueil des arrêts et décisions* 1998, édité par Carl Heymanns Verlag KG (Luxemburger Straße 449, D-50939 Cologne) qui se charge aussi de le diffuser, en collaboration, pour certains pays, avec les agents de vente dont la liste figure au verso.

The present judgment is subject to editorial revision before its reproduction in final form in *Reports of Judgments and Decisions* 1998. These reports are obtainable from the publisher Carl Heymanns Verlag KG (Luxemburger Straße 449, D-50939 Köln), who will also arrange for their distribution in association with the agents for certain countries as listed overleaf.

Liste des agents de vente/List of Agents

Belgique/Belgium: Etablissements Emile Bruylant (rue de la Régence 67, B-1000 Bruxelles)

Luxembourg: Librairie Promoculture (14, rue Duchscher (place de Paris), B.P. 1142, L-1011 Luxembourg-Gare)

Pays-Bas/The Netherlands: B.V. Juridische Boekhandel & Antiquariaat A. Jongbloed & Zoon (Noordeinde 39, NL-2514 GC

La Haye/'s-Gravenhage)

SUMMARY¹

Judgment delivered by a Chamber

Turkey – allegation of unlawful killing of applicant’s husband by a soldier at a checkpoint and of authorities’ failure to conduct an effective investigation

Government’s preliminary objection (non-exhaustion of domestic remedies)

Government not estopped from raising objection before Court – although authorities had provided Commission at admissibility stage with few details on progress of domestic proceedings against soldier accused of killing her husband, they may nevertheless be reasonably considered to have pleaded substance of objection at that juncture – in addition, applicant never informed Commission at any stage of her active participation in criminal proceedings against accused soldier, including her decision to intervene in proceedings as civil party – this factor must weigh against acceptance of her plea.

Reiteration of Court’s case-law on notion of effective remedy.

Investigation led to trial of accused soldier on charge of intentional homicide committed in excess of duty – in fact, accused soldier standing trial in month following her application to the Commission – soldier later convicted by an ordinary court of unintentional homicide – applicant’s appeal against judgment pending – prosecutor has also appealed against lightness of sentence imposed on soldier – furthermore, in view of soldier’s conviction applicant must be considered to have reasonable prospects of successfully suing him or his superiors in a tort action – no explanation given as to why applicant did not lodge either a compensation claim against accused soldier when she declared herself a civil party to criminal proceedings or sue authorities in an administrative-law action for damages – in view of these circumstances, it cannot be maintained that authorities remained totally passive with respect to killing of applicant’s husband or that investigation so ineffective as to make recourse to domestic remedies meaningless.

Having regard to combination of criminal, civil and administrative law remedies and in particular prospects which criminal-law proceedings offered for obtaining redress in respect of husband’s death, Court considers that applicant’s situation different from those of other applicants who have successfully contended in cases against same respondent State that they were dispensed from requirement to exhaust domestic remedies.

Conclusion: objection upheld (unanimously).

COURT'S CASE-LAW REFERRED TO

16.9.1996, Akdivar and Others v. Turkey; 18.12.1996, Aksoy v. Turkey; 28.11.1997, Menten and Others v. Turkey; 19.2.1998, Kaya v. Turkey; 25.5.1998, Kurt v. Turkey; 28.7.1998, Ergi v. Turkey

In the case of Aytakin v. Turkey¹

The European Court of Human Rights, sitting, in accordance with Article 43 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) and the relevant provisions of Rules of Court A², as a Chamber composed of the following judges:

Mr R. Bernhardt, *President*,

Mr Thór Vilhjálmsson,

Mr F. Gölcüklü,

Mr F. Matscher,

Mr G. Mifsud Bonnici,

Mr B. Repik,

Mr U. Lohmus,

Mr E. Levits,

Mr M. Voicu,

and also of Mr H. Petzold, *Registrar*, and Mr P.J. Mahoney, *Deputy Registrar*,

Having deliberated in private on 30 June and 25 August 1998,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 29 October 1997, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in an application (no. 22880/93) against the Republic of Turkey lodged with the Commission under Article 25 by a Turkish national, Mrs Gülten Aytekin, on 22 October 1993.

The Commission's request referred to Articles 44 and 48 and to the declaration whereby Turkey recognised the compulsory jurisdiction of the Court (Article 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 2 and 13 of the Convention.

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

3. The Chamber to be constituted included *ex officio* Mr F. Gölcüklü, the elected judge of Turkish nationality (Article 43 of the Convention), and Mr R. Bernhardt, the then Vice-President of the Court (Rule 21 § 4 (b)). On 28 November 1997, in the presence of the Registrar, the then President of the Court, Mr R. Ryssdal, drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr F. Matscher, Mr M.A. Lopes

Rocha, Mr B. Repik, Mr U. Lohmus, Mr E. Levits and Mr M. Voicu (Article 43 *in fine* of the Convention and Rule 21 § 5). Subsequently Mr G. Mifsud Bonnici, substitute judge, replaced Mr Lopes Rocha, who was unable to take part in the further consideration of the case (Rules 22 § 1 and 24 § 1).

4. As President of the Chamber (Rule 21 § 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the Turkish Government (“the Government”), the applicant’s lawyers and the Delegate of the Commission on the organisation of the proceedings (Rules 37 § 1 and 38). Pursuant to the order made in consequence, the Registrar received the Government’s and the applicant’s memorials on 24 and 28 April 1998 respectively. Further details of the applicant’s claims for just satisfaction were received at the registry on 2 June 1998. The Government’s observations on these claims were received at the registry on 11 June 1998.

On 7 August 1998, having consulted the Agent of the Government and the Delegate of the Commission, the President acceded to the applicant’s request for legal aid (Rule 4 of the Addendum to Rules of Court A).

5. In accordance with the President’s decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 29 June 1998. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*

Mr B. Cankorel, Ambassador, *Agent*,

Mrs D. Akçay, *Co-Agent*,

Mr E. Genel,

Mr K. Alatas,

Ms M. Gülsen,

Ms A. Günyakti, *Advisers*;

(b) *for the Commission*

Mr H. Danelius, *Delegate*;

(c) *for the applicant*

Ms A. Reidy, Barrister-at-Law,

Mr K. Boyle, Barrister-at-Law, *Counsel*.

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

AS TO THE FACTS

I. the CIRCUMSTANCES OF THE CASE

A. The applicant

6. The applicant, Mrs Gülten Aytekin, is a Turkish citizen, born in 1969 and currently living in Istanbul. She is the widow of Mr Ali Riza Aytekin, who she alleges was unlawfully killed by a soldier on 24 April 1993 at a checkpoint outside a gendarmerie headquarters on the road between Diyarbakir and Sason in south-east Turkey. Her deceased husband had been a building contractor and a partner in the Aytekinler Construction and Trading and Industry Company Ltd, which had its office in Diyarbakir. He was 27 years old at the time of his death.

B. The facts in dispute: the events of 24 April 1993

7. The circumstances in which the applicant's husband was killed on 24 April 1993 are disputed.

1. *The facts as presented by the applicant*

8. On 24 April 1993, Ali Riza Aytekin, his brother, Feyzullah Aytekin (a building contractor), and his cousins, Salih Aytekin and Resul Aytekin (both building workers), were travelling in a private car to check the construction of two bridges in the Sason district of the province of Batman, south-east Turkey. Ali Riza Aytekin's company had been awarded a contract by the State authorities for the construction of the bridges. Ali Riza Aytekin was at the wheel of the car.

9. At about 1.30 p.m. just as the vehicle had passed the Yanikkaya gendarmerie headquarters near Kozluk, a soldier on duty outside shouted to the vehicle to pull over and stop. Ali Riza Aytekin, who was driving

relatively slowly due to the presence of speed ramps, pulled over or began to pull over to the right-hand side of the road in response to the soldier's order.

10. Just as he stopped, the soldier, Private Tuncay Deniz, shot in the direction of the vehicle. The bullet went through the rear window of the vehicle, entered the back of Ali Riza Aytekin's head, came out through his forehead and exited the car through the windscreen. Ali Riza Aytekin was killed instantly.

11. When Feyzullah Aytekin, Salih Aytekin and Resul Aytekin got out of the car, Private Tuncay Deniz raised his rifle as if to fire at them. However, when other soldiers came out of the gendarmerie headquarters and surrounded the car, Private Tuncay Deniz changed his mind and approached the car.

12. All the persons in the car were unarmed and there was nothing in the vehicle except their personal belongings, the tools of their trade, a map and a calculator.

13. Following the conduct of a post-mortem examination of the body and the issuance of a burial certificate Feyzullah Aytekin, Salih Aytekin and Resul Aytekin had to procure a car from local villagers in order to transport the deceased's body back to Diyarbakir. The applicant was living in Istanbul at the time of her husband's death.

14. The applicant maintains that the above description of the circumstances surrounding the killing was confirmed by, *inter alia*, Feyzullah Aytekin, Salih Aytekin and Resul Aytekin in the statements which they each gave to the public prosecutor shortly after the incident (see paragraph 21 below). She also relies on the evidence of Mehmet Bayram and his son Ramazan who were waiting to be picked up by her husband at a café about 50–60 metres down the road from the gendarmerie headquarters and who both gave statements to the Batman Criminal Court (see paragraph 32 below).

2. The facts as presented by the Government

15. The Government, in their memorial, rely on the facts as outlined in the judgment of the Batman Criminal Court which convicted Private Tuncay Deniz of manslaughter on 2 October 1997 (see paragraphs 32–35 below).

16. Private Tuncay Deniz, a conscript who was 21 years old at the time, was performing his military service at the Yanikkaya gendarmerie headquarters in Kozluk in Batman province, south-east Turkey. He was on guard duty on 24 April 1993. Part of his functions was to check passing vehicles.

17. At about 1.30 p.m. a car driven by Ali Riza Aytekin and containing three passengers approached the checkpoint. Private Tuncay Deniz warned the driver of the car to stop, first by blowing his whistle and then by firing a shot in the air. Despite these warnings and despite the fact that a "Stop – Gendarmerie" warning sign had been placed 65 metres before the checkpoint, the car failed to stop. When it had travelled more than 50 metres past the checkpoint, Private Tuncay Deniz fired a shot towards the car. This shot, fired from behind, caused the driver's death. The incident was immediately reported to the prosecuting authorities by the commanding officer of Kozluk gendarmerie headquarters.

C. The investigation and the proceedings before the domestic authorities

1. The investigation

18. It is not disputed that shortly following the shooting the public prosecutor of Kozluk, Ümit Ceyhan, arrived at the scene with a doctor, Mehmet Kökcü, to conduct a post-mortem examination. The autopsy report confirmed the entry and exit points of the bullet and that the brain of Ali Riza Aytekin had been shattered by the impact of the bullet. An incident report was prepared, a sketch made of the scene and a burial certificate issued.

19. On 24 April 1993 Major Cengiz Eryilmaz, the Kozluk district commander, took statements from Private Tuncay Deniz as well as from Sergeant Bekir Çakir who was also on duty on that day.

20. The Kozluk public prosecutor, who arrived at the scene shortly after the fatal shooting, immediately commenced an investigation into the incident (file no. 1993/112). At 4.50 p.m. on 24 April 1993 he took written statements from Feyzullah Aytekin, Salih Aytekin and Resul Aytekin.

21. The statements provided by Feyzullah Aytekin, Salih Aytekin and Resul Aytekin reflect the applicant's account of the incident. When Feyzullah Aytekin was asked by the public prosecutor whether he wished to file a complaint against anyone, he replied that he wished to file a complaint against those who shot his brother.

22. On 26 April 1993 the public prosecutor took statements from Private Tuncay Deniz and Sergeant Bekir Çakir, both of whom had been interviewed by Major Cengiz Eryilmaz on the day of the incident, as well as from Sergeant Murat Hekim who drew up the sketch of the incident. In his statement Private Tuncay Deniz affirmed that it was never his intention to kill the driver, only to stop the car by firing one shot at the tyres. According to Private Tuncay Deniz, the car had been driven towards him at speed forcing him to jump aside. The driver continued beyond the checkpoint failing to heed his warning whistle and shot.

2. The decision of non-jurisdiction and the preliminary investigation by the military authorities

23. On 27 April 1993 the public prosecutor decided that he lacked jurisdiction in the matter and that the case, since it involved a soldier, should be dealt with under the Prosecution Against Public Officials (Official Conduct) Act. The file was subsequently transferred to the Kozluk district governor.

24. On 29 April 1993 the Kozluk district governor referred the file to the Batman Administrative Council which in turn appointed Major Osman Gökçen to investigate the incident. Statements were taken on 11 May 1993 from Private Tuncay Deniz and from Sergeants Bekir Çakir, Murat Hekim and Expert Sergeant Kutlu Alkurt, the latter also having been on duty on the day of the incident. Major Osman Gökçen also had regard to the statements which Feyzullah Aytekin, Salih Aytekin and Resul Aytekin gave to the public prosecutor.

25. Major Osman Gökçen drafted his summary report on 11 May 1993. In his report, he concluded that:

"On 24 April 1993 at 1.30 p.m. when the incident took place, the accused soldier, Tuncay Deniz, was posted at the road checkpoint by his commander. This area has a critical importance in terms of security. The terrorist organisation, PKK, is known to be transferring weapons and other goods along this route. It is also a route for other sorts of smuggling. The soldier on duty saw the car travelling from Batman in the direction of Sason and waved to it to stop. Instead, the car increased its speed, came towards the soldier and passed him. The soldier tried to stop the car by whistling and firing a warning shot. The car failed to stop and as a last resort the soldier fired once at the tyres of the car. Due to reasons beyond the control of Tuncay Deniz and to the fact that the car was moving, the bullet entered through the rear window and caused the death of the driver, Ali Riza Aytekin."

3. The decision to prosecute Private Tuncay Deniz

26. On receipt of the report, the Kozluk public prosecutor, on 8 June 1993, contacted the military prosecutor in respect of competence to proceed further with the case. In the opinion of the public prosecutor, the investigation should be completed by the military prosecutor in accordance with section 87(4) of Law no. 211 which regulates investigations against members of the armed forces. The military prosecutor in turn sent Private Tuncay Deniz for trial before the Diyarbakir Military Tribunal on a charge of intentional homicide committed in excess of his duties contrary to Article 448 taken together with Article 50 of the Criminal Code.

27. On 6 and 26 May 1993 the applicant gave general powers of attorney to Mr Sedat Aslantas and Mr Arif Altinkalem, both of the Diyarbakir Bar. On 8 June 1993 Mr Aslantas wrote to the Kozluk public prosecutor submitting that the applicant's husband's death was the result of an act of intentional homicide and that the necessary steps should be taken to prosecute the soldier for murder and the gendarmerie commander for negligence.

4. The proceedings before the Diyarbakir Military Tribunal

28. On 27 September 1993 Private Tuncay Deniz was put on trial before the Seventh Military Tribunal in Diyarbakir, charged with intentional homicide committed in excess of his duties. Statements obtained pursuant to letters rogatory were submitted to the Diyarbakir Military Tribunal by Sergeants Murat Hekim and Bekir Çakir and Expert Sergeant Kutlu Alkurt. Feyzullah Aytekin testified before the Diyarbakir Military Tribunal on 22 March 1994, repeating the version of the incident which he had given to the public prosecutor on the day of the incident (see paragraph 21 above).

29. On 10 May 1994 the tribunal decided that as the crime was not one against another soldier or committed in a military location it had no jurisdiction to hear the case. The tribunal transferred the file accordingly to the Batman Criminal Court so that the case could be tried under Articles 448 and 50 of the Criminal Code.

30. The applicant applied to the tribunal on 10 May 1994 to join the proceedings as a civil party in accordance with the provisions of Article 365 of the Code of Criminal Procedure. She averred that her spouse had been intentionally murdered by Private Tuncay Deniz and for that reason wished to participate in the hearings as an intervening party. On the same date she also requested the tribunal to take statements from Mehmet Bayram and Ramazan Bayram, who had been waiting to be picked up by her deceased husband on the day of the incident (see paragraph 14 above). Since the tribunal had declared the same day that it lacked competence to hear the case against Private Tuncay Deniz it was unable to take a decision on the applicant's requests. Notwithstanding, it added the applicant's requests to the file.

31. The case file was transferred to the Batman Criminal Court. In transferring the file, the Diyarbakir Military Tribunal declared:

"After the examination of the files, it is clear that the accused, who was the soldier on duty for road inspection and control at Yanikkaya gendarmerie headquarters, first warned the private car to stop (licence plate number: 34 Z 9189) then whistled to warn it; immediately after that he fired a warning shot in the air, then fired once again towards the car without aiming at any specific target. The single bullet fired from his rifle hit the civilian, Ali Riza Aytekin, in the head and caused his death."

5. The proceedings before the Batman Criminal Court

32. When it was seized of the case (file no. 1994/283), the Batman Criminal Court organised on 13 July 1994 the future procedure for dealing with the case and to that end drew up a list of witnesses and documents. The court ordered that the evidence of the witnesses be taken by other domestic courts by letters rogatory and their statements forwarded to it for inclusion in the case file. In accordance with the procedure so fixed, the Batman Criminal Court obtained the statements of a number of witnesses, including Resul Aytekin, Mehmet Bayram and Ramazan Bayram. A statement was also obtained from Private Tuncay Deniz in which he claimed that he was not guilty of the charges against him as well as from Sergeants Murat Hekim and Bekir Çakir and Expert Sergeant Kutlu Alkurt.

33. On 20 September 1994 the court accepted the submissions of the prosecuting counsel that the applicant be acknowledged as an intervening party in the proceedings on account of the possibility that she may have suffered as a result of the offence committed by Private Tuncay Deniz. The court had regard in this respect to the petition which the applicant submitted to the Diyarbakir Military Tribunal on 10 May 1994 (see paragraph 30 above). The court acknowledged at the same time that she would be represented in her capacity of intervening party by the lawyers to whom she had given a power of attorney (see paragraph 27 above). A statement was taken from the applicant by letters rogatory on 20 October 1994 and forwarded to the Batman Criminal Court. In her statement she informed the court that she had learned of the circumstances of her husband's death from Feyzullah Aytekin and relied on his account of the circumstances in which her husband was killed. She also declared that she filed a complaint against the defendant.

34. On 19 January 1995 the Forensic Department of the Ministry of Justice submitted to the Batman Criminal Court at the latter's request a ballistics report on the two spent bullets found at the scene of the incident. According to the report, the bullets had been fired from Private Tuncay Deniz's gun.

35. On 2 October 1997 Private Tuncay Deniz was convicted under Article 452 § 1 of the Criminal Code (see paragraph 51 below) which governs causing death unintentionally, in conjunction with Article 50 thereof (using force in excess of that required by lawful self-defence) and was sentenced to three years and four months' imprisonment. The court also ordered the defendant to pay the legal fees of the applicant as from the moment she became an intervening party in the proceedings. In its judgment the Batman Criminal Court considered that:

"According to the defendant's evidence and the preliminary statement of his friend Bekir, who was at the gendarmerie headquarters, the defendant signalled the approaching vehicle to stop; when the vehicle failed to stop he gave a warning with his whistle and fired one round in the air. The vehicle still not having stopped he fired towards it without taking any particular aim when it was 50 metres away. By doing so he caused the death of Ali Riza Aytekin. According to the passenger witnesses' account they were not warned to stop in any way. However, if the driver was not warned to stop, it would have been illogical for him to have moved to the right. Under these circumstances the driver was warned one way or another, even after he had passed. Nevertheless witness Feyzullah Aytekin declared in his preliminary statement, and there is no reason for this statement not to be taken seriously, that he heard the sound of a whistle. The witness Ramazan Bayram's account that the defendant fired from a distance of 10 to 15 metres

without seeing anything at all was not confirmed by his father who was sitting in the same location.

The primary issue to be resolved is whether the defendant acted with the intention to kill in this incident...

As it may be concluded from the content of the file, the defendant did not know the victim and the other passengers. The incident sketch in the file indicates that the firing distance was 40–50 metres. In addition to the driver, there were two persons seated in the back and one other passenger in the front. Under these circumstances and at that distance it would not have been possible to identify the driver through the persons sitting in the back seat and take aim. Despite there being nearly twenty bullets in his rifle, the defendant fired one single shot and despite that he still did not know whether this caused death. If his intention was to kill, he could have continued firing. Nevertheless there is no reason to ground a finding of murder. Having considered all these elements it is concluded that the defendant did not act with the intention to kill. Therefore, in due fairness, it is more appropriate to conclude that the intention was a wrongful assault.

Although the defendant was on duty he should have assumed that the individuals in the vehicle did not hear him and he could have fired more than one shot in the air; and having considered the fact that a serious situation such as an escape or apprehending someone in the act was not present and since an assumption must be made that he knew the specification of his weapon, he should have been more careful and should have fired his weapon in a way which would not have harmed the persons in the vehicle. As a result of failing to comply with these considerations he exceeded the limits of his duty. However, the reduction of his sentence based on this factor is to be minimal as a result of the reasons, importance and seriousness of the offence, and the gravity of the harm caused by the offence..."

6. The appeal against the judgment of the Batman Criminal Court

36. The applicant, through a domestic lawyer, Mr Oktay Bagatir, appealed to the Court of Cassation on 13 October 1997 against the judgment of the Batman Criminal Court on the grounds that the accused should have been convicted of intentional homicide.

37. According to the information provided by the Government at the hearing, the victim's brother, Mr Feyzullah Aytekin, requested that as one of the intervening parties in the domestic proceedings he be permitted to exercise separately his right to appeal against the judgment. The Court of Cassation acceded to this request on 22 April 1998. Furthermore, the Batman public prosecutor appealed to the Court of Cassation on 14 October 1997 against the judgment of the Batman Criminal Court on the ground that Private Tuncay Deniz should have been convicted of the more serious offence of wilful homicide as defined under Article 448 of the Criminal Code.

38. The appeal is currently pending before the Court of Cassation.

D. The Commission's evaluation of the evidence

1. The approach to the evaluation of the evidence

39. Although the Government submitted to the Commission on 14 October 1996 details of the investigation into the death of the applicant's husband as well as of the trial of the accused soldier before the Diyarbakir Military Tribunal and the state of the proceedings against him before the Batman Criminal Court, the Commission did not in fact have the benefit of the full file when assessing the evidence surrounding the killing since the Government's submissions had been misplaced as a result of a clerical error.

40. As a consequence of this error, the Commission based its assessment of the case on the following official documents only: the incident report prepared by Major Cengiz Eryilmaz; the sketch map of the incident drawn by hand by Sergeant Murat Hekim; the post-mortem and autopsy report prepared by the medical examiner; statements taken by Major Cengiz Eryilmaz on 24 April 1993 from Private Tuncay Deniz and Sergeant Bekir Çakir; statements taken by Major Osman Gökçen on 11 May 1993 from Private Tuncay Deniz, Sergeant Bekir Çakir, Expert Sergeant Kutlu Alkurt and Sergeant Murat Hekim (see paragraphs 18, 19 and 24 above).

The Commission also had regard to the following: four statements of Feyzullah Aytakin, two of which had been taken by the Diyarbakir Human Rights Association; a statement of the applicant taken by the Diyarbakir Human Rights Association on 30 April 1993; an expert statement dated 7 February 1995 of Dr Christopher Milroy, a consultant pathologist for the British Home Office.

2. The findings concerning the death of the applicant's husband

41. The Commission accepted firstly that there were speed ramps in place outside the gendarmerie headquarters which would have made it difficult and unlikely that the applicant's husband could have driven the car at speed through the checkpoint.

42. Secondly, no explanation was offered as to why the deceased would have driven recklessly through the checkpoint causing the soldier to jump to safety. For these reasons, the Commission found the soldier's account of being at risk to be unconvincing.

43. Thirdly, while the Commission was unable to determine on the evidence whether the car was stationary or was still moving when the gendarme opened fire, it found it established that Private Tuncay

Deniz signalled the car to stop. However, in its view there was insufficient material to conclude that he had fired a warning shot in the air as alleged since no ballistics report had been submitted.

44. Fourthly, the Commission considered that there must be a very strong inference either that Private Tuncay Deniz aimed into the back of the car at the driver or fired so quickly as to render his aim inaccurate.

45. In view of the above findings the Commission concluded that the car driven by the applicant's husband was driven slowly up to and through the checkpoint, that the soldier signalled it to stop and that very shortly afterwards he opened fire intending to stop the car, either aiming at the driver or failing to take proper aim.

ii. relevant domestic law

46. In the absence of detailed submissions on domestic law and practice, the Court, like the Commission, has had regard to the relevant provisions and submissions made in the context of previous cases involving the respondent Government and the applicant's representatives.

A. Administrative liability

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

"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."

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

49. The principle of administrative liability is reflected in the additional section 1 of Law no. 2935 of 25 October 1983 on the state of emergency, which provides:

"... actions for compensation in relation to the exercise of powers conferred by this Law are to be brought against the authorities before the administrative courts."

B. Criminal responsibility

50. The Turkish Criminal Code contains provisions dealing with unintentional homicide (Articles 452, 459), inadvertent and negligent homicide (Article 455), intentional homicide (Article 448) and murder (Article 450). Articles 49 and 50 of the Criminal Code address the commission of offences carried out *inter alia* in excess of a duty.

51. According to Article 448 any person who intentionally kills another shall be sentenced to a term of imprisonment of twenty-four to thirty years. According to Article 450, the death penalty may be imposed in cases of, *inter alia*, premeditated murder. Under Article 452, where death results from an act of violence but it was not the intention of the offender to kill his victim, a sentence of eight years' imprisonment shall be imposed on the offender. Where death results from an act of carelessness, negligence or inexperience on the part of the offender in breach of a law, orders or regulations, Article 455 stipulates that the guilty party shall be sentenced to a term of imprisonment of two to five years and to a substantial fine.

52. According to Article 49 of the Code, a person shall not be punished for committing an act which was carried out in pursuance of a law or on the orders of a competent authority or where the person was obliged to commit the act in immediate necessity to repel an unjustified assault against his own or another's person or chastity or in order to save his life or the life of another from an immediate and grave personal

danger for which he was not responsible and the commission of the act was the only way in which the danger could be avoided. Article 50 qualifies the provisions of Article 49 in stipulating that where the person in committing the act exceeds the limits of a duty prescribed by law or by the competent authority or exceeds the exigencies of the situation, that person shall be sentenced to a minimum term of imprisonment of eight years if the punishment in respect of the act is the death penalty, and to a minimum term of imprisonment of between six and fifteen years if the punishment in respect of the act is life imprisonment.

53. Pursuant to section 23(1) of Law no. 2935 on the state of emergency, when a state of emergency has been proclaimed the security forces, special forces on duty and members of the armed forces when carrying out their duties are empowered to use their weapons in situations where recourse to them is considered justified under law. According to section 23(2), when a state of emergency has been declared under section 3(b) of the Law, members of the security forces when on duty may without hesitation open fire directly on a person who fails to heed their orders to surrender, returns fire or when they are obliged to act in self-defence.

54. For all such offences complaints may be lodged, pursuant to Articles 151 and 153 of the Code of Criminal Procedure, with the public prosecutor or the local administrative authorities. The public prosecutor and the police have a duty to investigate crimes reported to them, the former deciding whether a prosecution should be initiated, pursuant to Article 148 of the Code of Criminal Procedure. A complainant may appeal against the decision of the public prosecutor not to institute criminal proceedings (Article 165).

55. If the suspected authors of the impugned acts are military personnel, they may also be prosecuted for causing extensive damage, endangering human lives or damaging property, if they have not followed orders in conformity with Articles 86 and 87 of the Military Code. Proceedings in these circumstances may be initiated by the persons concerned (non-military) before the competent authority under the Code of Criminal Procedure, or before the suspected person's hierarchical superior (sections 93 and 95 of Law no. 353 on the constitution and the procedure of military courts).

56. If the alleged author of a crime is a State official or civil servant, which includes members of the security forces, permission to prosecute must be obtained from local administrative councils (the Executive Committee of the Provincial Assembly) which carry out a preliminary investigation (Article 4 § 1 of Decree no. 285). The local council decisions may be appealed to the Supreme Administrative Court; a refusal to prosecute is subject to an automatic appeal of this kind.

C. Provisions on compensation

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

58. Proceedings against the authorities may be brought before the administrative courts, whose procedure is written. A plaintiff has one year in which to lodge a complaint against the authorities in respect of an impugned act and thereafter 120 days in which to bring the complaint before the administrative courts.

59. The Criminal Code also makes provision to allow a person to constitute himself or herself a civil party in respect of pecuniary loss resulting from the commission of an offence. According to Article 365 of the Code of Criminal Procedure, any person injured by a crime may, at any time during an investigation, by means of a complaint declare himself or herself a civil party and request compensation for damage which is the direct result of the accused's criminal act. This remedy is only available to direct victims and cannot be exercised on behalf of a deceased victim. The remedy is not applicable if the accused is acquitted of the offence. The acquisition of civil party status is dependent on the fact that that party has not sought compensation from the civil courts in respect of the damage resulting from the offence.

D. Limitations on the constitutional safeguards

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

1. Constitutional provisions

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

62. Provisional Article 15 of the Constitution provides that there can be no allegation of unconstitutionality in respect of measures taken under laws or decrees having the force of law and enacted between 12 September 1980 and 25 October 1983. That includes Law no. 2935 on the state of emergency of 25 October 1983, under which decrees have been issued which are immune from judicial challenge.

2. Emergency provisions

63. Extensive powers have been granted to the regional governor of the state of emergency by such decrees, especially Decree no. 285, as amended by Decrees nos. 424 and 425, and Decree no. 430.

64. Decree no. 285 modifies the application of Law no. 3713 of 1981 on the prevention of terrorism in those areas which are subject to the state of emergency, with the effect that the decision to prosecute members of the security forces is removed from the public prosecutor and conferred on local administrative councils.

PROCEEDINGS BEFORE THE COMMISSION

65. Mrs Aytakin applied to the Commission on 22 October 1993. She relied on Articles 2 and 13 of the Convention, complaining that her husband had been unlawfully killed by a soldier of the respondent State whilst driving through a road checkpoint and that she had no effective remedy in respect of his death.

66. The Commission declared the application (no. 22880/93) admissible on 15 May 1995. In its report of 18 September 1997 (Article 31), it expressed the opinion that there had been a violation of Article 2 of the Convention (twenty-nine votes to one) and that no separate issue arose under Article 13 of the Convention (twenty-nine votes to one). The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment¹.

FINAL SUBMISSIONS TO THE COURT

67. The applicant requested the Court to find that the facts of the case disclosed violations of Articles 2 and 13 of the Convention and to award her just satisfaction under Article 50.

The Government contended as their primary submission that the applicant had not exhausted domestic remedies and for that reason her application should have been declared inadmissible. In the alternative they maintained that there had been no breach of the Articles invoked by the applicant.

AS TO THE LAW

The Government's preliminary objection

A. Arguments of those appearing before the Court

1. The Government

68. The Government argued that the Commission should have declared the applicant's complaints inadmissible on account of her failure to exhaust domestic remedies, as required by Article 26 of the Convention which provides:

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

They stressed in this respect that an official investigation into the killing of her husband had been opened on the very day the incident occurred and that that investigation had culminated in the trial and subsequent conviction of Private Tuncay Deniz by the Batman Criminal Court on 2 October 1997. Furthermore, even on the date of the hearing the applicant was still availing herself of domestic remedies to secure redress in respect of her husband's death since she had lodged an appeal against the judgment of the Batman Criminal Court and that appeal was now pending before the Court of Cassation (see paragraph 36 above).

69. The Government contended that the Commission declared the applicant's complaints admissible on 15 May 1995 in disregard of the ongoing judicial investigation, which had been brought to its attention in the Government's observations submitted on 5 December 1994. In addition, the Commission had regrettably misplaced their detailed description of the investigation and judicial proceedings which their authorities had forwarded on 14 October 1996 (see paragraph 39 above). This resulted in the adoption by the Commission of its Article 31 report on 18 September 1997 finding a violation of Article 2 of the Convention in ignorance of the fact that Private Tuncay Deniz was

standing trial at the time on a charge of intentional homicide committed in excess of his duties and was about to be convicted and sentenced.

70. In their further submissions, the Government also highlighted the fact that the applicant when applying to join the criminal proceedings against the accused could have claimed pecuniary and non-pecuniary damages in application of the provisions of Article 365 of the Code of Criminal Procedure (see paragraphs 30, 33 and 59 above). However, she failed to do so. They also maintained that she did not attempt to institute administrative-law proceedings on the basis of the principle of the strict liability of the authorities (see paragraphs 47–49 above). As regards the latter remedy, she had had one year from the date of the death of her husband in which to exercise it and 120 days thereafter in which to appeal to the administrative court against any decision taken on her claim (see paragraph 58 above).

71. For the above reasons the Government requested the Court to uphold their objection to the admissibility of the applicant's complaints.

2. The applicant

72. The applicant submitted before the Court that the Government must be considered estopped from relying on the proceedings before the Batman Criminal Court since they had never informed the Commission that such proceedings had been instituted prior to her complaints being declared admissible. They had simply confined themselves to stating that the military authorities were continuing with their investigation into her husband's killing. Furthermore, the Government had an additional opportunity to inform the Commission of the state of the proceedings when they requested the Commission on 2 October 1995 to declare the case inadmissible in application of Article 29 of the Convention. The authorities in fact only supplied complete information to the Commission on the criminal case against Private Tuncay Deniz on 14 October 1996, ten months after the deadline fixed for submission of pleadings on the merits and long after the commencement of the trial before the Batman Criminal Court.

73. In any event, the investigation conducted into her husband's death and the subsequent trial and conviction of Private Tuncay Deniz could not be considered an effective remedy for the purposes of Article 26 of the Convention. She stressed that it had taken four and a half years to secure a conviction even though it was known from the day of the incident that Private Tuncay Deniz was responsible for firing the fatal shot. She contended that he should properly have been convicted of murder but this option was excluded since the pre-trial investigation was not only seriously deficient in many respects, it was also biased since the investigating authorities favoured the account given by Private Tuncay Deniz and completely disregarded the merits of the testimony of the three passengers who were in the car with her husband when he was shot dead.

74. In the applicant's opinion, the Government's preliminary objection, if not rejected on grounds of estoppel, should be joined to the merits of her complaints under Articles 2 and 13 of the Convention.

3. The Commission

75. The Delegate of the Commission explained to the Court at the hearing that the Commission declared the applicant's complaints admissible on 15 May 1995 having received only summary observations from the Government contending that she had failed to exhaust domestic remedies. The Commission did not find that the Government's

arguments were sufficient to reject the application on that account, being limited to the fact that the Kozluk public prosecutor had initiated an investigation into the shooting incident but had had to refer the case file to the military authorities on 8 June 1993 for lack of jurisdiction and that it was the preliminary opinion of the latter authorities that Private Tuncay Deniz had not been culpable of any deliberate or unruly action. No further information was submitted about any measures having been subsequently taken against the soldier.

In the Commission's view, given that more than two years had elapsed since the killing of the applicant's husband and that all relevant evidence appeared to be easily accessible to the investigating authorities, the inquiry could not be considered to constitute an effective remedy for the purposes of Article 26 of the Convention.

76. In the Delegate's opinion, the subsequent conviction of Private Tuncay Deniz on 2 October 1997 by the Batman Criminal Court did not lead to the conclusion that the applicant had obtained sufficient redress at the domestic level in respect of her complaints. As to whether the applicant could at some stage have claimed compensation from the authorities, the Delegate also observed that the Commission has with reason taken the view that where an applicant is the victim of a crime, he or she is entitled to await the outcome of criminal proceedings and does not have to bring parallel administrative or civil proceedings in order to comply with the Convention requirement to exhaust domestic remedies. Accordingly the applicant's failure to meet the time-limit for instituting administrative-law proceedings had to be viewed in this context. On the other hand, the Delegate conceded that the Government's observations of 2 October 1996 might shed a different light on the nature of the investigation carried out by the authorities and that the Commission's conclusion finding the respondent State in breach of its procedural obligation under Article 2 may need to be looked at with particular attention by the Court.

B. The Court's assessment

77. The Court reiterates that it takes cognisance of preliminary objections in so far as the State in question has already raised them, at least in substance and with sufficient clarity, before the Commission, in principle at the stage of the initial examination of admissibility (see, most recently, the *Ergi v. Turkey* judgment of 28 July 1998, *Reports of Judgments and Decisions* 1998-IV, p. 1769, § 59).

78. The Court notes that the Government in their submissions on the admissibility of the applicant's complaints merely informed the Commission that the investigation into the death of her husband was proceeding. They provided no details of the progress which had been made in the case beyond the date of the decision of the public prosecutor to relinquish jurisdiction to the military authorities (see paragraph 26 above). On that basis alone they contended that the applicant had not exhausted domestic remedies. No explanation has been given as to why the Government did not keep the Commission informed prior to the adoption of its admissibility decision of the subsequent stages of the investigation. It is to be observed in this respect that by the date of the admissibility decision, the military prosecutor had decided to commit the accused for trial, the Diyarbakir Military Tribunal between 27 September 1993 and 10 May 1994 had heard

evidence in the case before relinquishing jurisdiction in favour of the Batman Criminal Court, and the latter court had been seized of the case since July 1994.

The Government reasserted their objection to the admissibility of the application in a second series of observations submitted to the Commission on 2 October 1995 in which they requested the Commission to apply Article 29 of the Convention and to reverse its earlier admissibility decision. In those observations they highlighted the failure of the applicant to seek compensation in respect of the death of her husband by instituting administrative-law proceedings against the authorities on the basis of the principle of strict liability (see paragraph 48 above). The Government's request was rejected by the Commission on 9 September 1997.

Finally, on 14 October 1996, and prior to the rejection by the Commission of the Government's Article 29 request, the authorities submitted a complete picture of the investigation and proceedings against Private Tuncay Deniz up until that date. However, the documentation was never considered by the Commission since it was misplaced in the latter's files.

79. In the Court's view, even if the Government provided the Commission with few details at the admissibility stage of the proceedings on the progress being made in the investigation at the domestic level, it is nevertheless clear that they attached importance in their submissions to the outcome of that investigation as a means of securing the applicant redress in respect of the death of her husband including the possibility of obtaining compensation on the strength of its findings. The Government may accordingly be reasonably considered to have pleaded at that juncture the substance of their objection that the applicant had not exhausted domestic remedies.

80. It must also be observed that the applicant herself was fully aware of the state of the proceedings against Private Tuncay Deniz by the date of the Commission's admissibility decision. It is to be noted that she had applied to the Diyarbakir Military Tribunal on 10 May 1994 to join the proceedings as a civil party and she had requested the tribunal on the same day to hear the evidence of Mehmet and Ramazan Bayram (see paragraph 30 above). Her brother-in-law, Feyzullah Aytekin, had for his part attended the proceedings before the tribunal on 22 March 1994 and had given a statement (see paragraph 28 above). The applicant was also authorised to join the proceedings before the Batman Criminal Court on 20 September 1994 and on 20 October 1994 she provided that court with a statement obtained pursuant to letters rogatory (see paragraph 33 above).

It does not appear from the observations which she submitted to the Commission on the admissibility of her application, nor from any of her later observations on the merits, that she informed the Commission of the true extent of her involvement in the domestic proceedings against Private Tuncay Deniz. Having regard to the fact that the plea of estoppel has been asserted by the applicant, her active participation in the domestic proceedings and her failure to inform the Commission of such must be seen as a factor which weighs against the acceptance of her plea.

81. Having regard to the above circumstances, the Court concludes that the Government cannot be considered estopped from raising their objection of non-exhaustion at this stage and from relying on the outcome of the criminal proceedings against the accused soldier.

82. The Court must determine whether the remedies indicated by the Government were available and sufficient to afford the applicant redress in respect of her Article 2 complaint. In this regard, it is incumbent on the Government to satisfy it that the remedies which they rely on were effective ones available in theory and in practice at the relevant time, that is to say that they were accessible, were capable of providing redress in respect of her complaint and offered reasonable prospects of success. However, once this burden of proof has been satisfied it falls to the applicant to establish that the remedies advanced by the Government were in fact exhausted or were for some reason ineffective in the particular circumstances of the case or that there existed special circumstances absolving her from the requirement (see, *mutatis mutandis*, the Akdivar and Others v. Turkey judgment of 16 September 1996, *Reports* 1996-IV, p. 1211, § 68).

83. The Court notes that the investigation into the killing of the applicant's husband resulted in the conviction by the Batman Criminal Court of Private Tuncay Deniz on a count of unintentional homicide. Despite the applicant's criticism of the conduct of the official investigation and the trial of the gendarme, this has not deterred her from taking an active part in the proceedings since lodging her application with the Commission (see paragraph 80 above). The Court recalls that in the month following her application to the Commission and shortly after her lawyer had requested the public prosecutor to prosecute Private Tuncay Deniz for the murder of her husband (see paragraph 27 above), the soldier was being tried by the Diyarbakir Military Tribunal on a charge of intentional homicide committed in excess of his duties. In these circumstances it cannot be said that the official investigation conducted first by the public prosecutor and subsequently by the military authorities did not offer the applicant any reasonable prospects of success in her efforts to bring the person responsible for the death of her husband to justice. Indeed, the applicant has not shown that this remedy has in fact been exhausted. As the Government have pointed out, her appeal against the judgment of the Batman Criminal Court is currently pending before the Court of Cassation. It may also be noted that the public prosecutor has also appealed against the sentence handed down by the Batman Criminal Court and has pressed for a more severe sentence to be imposed on the soldier (see paragraph 37 above).

84. As to the possibility of instituting compensation proceedings in respect of the death of her husband, the Court recalls that an alleged violation of Article 2 of the Convention cannot be remedied exclusively through an award of damages to the relatives of the victim (see the Kaya v. Turkey judgment of 19 February 1998, *Reports* 1998-I, p. 329, § 105). However, having regard to the measures taken by the authorities to mount a prosecution case against Private Tuncay Deniz and to the fact that he was subsequently tried and convicted by an ordinary court on a charge of unintentional homicide, it must be concluded that the applicant has reasonable prospects of successfully suing the convicted soldier or his superiors in a tort action, including with respect to any alleged deficiency in the way the checkpoint was manned and operated.

The Court would also note that, as an alternative to a civil action in damages, it was open to the applicant to lodge a claim for compensation against the accused soldier when she declared herself a civil party in the proceedings before the Batman Criminal Court. No explanation has been given as to why she failed to do so, it being observed that, as a civil party, she was represented by a lawyer in the proceedings (see paragraph 35 above).

Nor has the applicant shown to the Court's satisfaction why, in parallel to the criminal proceedings, she did not lodge a compensation claim with the Ministry of Defence relying on the principle of the strict liability of the authorities for the acts of their officials. Her failure to make such a claim within the prescribed time-limit (see paragraph 58 above) has not been explained either and may be considered to contrast sharply with the extent of her participation in the criminal proceedings against Private Tuncay Deniz.

85. Having regard to the combination of the above criminal, civil and administrative law remedies and in particular to the prospects which the criminal proceedings offered for obtaining redress in respect of the death of her husband (the prosecution and conviction of the person responsible and compensation), the Court notes also that the applicant's situation and personal circumstances cannot be compared to those of other applicants who have successfully contended in cases against the respondent State that they were dispensed from the requirement to exhaust such remedies on account of the existence of special circumstances. In particular, and without pronouncing on the merits of the investigation carried out in the instant case, it cannot be maintained that the competent authorities remained totally passive with respect to the circumstances in which the applicant's husband was killed or that the investigation which was undertaken was so ineffective as to make recourse to domestic remedies meaningless (see the above-mentioned *Akdivar and Others* judgment, pp. 1213–14, § 77; the *Aksoy v. Turkey* judgment of 18 December 1996, *Reports* 1996-VI, p. 2277, § 57; the *Mentes and Others v. Turkey* judgment of 28 November 1997, *Reports* 1997-VIII, pp. 2707–08, § 60; and the *Kurt v. Turkey* judgment of 25 May 1998, *Reports* 1998-III, pp. 1176–77, § 83).

86. Having regard to these considerations and to the particular circumstances of this case the Court concludes that the applicant must be considered to have failed to exhaust domestic remedies in respect of her Convention grievances. The Government's preliminary objection is accordingly upheld.

for these reasons, the court unanimously

Holds that as domestic remedies have not been exhausted it cannot consider the merits of the case.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 23 September 1998.

Signed: Rudolf Bernhardt

President

Signed: Herbert Petzold

Registrar

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

Notes by the Registrar

1. The case is numbered 102/1997/886/1098. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

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

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