Caso de Ogur contra Turquía, de 20/05/1999 [ENG]

Preliminary objection rej

EUROPEAN COURT OF HUMAN RIGHTS

JUDGMENT

STRASBOURG

20 May 1999

In the case of Ogur v. Turkey,

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

Mr L. Wildhaber, *President*,

Mr A. Pastor Ridruejo,

Mr G. Bonello,

Mr J. Makarczyk,

Mr P. Kuris,

Mr J.-P. Costa,

Mrs F. Tulkens,

Mrs V. Stráznická,

Mr M. Fischbach,

Mr V. Butkevych,

Mr J. Casadevall,

Mrs N. Vajic,

Mrs H.S. Greve,

Mr A.B. Baka,

Mr R. Maruste,

Mrs S. Botoucharova,

Mr F. Gölcüklü, ad hoc *judge*,

and also of Mr P.J. Mahoney and Mrs M. de Boer-Buquicchio, *Deputy Registrars*,

Having deliberated in private on 3 February and 22 April 1999,

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

PROCEDURE

1. The case was referred to the Court, as established under former Article 19 of the Convention[3], by the European Commission of Human Rights ("the Commission") on 15 December 1997, within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention. It originated in an application (no. 21594/93) against the Republic of Turkey lodged with the Commission under former Article 25 by a Turkish national, Mrs Sariye Ogur, on 16 March 1993.

The Commission's request referred to former Articles 44 and 48 and to the declaration whereby Turkey recognised the compulsory jurisdiction of the Court (former 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 Article 2 of the Convention.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of former Rules of Court A[1], the applicant stated that she wished to take part in the proceedings and designated the lawyer who would represent her (former Rule 30). The lawyer was given leave by the President of the Court at the time, Mr R. Bernhardt, to use the Turkish language in the written procedure (former Rule 27 § 3).

3. In the meantime Mr R. Ryssdal, Mr Bernhardt's predecessor as President of the Court, acting through the Registrar, had consulted the Agent of the Turkish Government ("the Government"), the applicant's lawyer and the Delegate of the Commission on the organisation of the written procedure. Pursuant to the order made in consequence on 9 February 1998, the Registrar received the applicant's memorial on 23 March 1998 and the Government's memorial on 4 June 1998, and subsequently, on 23 November 1998, an addendum to the applicant's claims under Article 41 of the Convention and, on 4 December 1998, the Government's observations on those claims.

4. After the entry into force of Protocol No. 11 on 1 November 1998 and in accordance with the provisions of Article 5 § 5 thereof, the case was referred to the Grand Chamber of the Court. The Grand Chamber included *ex officio* Mr R. Türmen, the judge elected in respect of Turkey (Article 27 § 2 of the Convention and Rule 24 § 4 of the Rules of Court), Mr. L. Wildhaber, the President of the Court, Mrs E. Palm, Vice-President of the Court, and Mr J.-P. Costa and Mr M. Fischbach, Vice-Presidents of Sections (Article 27 § 3 of the Convention and Rule 24 §§ 3 and 5 (a)). The other members appointed to complete the Grand Chamber were Mr A. Pastor Ridruejo, Mr G. Bonello, Mr J. Makarczyk, Mr P. Kuris, Mrs F. Tulkens, Mrs V. Stráznická, Mr V. Butkevych, Mr J. Casadevall, Mrs H.S. Greve, Mr A.B. Baka, Mr R. Maruste and Mrs S. Botoucharova (Rule 24 § 3 and Rule 100 § 4). Subsequently Mrs N. Vajic, substitute judge, replaced Mrs Palm, who was unable to take part in the further consideration of the case (Rule 24 § 5 (b)).

5. On 19 November 1998 Mr Wildhaber exempted Mr Türmen from sitting; the latter had withdrawn following a decision taken by the Grand Chamber under Rule 28 § 4.

On 17 December 1998 the Government informed the Registrar of the appointment of Mr F. Gölcüklü as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

6. At the Court's invitation (Rule 99), the Commission delegated one of its members, Mr M.A. Nowicki, to take part in the proceedings before the Grand Chamber.

7. In accordance with the decision of the President, who had also given the applicant's counsel leave to address the Court in Turkish (Rule 34 § 3), a hearing took place in public in the Human Rights Building, Strasbourg, on 3 February 1999.

There appeared before the Court:

(a) *for the Government*

Mrs D. Akçay, *Co-Agent*,

Mr E. Genel,

Mr M. Soysal,

Mrs A. Günyakti,

Mrs M. Gülsen,

Mr B. Caliskan, *Advisers*,

Mrs S. Güzel, *Expert*;

(b) *for the applicant*

Mr H. Kaplan, of the Istanbul Bar, *Counsel*;

(c) *for the Commission*

Mr M.A. Nowicki, *Delegate*.

The Court heard addresses by Mr Nowicki, Mr Kaplan and Mrs Akçay.

THE FACTS

I. the circumstances of the case

A. The applicant

8. The applicant is a Turkish national born in 1923 and she lives in Sariyaprak, a district in the province of Siirt, where a state of emergency is

in force. She lost her son during an operation by the security forces, which is described below.

B. The facts

9. On 24 December 1990 the security forces carried out an armed operation at a site belonging to a mining company some six kilometres from the village of Dagkonak. The applicant's son, Musa Ogur, who worked at the mine as a night-watchman, was killed at about 6.30 a.m. as he was about to come off duty.

10. According to the Government, the scene of the incident had been used as a shelter by four terrorists who were members of the PKK (Workers' Party of Kurdistan), including the applicant's son. Musa Ogur had been hit by bullets from warning shots fired by the security forces.

According to the applicant, her son had merely been one of the guards at the mining company's site and he had been shot dead by the security forces without warning.

11. On the day of Musa Ogur's death his employer, Mehmet Zeyrek, reported the incident to the Sirnak public prosecutor. He stated that his employee had been shot by the security forces and the village guards, whose identity he did not know.

12. On 26 December 1990 the public prosecutor's office issued a decision in which it recorded the following:

"On the date of the incident an operation was conducted by the security forces and the village guards, acting on information that an injured terrorist belonging to the PKK had taken refuge and was being cared for in a shelter near Mehmet Zeyrek's mine. When, during the operation, the victim, Musa Ogur, one of the watchmen at the mine who guarded the mechanical shovels and bulldozers at the site belonging to Mehmet Zeyrek, left the shelter and the other watchmen and squatted in order to defecate, the security forces gained the impression that the suspect was escaping and they opened fire and killed him. The public prosecutor carried out an investigation and gathered the initial evidence."

The prosecutor's office pointed out that the actions of the security forces under the orders of the governor of a region in which the state of emergency was in force were subject to the rules governing prosecutions of civil servants and accordingly declared that it had no jurisdiction, and, by a letter of 26 December 1990, forwarded the file to the Administrative Council of the province of Sirnak.

13. On 15 August 1991 the Administrative Council delivered its decision, which was signed by the deputy governor and the directors of the various government departments of the province but not served on the applicant's lawyer. The Council concluded that no proceedings should be brought in the criminal courts against the civil servants of the security forces which had taken part in the operation on 24 December 1990. In its view, the victim, who was regarded as a suspect, had died after warning shots had been fired during the operation in question. Neither the evidence in the file nor taking statements from witnesses would make it possible, however, to identify with any certainty the person who had fired.

14. On 19 September 1991 the Supreme Administrative Court, to which the case had automatically been referred by the operation of law, upheld the decision of 15 August 1991 in the following terms:

"Offences committed by civil servants acting in the course of their duties or in their official capacity are subject to the procedures governing prosecutions of civil servants …, an administrative investigating officer responsible for conducting the investigation is appointed by means of an order …

In order that an investigation may be conducted in respect of a civil servant, the civil servant concerned must first of all be accurately identified. Failing any accurate

identification, no investigation can be carried out, no investigation report can be drawn up and no court with competence in the matter may give judgment.

The information in the investigation file has not made it possible to determine who committed the alleged offence; consequently, that investigation should not have been commenced. However, an investigation file was compiled by the appointed investigating officer and, on the basis of that file, the Administrative Council of the province decided that there was no case to answer, on the ground that the persons responsible were unknown and that it was impossible to investigate the case. The Supreme Administrative Court decides unanimously, for the aforementioned reasons, to uphold the decision of the Administrative Council and to send the case back."

15. In a letter of 20 January 1993 the applicant's lawyer enquired of the chairman of Sirnak Administrative Council about the progress of the proceedings, since during the administrative investigation the file had been inaccessible to the victim's close relatives and they had had no means of learning what was in it. On 3 February 1993 the Sirnak provincial governor's office sent him a copy of the decision of 15 August 1991 that there was no case to answer. The Supreme Administrative Court's judgment was served on him on 15 March 1993.

C. The evidence gathered by the Commission

1. Written evidence

16. Those appearing before the Court submitted various documents concerning the investigation following Musa Ogur's death.

(a) Statement made to the prosecutor's office by Musa Ogur's employer, Mehmet Zeyrek, on 24 December 1990

17. Musa Ogur's employer alleged that the victim had been shot dead by the security forces and the village guards, whose identity, however, he did not know. He did not know the reasons for the murder but surmised that it might have been carried out by persons whose interests might have been affected by the mine he owned, where the victim worked as a night-watchman.

(b) Incident report of 24 December 1990 signed by six members of the security forces **(who had taken part in the operation) and approved by the lieutenant of the infantry regiment**

18. This document contains a detailed description of the incident of 24 December 1990 by six members of the infantry squad and their lieutenant, Ismail Çaglayan, all of whom took part in the operation. The events as they describe them took place as follows:

"On 23 December 1990, following a report to the effect that a terrorist wounded during a clash with the security forces had taken refuge in a shelter on a hill six kilometres from the village of Dagkonak, three infantry squads …[1] went to the scene of the incident. At 4.30 a.m. the area was placed under the control of the soldiers, who began to observe the shelter using infra-red sights. When movements were noted in this area at about 5 a.m., we approached the shelter under cover of heavy snowfall and fog. As we approached the shelter, we shouted to those inside that they were surrounded, that escape was impossible and that they should come out of the shelter within five minutes,

leaving their weapons behind them. As nothing had happened after five minutes, we fired warning shots into the air. Someone came out of the shelter shooting and began to move away. After warnings which were ignored we fired, but the person we had glimpsed disappeared ... We waited until day broke and pinpointed the shelter ... We again told them to come out and three people emerged from the shelter. We told them to approach and we questioned them. We then went into the shelter, where we found three shotguns, food and medicines. ... outside, fifteen metres from the shelter, we found a wounded man, but he died while we were taking him to a safer place. We discovered three trenches twenty, fifty and eighty metres away from the shelter. We found shotgun cartridges, five of which smelt of smoke, as did one of the shotguns. When we searched the surrounding area, we found several footprints, but we were not able to follow them as they were covered by the falling snow. We concluded that the footprints probably belonged to the wounded terrorist and the accomplices who had come to his aid ... We inspected the medicines, namely hydrogen peroxide, ..., two cloths, ... and some penicillin powder. The incident was immediately reported to the brigade, we awaited the arrival of the inspection team, we made the sketch and this report was drawn up by those whose signatures appear below."

(c) Plan of the scene with a manuscript description of the events drawn up by Lieutenant Ismail Çaglayan on 24 December 1990 (the "sketch")

19. This document contains a detailed sketch of the topography of the scene of the incident and the positions of the actors in it. It shows that the

security forces and village guards split into three groups, one to the left of the shelter, one to its right and one in front of it. These fired several shots in the direction of the shelter and behind it. Some shots were fired from the shelter towards the group of armed forces on the left of the shelter.

(d) Report of the inspection of the scene of the incident and findings made on Musa Ogur's body, drawn up by the Sirnak public prosecutor, Ali Ihsan Demirel, on 24 December 1990

20. The Sirnak public prosecutor reported the facts as follows:

"Having been informed this morning at about ten o'clock that there had been a confrontation with the security forces near Mehmet Zeyrek's coal mine at Araköyü-Sirnak, that a person had been wounded and had subsequently died after the confrontation and that the body was at the scene of the incident, we – Ali Ihsan Demirel, public prosecutor, Namik Demiralay, pathologist, Yahya Bahsis, court registrar, and Bilgin Yilmaz, the pathologist's assistant – decided to go to the scene at about 11.30 a.m. ... We found the body, covered with a blanket, at a hidden spot on a hill at Mehmet Zeyrek's coal mine.

... The post-mortem carried out on the undressed body revealed that rigor mortis had not yet set in, that the body was partly cold, that the stains and marks had not yet turned bluish, that the bullet had entered the back of the skull about four finger-breadths from the nape of the neck, making a hole five centimetres in diameter, that it had exited from the upper part of the forehead at the hairline, shattering the bone and making an irregular three-centimetre hole. Bleeding was found where the bullet had entered and exited, the face was covered in blood, and there was white brain tissue where the bullet had exited ...

The pathologist, Namik Demiralay, stated: 'The wound due to the bullet which entered the occipital part of the cranium and exited through the frontal part caused the destruction of the brain and was therefore the cause of death. Since the gunshot wound was the certain cause of death and no other finding was made that could suggest any other cause, it was not considered necessary to carry out a full post-mortem.'

As Musa Ogur's death, which occurred this morning in the course of an armed operation by the security forces in the region, was caused by a gunshot wound, as was recorded by the pathologist who examined the body, it is unnecessary to carry out a full post-mortem. The body has been released to the family ...

A reconstruction of the events was carried out at the scene of the incident in the presence of the eyewitnesses, in order to determine the circumstances of the incident.

Gendarmerie Warrant Officer Aydin Gülsen, acting as commander of Sirnak central gendarmerie station, was appointed as the technical expert ...

The scene of the incident was identified and checked.

One of the witnesses, Naif Zeyrek, who was questioned by a gendarmerie officer, stated:

'This morning, at about 6.30 a.m., at the spot where we are standing at the moment, there were four of us watchmen employed by the Zeyrek mining company to guard the company's bulldozers and mechanical shovels. A bulldozer had been set on fire once before. After that incident, in order to keep watch on the plant, we kept guard in this shelter that we had built and in the dugouts around it. Four of us were responsible for keeping watch here during the night. This morning, dawn had broken. We were in this shelter near the vehicles. We got up and said our prayers. The victim, Musa Ogur, had heard partridges up there and said he was going to go shooting. I told him not to go shooting, and in the end he did not go out. A few moments later, he crossed the threshold of the door and went towards that hill that I have already shown you. An instant later we heard shots. Shots ringing out from everywhere. I wanted to fire my shotgun but my mate stopped me. Then I saw the soldiers and shouted out to them to stop firing. When the firing stopped, we went outside. I heard Musa Ogur, he was wounded. As he was wounded, we removed him from the spot where he lay, which I have shown you, and carried him away. But he died in the process, so we put the body down.'

Another witness, Salih Ogur, who was questioned by a gendarmerie officer, stated:

'Like my three mates, I was responsible for guarding the vehicles belonging to the Zeyrek mining company at the spot I have shown you. In order to guard the vehicles, we keep watch during the night in this shelter I built and in the dugouts we made near it. When we got up this morning, the victim, Musa Ogur, who is a relative of mine, said he had heard partridges and was going to go shooting. We stopped him from doing so. Then he did go out – I don't know what for. Perhaps to relieve himself. A moment later we heard shots coming from different directions. It was snowy and a bit misty. Dawn was only just breaking. We did not go outside because of the firing. We tried to see what was going on outside through a door on the other side. As it became light, I could see that there were soldiers outside. While we were watching, we saw a soldier in the distance. We called out to him, telling him who we were. The soldiers asked us to come out of the

shelter. We started walking to where they had told us to go. I heard Musa Ogur calling “Uncle!” We could not go to him immediately. We could not go and see him until the soldiers came up. He was wounded and could not speak. We took him from the place I showed you up to there for him to be treated. But as he did not survive the distance, we put him down where he had died. We did not fire any shots. As for Musa, he was unarmed when he went out. In order to guard the vehicles, we keep watch at night in the dugouts nearby. The spent cartridges in the first dugout are two or three days old. When we shoot, we do not leave spent cartridges in the dugouts. None of us fired a shot today.’

Another witness, Salih Zeyrek, who was questioned by a gendarmerie officer, stated:

‘I worked as a watchman with my mates. This morning, Musa Ogur went out to relieve himself. He was unarmed. A second later we heard shots. Musa called out “Uncle!” We did not go outside because of the firing. We looked out and saw soldiers. Then we called out to say who we were. At the time of the incident it was snowing

and it was also foggy. Later, two of my mates and I left the shelter and walked towards the soldiers. Then we learned that Musa had been shot and wounded and we went to him. He was wounded and could not speak. We could hear him breathing. In order to get him to a doctor, we lifted him and carried him. While we were carrying him, he stopped breathing and we realised that he was dead. We left him where he had died. None of us fired a shot.’

An inspection of the scene of the incident was carried out in the presence of the witnesses and the technical expert. We made the following findings at the scene: Mehmet Zeyrek’s mining operation was spread over a large area; there were three mechanical shovels and bulldozers five or six metres from the shelter; the shelter, which was made of stone and built right into the mountainside, was a covered, concealed shelter which blended in with the landscape, and inside there were things belonging to the watchmen and a stove. We inspected the spot where, according to the witnesses, the dead man was wounded and the spot from which the shot might have been fired. We combed likely areas, looking for spent cartridges but not finding any. We examined the spot where the dead man was originally wounded. We walked about ten or fifteen paces down the hill. In the area referred to, we noted the presence of large quantities of blood and found a red turban (worn rolled round the head), which we presumed to be the dead man’s. There were two holes in the turban where the bullet had entered and exited. We took the turban away and mentioned it in the report. We examined two separate dugouts near the shelter, which we were told were the watchmen’s. In the dugouts we found eight spent shotgun cartridges. The cartridges were taken away and mentioned in the report. The technical expert ... stated: ‘I inspected the scene of the incident and listened to what the witnesses had to say; I recorded the locations of the shelter, the vehicles, the wounded man and the dugouts individually on simple sketches; I examined the spent cartridges and photographed the scene of the incident from various angles. I will hand these sketches and photographs over to you when the latter have been developed. When I examined the spent cartridges, I found that they were not recent but must have been two or three days old. When I examined the watchmen’s shotguns, which had been given into my care and two of which were Hoglus, I found and smelt powder on them. However, it is impossible to say whether it was fresh powder or not. There was no powder on the other two shotguns,

nor did they smell of fresh powder.' The three shotguns found in the shelter were recorded and taken for examination ...'

The medical expert was questioned about the medical supplies shown to him. He stated that they were used to treat grazes and wounds ...

The witnesses were then questioned about the medical supplies. Salih Zeyrek volunteered the following information: 'About ten days ago I fell here during working hours and injured my finger. I had these things bought to treat my finger. They belong to me. As the injury to my finger was slight, I treated it myself.' He then showed us his injury. We noted a slight injury to the upper part of the third finger of his left hand. The pathologist, a medical expert, examined the wound and stated: 'My observations allow me to conclude that the scratch on the witness's hand is an old wound which became slightly infected and which has obviously been treated.'

Following the questioning of the eyewitnesses and the inspection of the scene of the incident, the technical expert was given ten days to develop his photographs and put his sketches into their final form. As there were no other verifications to be made

at the scene, we decided to terminate the investigation. We decided to return to the office and then signed this report together, at 2.15 p.m. on 24.12.1990."

Later the same day, the public prosecutor interviewed Mehmet Zeyrek concerning his statement implicating the security forces and the village guards (see paragraph 17 above).

(e) Record of the objects found near Musa Ogur, drawn up by the Sirnak public prosecutor, Ali Ihsan Demirel, on 25 December 1990

21. This document lists "the objects found at or near the spot where the victim died": eight shotgun cartridges and a turban (*kefi*) "with a red and white pattern, in which there were two holes where a bullet had entered and exited".

(f) Expert report on the confrontation with the security forces **and the incident of 24 December 1990, drawn up by Aydin Gülsen, commanding officer of Sirnak central gendarmerie station, on 1 January 1991**

22. Aydin Gülsen, a gendarmerie warrant officer acting as commander of Sirnak central gendarmerie station and appointed as technical expert by the public prosecutor during his inspection of the scene of the incident, established the facts as follows:

"I examined the wound which had caused the death of Musa Ogur, who was fatally wounded in an armed confrontation between the security forces and members of the PKK terrorist movement at Mehmet Zeyrek's coal mine ... when the security forces went to the scene to check the accuracy of information they had received. I recorded the place in which he had been sheltering and the surrounding area in sketches, both of individual details and of the general scene.

When the public prosecutor, Ali Ihsan Demirel, went to inspect the scene of the incident, I made sketches to record the location of evidence found at the scene, traces of blood and the victim's possessions and noted all other discoveries. During these inspections of the scene I noted, *inter alia*:

1. At 6.30 a.m. on the day of the confrontation, 24 December 1990, it was misty and was snowing heavily and visibility was no more than five metres in places.

2. The confrontation occurred at a spot where watchmen employed to guard the machinery belonging to the Zeyrek mine were working. The place, which was built into the hillside on two sides and had stone walls on the other two, like a hideout, was difficult to appraise and surround owing to the bad weather. During an exchange of fire between the security forces and members of the PKK terrorist movement who were firing from the shelter and seeking to escape, Musa Ogur was wounded in the head there, fell to the ground and rolled ten or twelve metres. After a warning had been given, the other persons in the shelter came out unarmed and gave themselves up.

3. At different places near the shelter, and at different distances from it, four dugouts had been constructed in which there were spent shotgun cartridges.

4. The spent cartridges were between one and three days old. An examination of the guns found in the shelter suggested that they had been used.

5. Musa Ogur was wounded and died when caught in crossfire, the security forces responding to fire from the shelter in bad weather which appreciably reduced visibility.

6. The security forces had approached the scene of the incident and examined the dugouts in which the shotgun cartridges were found. They noted that these dugouts were identical to those used by PKK members to take refuge and hide arms.

7. The manner in which the shelter had been built gave [the security forces] the impression that it was a hideout; it was misty and was snowing heavily and there were dugouts scattered across the landscape; in such a situation a shot – even from a shotgun – could very easily mislead the security forces and it must be pointed out that the security forces had no means of distinguishing between the shots fired by the persons in the shelter and those fired by the PKK members.

8. Regard being had to the statements made by both sides at the time of the incident, the conclusion is that the victim, Musa Ogur, died as a result of a head wound, that he was not killed intentionally but was caught in crossfire; that is the conclusion I have reached for the purposes of this expert report."

(g) Schedule drawn up on 3 January 1991 of the documents in the case file prepared by the public prosecutor

23. This schedule lists the documents available to the public prosecutor, Ali Ihsan Demirel, when he was drafting the decision of 26 December 1990 (see paragraph 12 above). Essentially, it comprises the report of the inspection of the scene of the incident and the autopsy performed on Musa Ogur, a record of medical supplies seized as evidence on 24 December 1990, the statements made by Naif Zeyrek, Salih Zeyrek and Salih Ogur on 24 December 1990 and a record of the objects found near Musa Ogur's body on 25 December 1990 and seized as evidence.

On 16 January 1991 the Sirnak central gendarmerie headquarters sent the incident report and the "sketch" (see paragraphs 18 and 19 above) to the Sirnak public prosecutor's office, for information.

(h) Documents from the investigation carried out by the investigating officer, Celal Uymaz

24. On 3 January 1991 the governor of Sirnak province wrote to Celal Uymaz, a gendarmerie lieutenant-colonel, instructing him to carry out, as

investigating officer, the preliminary investigation into the events of 24 December 1990 and sending him the case file. On 22 January 1991 the governor sent him further documents. On 30 April 1991 the deputy governor wrote to Lt.-Col. Uymaz asking him to expedite the matter. On 3 August 1991 the investigating officer took evidence from the witnesses Salih Zeyrek and Salih Ogur. Mr Zeyrek's statement, made through an interpreter, was recorded as follows:

"I and my friends were the watchmen at the Zeyrek mine. On the morning of the day of the incident Musa Ogur went out to relieve himself. I was awake. So I saw him go out. He said he was going out to relieve himself. A few seconds later we heard shots. We were scared and did not go out of the shelter straight away. Looking outside, we saw the soldiers. We called out and said who we were. It was foggy and it was snowing. We left the shelter and went up to the soldiers. They told us that Musa was wounded. He was lying on the ground. He could not speak. He was breathing slowly. We immediately set off to find the doctor but Musa died on the way. The prosecutor and the pathologist examined him afterwards. None of us fired a shot during the incident."

In his statement Salih Ogur said:

"... On the day of the incident Salih Zeyrek, Musa Ogur (the deceased), Naif Zeyrek and I were on the mine premises to guard the machinery. We slept in a shelter and at night we kept watch in the trenches around the site. We woke up at 6.30 a.m. Musa Ogur, who is a relative of mine, said that he had heard a partridge and that he wanted to take a look outside. We told him not to. He went out, saying that he was going to relieve himself. Just after that we heard shots. It was raining and it was foggy. We did not go out straight away. As it was light, I thought it might be soldiers. Looking outside, I saw a soldier. We called out and said who we were. The soldiers told us to come out of the shelter. We came out and walked towards the soldiers. It was then that we heard Musa Ogur's voice. He was calling 'Uncle'. We didn't go to him straight away. The soldiers came up to us and we all went to see him together. He was wounded. He could not speak. We tried to carry him to a hospital but he died. We left him at the scene. None of us fired a shot during the incident. Musa was unarmed when he went out. Our job is to spend the night in the trenches and guard the machinery. The cartridges found in the first trench had been there for two days. We always leave spent cartridges where they fall."

(i) The investigating officer's report, filed on an unspecified date in August 1991

25. In his report the investigating officer records the facts as follows:

"In the course of carrying out an operation in the region where the incident occurred, the internal security forces noticed a person behaving suspiciously and fired warning shots in his direction.

Witness statements:

(a) Salih Ogur: I was in the shelter. I came out when the shooting stopped. I saw that Musa Ogur had been hit. He died shortly afterwards. I do not know who fired.

(b) Salih Zeyrek: I did not see who shot Musa Ogur. The soldiers were at the scene of the incident. I do not know them. I did not see who fired.

It is not known who shot Musa Ogur or how he shot him.

I propose that no (criminal) proceedings should be brought, seeing that it is not known who shot Musa Ogur or how he shot him."

(j) Schedule of the documents in the Sirnak Administrative Council's case file

26. This schedule lists the documents available to the Administrative Council when it was drawing up its decision of 15 August 1991 that there was no case to answer (see paragraph 13 above). Essentially, it comprises – apart from the public prosecutor's decision of 26 December 1990 that he had no jurisdiction and the documents in his office's case file (see paragraph 12 above) – the "sketch" (see paragraph 19 above), the incident report of 24 December 1990 (see paragraph 18 above) and the expert report of 1 January 1991 (see paragraph 22 above).

2. Oral evidence

27. On 4, 5 and 6 October 1995 three delegates of the Commission took the following statements in Ankara.

(a) Ali Ihsan Demirel

28. In 1990 this witness (born in 1960) was the public prosecutor in Sirnak.

On the morning of 24 December 1990 he went to the scene of the incident with a doctor and other officials. He found that Musa Ogur had been hit by a bullet which had entered his body at the back of his neck and exited through his forehead. There were no cartridges or cartridge cases near the body.

He questioned Musa Ogur's employer, Mehmet Zeyrek, and the other mine watchmen. The watchmen said that they had not used their guns.

29. His account of the events was as follows. The weather had been bad (fog and falling snow) and the terrain was hilly, so that it had been difficult to see the shelter where the victim was. An informer had told the security forces that there were PKK members in the area. An armed squad of about

thirty to fifty men had gone to the spot to arrest them. After the usual warnings had been given, someone had come out of the shelter and run away while warning shots were being fired; then the incident had occurred. The security forces must have been below the shelter, about thirty to fifty metres away from the victim. The security forces had not surrounded the shelter. The incident had occurred while they were moving towards the shelter.

30. According to the witness, there were shotguns and spent shotgun cartridges at the scene; some of the spent cartridges were recent but he had not been able to establish

with certainty whether they had been fired that day or earlier. No forensic examination of the guns had been requested.

The witness had not taken down the identities of the members of the security forces which had conducted the operation, nor had he taken evidence from them; he maintained that since they were civil servants, the Administrative Council alone had power to do so. He had not been notified of the Administrative Council's decision.

(b) Mehmet Zeyrek (statement taken over the telephone)

31. This witness (born in 1958) was the owner of the mine where the incidents took place. He stated that he knew Musa Ogur.

On 24 December 1990 he went to the scene of the incident and was questioned by the public prosecutor. He said that he stood by the terms of the statement he had made at that time.

He stated that the security forces had been acting on a tip-off from an informer. He asserted that in his statement he had given the names of the persons who had told the security forces that PKK terrorists were using the shelter. He said that those persons had been motivated by a desire for personal revenge on his own family. The idea was to pursue a feud going back more than fifty years by misleading the security forces.

According to the witness, none of the mine watchmen had a gun except Naif Zeyrek, his nephew, who had a shotgun. His nephew had not fired any shots, however.

(c) Mehmet Akay

32. At the material time this witness (born in 1966) was doing his national service and was a sergeant in the infantry. He had been serving in the Sirnak region for fifteen months. As a member of the squad which carried out the operation, he was an eyewitness and one of the six people who signed the incident report of 24 December 1990 (see paragraph 18 above).

33. He stated that after being tipped off that there were terrorists in the area round the village of Devran, his squad of seventeen or eighteen men had taken up position round the shelter during the night. The squad had split into two as a precaution. Owing to the weather (snow) and the darkness, the only thing they had been able to see was a light about two hundred metres ahead of them. They did not know that they were on a mining site. They had been fired on for two or three minutes. He had not been able to tell where the shots came from. He remembered that they came under fire from Kalashnikovs and shotguns.

The squad commander, Ismail Çaglayan, an infantry lieutenant, had ordered his men to fire warning shots in response, and the whole squad had done so. About three or four series of warning shots had been fired. No verbal warning by loud hailer had been given. They had thought they were up against terrorists.

When day broke, the witness, his lieutenant and two other members of the squad had approached the shelter. They had then seen the presumed terrorist lying dead on the ground. The body was about fifteen to twenty metres away from the shelter. There was no gun beside it. They had then enquired by radio if anyone had shot at this man and were told that no one had. In the shelter, they had found three shotguns, a large number of

cartridges from those guns, medical supplies (dressings and bandages) and provisions (rice, sugar and flour). The witness emphasised that there had been a large quantity of these supplies and foodstuffs (enough to last a family for about two years), as was the case in PKK militants' hideouts in the Cudi mountains.

34. According to the witness, no member of the squad could have shot the victim. In support of that assertion he cited the distance between the squad members and the victim (about two hundred metres), the weather (snow) and the rules governing such operations, which forbade shooting to kill. None of the squad had admitted firing in the direction of the victim.

The witness stated that the squad had had infra-red sights, which were used to locate moving targets in the dark.

35. The witness said that he had not been informed that there were coal-mines at the location or that night-watchmen were on duty there. He deduced from this that the persons who had tipped them off about the presence of terrorists had wanted to have the army blamed. He explained that the Cudi mountains were one of the PKK's favourite haunts.

In his view, there was no difference between the mine watchmen's shelter and those habitually used as hideouts by the PKK.

He added that revealing the identities of the soldiers who had taken part in such operations could put their lives at risk.

(d) Ahmet Serif Aka

36. At the material time this witness (born in 1969) was doing his national service and was a corporal. He was in his thirteenth or fourteenth month of military service. As a member of the squad which carried out the operation, he was an eyewitness and one of the six people who signed the incident report of 24 December 1990.

37. The witness stated that, following a tip-off, his squad had gone on an operation in the mountains to try to ambush some PKK members before daybreak. The squad had comprised eighteen men under Lieutenant Ismail Çaglayan, a regular soldier.

The men had seen light coming from a shelter. Before dawn his fellow squad members had seen a man come out of the shelter and run off. Lieutenant Çaglayan had shouted to him to surrender. Shotgun and Kalashnikov fire had broken out. The witness had left his position, climbed a hill and found himself in a small wood. He had looked up and the man who had been running away had fired a Kalashnikov at him. The witness had fled, then pulled himself together and returned to his position with his squad. He stated that another member of the squad had pointed his loaded gun at him and that he had had to call out to make him lower it. There had been more gunfire. Lieutenant Çaglayan had given further verbal warnings in the terrorists' direction and two or three men had come out of the shelter. One of the terrorists had been killed or wounded. In the shelter they had found large quantities of medicines, dressings, etc.

38. According to the witness, only one member of the squad had fired a warning shot into the air, on the commanding officer's orders. Asked about Mr Akay's statement that all the members of the squad had fired warning shots, the witness said that it was

possible and that he did not remember exactly who had fired. Nor could he remember whether the commanding officer had used a loud hailer.

He stated that he himself did not hear the order to fire warning shots, as the soldiers, who were lying on the ground, were more than fifty metres apart. The whole squad was spread out in a line made up of eighteen soldiers, each fifty metres apart. He was told by his nearest colleague in person, not by radio, that a warning shot had been fired. The distance between the soldiers and the shelter was about 800 to 1,000 metres.

39. The witness did not remember whether the victim had been armed. He had a vague recollection of a shotgun being found either near the victim or in the shelter. He was not sure whether there had been other weapons in the shelter. They had not found any Kalashnikovs at the scene but had thought that the terrorists had taken them with them when they fled. The witness said that he would not recognise the sound of a Kalashnikov but that officers would.

Nor did the witness know what bullet had hit the victim. He stated that any warning shots fired by the military could not have hit the victim, because they had been fired into the air. According to him, it was certain that shots had been fired from the area of the shelter as they were tracer bullets, so that he had been able to see them and determine where they were coming from.

The witness said that it was not until daybreak that he had seen the industrial plant and realised that he was on the site of a coal-mine.

(e) Celal Uymaz

40. This witness (born in 1946) is a lieutenant-colonel in the gendarmerie and at the material time was the head of intelligence and public safety at the gendarmerie headquarters in the town of Sirnak. He said that he had been appointed by the governor as investigating officer to carry out an investigation some two weeks after the incident had taken place.

41. His account of the events was as follows. The security forces had been informed that a wounded PKK terrorist had taken refuge in the area. They had fired warning shots in the direction of Musa Ogur, whom they believed to be a terrorist. Then the security forces, together with about

fifty-four of the security guards employed to protect the Sirnak coal-mines, who were on the site, had opened fire. However, they had had no intention of killing the victim, or else he would have been hit by more than one bullet. Their intention had been to arrest a suspect whom they believed to be trying to escape. It was an accident that the victim had been hit by one of the warning shots. The victim was hit in the back of the neck, that is to say, according to the witness, where someone would be hit if running away in defiance of warnings. The security forces were spread out to the right and left of the shelter and in front of it.

42. According to the witness, in circumstances such as those in the case in question, the security forces were under orders to give a suspect at least three verbal warnings; they used a loud hailer to warn him orally and to order him to stop. If the suspect failed to obey, he had to be neutralised without the use of a firearm, by means of a rifle butt, bayonet or physical restraint. In the instant case there had been a considerable distance

between the suspect and the security forces, and the latter had accordingly been compelled to fire warning shots into the air to make him stop.

The witness acknowledged that the public prosecutor had recorded that shots had been fired at the victim with the intention of stopping him. His response was that the shot had not been intended to kill.

He asserted that in the circumstances in which the incident had occurred (snow, fog and darkness) it was technically impossible to hit a target without night sights. He acknowledged that infantry units like the ones that had been deployed were equipped with infra-red field glasses enabling them to see in the dark. According to him, these were used to observe the terrain, however, and not to pinpoint targets.

The witness stated that the security forces, the security guards from the Sirnak coal-mines and the mine watchmen were armed with G3 rifles. They were also entitled to shotguns. According to him, none of the shotguns found at the scene had been entered in the gun-licence register.

43. The witness stated that he had carried out his investigation on the basis of the documents drawn up for the purposes of the preliminary investigation (the incident report, the public prosecutor's decision that he had no jurisdiction, the post-mortem report, etc.) and the oral evidence of two of the mine watchmen, Salih Zeyrek and Salih Ogur, whom the governor had identified. He did not visit the scene of the incident.

He said that he had not considered it necessary to identify the members of the security forces who had taken part in the operation. He had not questioned any of them, because there had been so many of them and, in addition, village guards and fifty-four other members of the security service of the Sirnak coal-mines. Nor had he considered it necessary to interview the people who had signed the incident report, although he admitted that that report gave the name or number of the squads participating in the operation and that he could have called the members of those squads in for questioning by applying to the gendarmerie brigade commander. He had not identified the village guards who had taken part in the operation. He had not requested ballistic tests, because he had relied on the incident report and because about two weeks had elapsed since the events.

The witness admitted that the finding in his report that warning shots had been fired had been based on the incident report. He had not seen any need to interview the six members of the security forces who had signed the incident report because, although he acknowledged that they had been eyewitnesses, he had thought that there was no point in questioning them since it had still not been proved that they had fired.

(f) Nurettin Güven

44. This witness (born in 1952) was in post at Siirt in December 1990. In 1991, as deputy governor of Sirnak, he chaired, in place of the governor, the Sirnak Administrative Council which on 15 August 1991 decided that the members of the security forces had no case to answer. He did not himself visit the scene of the incident.

45. The witness described as follows the rules governing the prosecution of civil servants. The governor appointed an investigating officer, who gathered all the evidence and submitted his findings to the Administrative Council. The case was considered at a meeting of the Administrative Council, during which each member of the Council made comments. The investigating officer did not attend that meeting. The decision whether or not criminal proceedings should be brought was taken by a majority. That decision was referred to the Supreme Administrative Court, which upheld or quashed it after studying the case file. The special rules governing criminal proceedings against civil servants applied in regions in which a state of emergency was in force. A state of emergency was declared by due democratic process, by a majority vote in the National Assembly.

46. The witness admitted that it was possible to find out the names of the commanders of squads carrying out such operations. He said that the security forces open fire only in self-defence.

(g) Cengizhan Uysal

47. In 1991 this witness (born in 1949) was Director of Public Health for Sirnak. He was a member of the Sirnak Administrative Council which on 15 August 1991 decided that there was no case to answer. He did not himself visit the scene of the incident.

48. The witness did not remember the particular circumstances of the case. He said that such incidents had been frequent at the time and that it had been the Administrative Council's practice to conclude that it was impossible to identify those responsible.

He explained that the Administrative Council based its decisions on the documents already placed in the case file by the investigating officer (appointed by the governor) and was not strictly empowered to carry out its own investigation. It was the governor who had the duty and the power to investigate. The members of the Administrative Council were all subordinate to the governor. The Administrative Council generally met once a month, although sometimes there was no meeting. In that event the governor distributed the draft decision to the Council members for signature. When the Council did meet, it was chaired by the governor or his representative. The Council Secretary read out the case file. The members of the Council could examine the documents in the file. They were then invited to make comments and to sign the draft decision. In theory they could disagree with the conclusions proposed by the governor. Those who were not persuaded of the correctness of the conclusions could ask for further inquiries to be made. But ultimately the procedure was based on trust in the governor. Either the members were convinced and signed the

decision or they were replaced by others who were willing to sign it. In practice, it was out of the question for the decision in the form proposed by the governor not to be signed.

49. The witness acknowledged that the decision in the instant case had not been a ruling that there was no case to answer but rather a decision not to bring criminal proceedings against civil servants and not to transfer the case file to the prosecutor for further investigations to be carried out with a view to identifying the probable culprits. He had not been informed of the outcome of the case.

He stated that the gendarmerie knew the identity of the commanding officer of every operation carried out by the security forces at the coal-mines.

(h) Other witnesses summoned

50. The following witnesses were also summoned by the Commission but did not appear: Mrs Sariye Ogur, the applicant and the victim's mother; Mr Naif Zeyrek, Mr Salih Zeyrek and Mr Salih Ogur, watchmen at the mine; and other members of the security forces who had taken part in the operation on 24 December 1990.

II. relevant domestic law

A. Criminal prosecutions

51. Under the Criminal Code all forms of homicide (Articles 448 to 455) and attempted homicide (Articles 61 and 62) constitute criminal offences. 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 members of 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 course 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).

52. 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), which is chaired by the governor, to conduct the preliminary investigation and, consequently, to decide whether to prosecute. In the instant case the presiding governor had under his command the security forces that carried out the operation in issue. 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.

53. By virtue of Article 4, paragraph (i), of Legislative Decree no. 285 of 10 July 1987 on the authority of the governor of a state of emergency region, the 1914 Law (see paragraph 52 above) also applies to members of the security forces under the governor's authority.

54. 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 9-14 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 51 above) or with the offender's superior.

B. Civil and administrative liability arising out of criminal offences

55. 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.

56. Article 125 §§ 1 and 7 of the Constitution provides:

"All acts or decisions of the authorities shall be 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.

57. Article 8 of Legislative Decree no. 430 of 16 December 1990 specifies in this connection:

"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."

Additional section 1 of Law no. 2935 of 25 October 1983 on the state of emergency provides:

"… actions for damages in respect of the exercise of powers conferred by this statute shall be brought against the administrative authorities in the administrative courts."

58. Under the Code of Obligations, anyone who suffers damage as a result of an illegal or tortious act may bring an action for damages for pecuniary loss (Articles 41-46) 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 (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).

PROCEEDINGS BEFORE THE COMMISSION

59. The applicant applied to the Commission on 16 March 1993. She alleged that the security forces had killed her son during the operation on 24 December 1990, contrary to Article 2 of the Convention.

60. The Commission declared the application (no. 21594/93) admissible on 30 August 1994. In its report of 30 October 1997 (former Article 31 of the Convention), it expressed the opinion by thirty-two votes to one that there had been a violation of Article 2. The full text of the Commission's opinion and of the two separate opinions contained in the report is reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT

61. In her memorial the applicant requested the Court to hold that there had been a violation of Article 2 of the Convention and to award her just satisfaction.

62. In their memorial the Government asked the Court to declare that the applicant had not exhausted domestic remedies and that there had not been a violation of Article 2.

THE LAW

I. alleged violation of Article 2 of the convention

A. The Government's preliminary objections

1. Failure to exhaust domestic remedies

63. As they had done before the Commission, the Government maintained before the Court that the applicant had not exhausted the domestic remedies afforded her by Turkish law.

In the first place, the applicant could not be said to have exhausted the available criminal remedies, since the complaint that had given rise to the investigation undertaken in the case had been lodged not by the applicant herself but by the victim's employer. It would be difficult to equate the employer's action with a remedy used by the applicant, seeing that it had had a quite different aim, namely to have it officially established that the victim's death was the result of an industrial accident and therefore could not render the employer liable for negligence or a culpable act on his part. The applicant's first reaction, the request for information from the chairman of the Sirnak Administrative Council, occurred only on 20 January 1993 (see paragraph 15 above), that is to say more than three years after the events, although Mr Kaplan, the applicant's lawyer, had been instructed by her as far back as 28 December 1990.

Furthermore, the applicant had, the Government continued, omitted to avail herself of the other remedies available in Turkish law, notably in civil and administrative matters. As regards, in particular, an action in administrative law under Article 125 of the Constitution, the Government referred to the abundance of case-law with which they had supplied the Court, which in their view demonstrated the remedy's effectiveness. Relying on the judgments delivered by the Court in the cases of Cardot

v. France (19 March 1991, Series A no. 200), Ahmet Sadik v. Greece (15 November 1996, *Reports of Judgments and Decisions* 1996-V) and Aytekin v. Turkey (23 September 1998, *Reports* 1998-VII), the Government accordingly submitted that the application was inadmissible for failure to exhaust domestic remedies.

64. The applicant asserted that after the death of her son she had asked the Sirnak public prosecutor to open an investigation. She consequently considered that she had exhausted domestic remedies.

65. In its decision on admissibility the Commission expressed the opinion that the applicant had satisfied the requirement that domestic remedies should be exhausted.

66. The Court points out that in its judgment of 2 September 1998 in the case of Yasa v. Turkey it held that the applicant was not required to bring the same civil and administrative proceedings as those relied on by the Government in the instant case (*Reports* 1998-VI, p. 2432, § 75).

It noted, first of all, that a plaintiff in a civil action for redress for damage sustained through illegal acts or patently unlawful conduct on the part of State agents had, in addition to establishing a causal link between the tort and the damage he had sustained, to identify the person believed to have committed the tort. As in the instant case (see paragraph 14 above), however, those responsible for the acts complained of by the applicant remained unknown (see the judgment cited above, p. 2431, § 73).

Secondly, as regards the administrative-law action provided in Article 125 of the Constitution, the Court noted that this was a remedy based on the strict liability of the State, in particular for the illegal acts of its agents, whose identification was not, by definition, a prerequisite to bringing such an action. However, the investigations which the Contracting States were obliged by Articles 2 and 13 of the Convention to conduct in cases of fatal assault had to be able to lead to the identification and punishment of those responsible (see paragraph 88 below). That obligation accordingly could not be satisfied merely by awarding damages. Otherwise, if an action based on the State's strict liability

were to be considered a legal action that had to be exhausted in respect of complaints under Articles 2 or 13, the State's obligation to seek those guilty of fatal assault might thereby disappear (see the judgment cited above, p. 2431, § 74).

The Court sees no reason to depart from those conclusions in the instant case.

67. As to the fact that in the instant case the criminal proceedings were instituted not by the applicant herself but by the victim's employer (see paragraph 11 above), the Court reiterates that the purpose of the rule that domestic remedies must be exhausted is to afford the Contracting States the opportunity of preventing or putting right – usually through the courts – the violations alleged against them before those violations are submitted to the Court (see, among many other authorities, *Fressoz and Roire v. France* [GC], no. 29183/95, § 37, ECHR 1999-I). In the instant case the requirement was satisfied, seeing that the complaint lodged by the victim's employer had the same effect as one that could have been lodged by the applicant, namely that a criminal investigation was opened.

2. Estoppel

68. The Government also submitted that the applicant was "estopped from making her allegations" as she had not appeared before the Commission's delegation responsible for taking statements from the witnesses in Ankara, although she had been invited to do so.

69. The Court notes that the Government could themselves be regarded as estopped from raising this objection before it, since they did not do so before the Commission.

As to the merits of the issue, the Court considers that in principle the fact that an applicant has not appeared personally before the Convention institutions does not affect the validity of complaints he has raised before them in good time, provided that he maintains his application, as the applicant manifestly did in the instant case.

70. In conclusion, the Government's preliminary objections must be dismissed.

B. Merits

71. The applicant alleged that the members of the security forces had killed her son during the operation on 24 December 1990 and that an effective judicial investigation had not been made into the circumstances of his death. She complained of a violation 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."

72. The Government rejected that contention, whereas the Commission accepted it in substance.

1. The death of the applicant's son

73. The applicant alleged that her son, Musa Ogur, had been killed by a bullet fired by the security forces without any warning, when he emerged alone from the night-watchmen's refuge. In her submission, the witnesses' statements deprived the Government of any credibility in maintaining that the victim was a member of the PKK and that the security forces had been obliged to counter an attack from the night-watchmen's refuge.

74. The Commission regarded it as established that the security forces did not have to counter any attack, whether by members of the PKK, the victim or the other occupants of the shelter; that the victim had not been running away; that no loud-hailer warning had been given before firearms were used; and that Musa Ogur could have been fatally wounded by a shot from the security forces that was not a warning shot.

75. The Government submitted that the original aim of the members of the security forces had been to apprehend a terrorist, in accordance with information and instructions they had been given. When they came under fire, they had had to fire warning shots, one of which had unfortunately fatally wounded the applicant's son, who was running away. The fact that someone had been hit by a warning shot was explained by the special circumstances surrounding the incident: visibility was poor and the ground was sloping, so that the firing angle was substantially reduced.

No intention to kill on the part of the security forces had been established. It was thanks to their considerable numbers that, despite a major armed attack, further, even more serious incidents had been avoided, a fact that showed the operation had been well organised, notwithstanding very adverse weather and terrain. It had by no means been proved that the use of force by the security forces had not been absolutely necessary.

Furthermore, the Government contested in particular the value of the evidence given by Mr Cengizhan Uysal (see paragraphs 47 et seq. above), who they said was a PKK sympathiser.

76. The Court reiterates that under the Convention system before the entry into force of Protocol No. 11 on 1 November 1998, the establishment and verification of the facts was primarily a matter for the Commission (see former Articles 28 § 1 and 31). Only in exceptional circumstances will the Court exercise its own powers in this area. However, it is not bound by the Commission's findings of fact and remains free to make its own assessment in the light of all the material before it (see the Yasa judgment cited above, p. 2437, § 93).

In the absence of any fresh evidence submitted by those appearing before it, the Court will rely on the evidence gathered by the Commission, but will assess its weight and effects.

77. The Court notes, first of all, that none of those appearing before it disputed that the victim had been killed by a bullet fired by the security forces. The disagreement related solely to whether that bullet came from a warning shot or from a shot fired at the victim, and to the circumstances in which the shot was fired.

78. The Court, further, reiterates that the exceptions delineated in paragraph 2 of Article 2 of the Convention indicate that this provision extends to, but is not concerned exclusively with, intentional killing. The text of Article 2, read as a whole, demonstrates that paragraph 2 does not primarily define instances where it is permitted intentionally to kill an individual, but describes the situations where it is permitted to "use force" which may result, as an unintended outcome, in the deprivation of life. The use of force, however, must be no more than "absolutely necessary" for the achievement of one of the purposes set out in sub-paragraphs (a), (b) or (c).

In this respect the use of the term "absolutely necessary" in Article 2 § 2 indicates that a stricter and more compelling test of necessity must be employed than that normally applicable when determining whether State action is "necessary in a democratic society" under paragraph 2 of Articles 8 to 11 of the Convention. In particular, the force used must be strictly proportionate to the achievement of the aims set out in sub-paragraphs 2 (a), (b) and (c) of Article 2.

In keeping with the importance of this provision in a democratic society, the Court must, in making its assessment, subject deprivations of life to the most careful scrutiny, particularly where deliberate lethal force is used, taking into consideration not only the actions of the agents of the State who actually administer the force but also all the surrounding circumstances including such matters as the planning and control of the actions under examination (see the McCann and Others v. the United Kingdom judgment of 27 September 1995, Series A no. 324, p. 46, §§ 148-50).

79. The Court must therefore now consider whether in the instant case the force used against the victim by the security forces could be said to be absolutely necessary and therefore strictly proportionate to the achievement of one of the aims set out in paragraph 2 of Article 2, the only relevant ones of which, in the circumstances of the case, are the "defence of any person from unlawful violence" and "effect[ing] a lawful arrest".

80. In this connection, it should be remembered that, according to the Government, the objective of the members of the security forces had been to apprehend the victim, who was thought to be a terrorist. On that occasion they had had to face a "major armed response", to which they had replied with warning shots, one of which had hit Musa Ogur, who had allegedly been running away. That accident was explained, in particular, by the poor visibility at the scene of the events, due to fog and the lie of the land, which was sloping.

81. Like the Commission, the Court notes, however, that of all the witnesses interviewed, only the members of the security forces stated that they had been the target of an armed attack (see paragraphs 33, 37 and 41

above). Admittedly, the technical expert appointed by the Sirnak public prosecutor also noted in his report "an exchange of fire between the security forces and members of the PKK terrorist movement who were firing from the shelter and seeking to escape", but he gave no indication of the facts on which that statement was based (see paragraph 22 above).

On the other hand, in its decision of 26 December 1990 the public prosecutor's office made no mention of any attack on the security forces, noting merely that when Musa Ogur left the shelter and squatted down to answer a call of nature, "the security forces gained the impression that the suspect was escaping and they opened fire and killed him" (see paragraph 12 above).

The night-watchmen who were with the victim just before the incident all stated that he had gone out of the shelter alone, to answer a call of nature, and that neither before nor after the shot which fatally wounded Musa Ogur had they used the shotguns that were in the shelter (see paragraphs 20 and 24 above). In this connection, the Court notes that, according to the Sirnak public prosecutor, there were no cartridges or cartridge cases at the spot where the victim's body lay (see paragraph 20 above); that was a finding which the prosecutor confirmed orally (see paragraph 28 above). Only eight spent shotgun cartridges were found by the prosecutor in the dugouts, but they were two or three days old (see paragraph 20 above). Three shotguns were apparently also found in the shelter, but it was only a matter of surmise that the night-watchmen had used them against the security forces (see paragraphs 20 and 30 above). Lastly, it would appear that no member of the security forces was wounded during the operation in question.

The Court consequently considers that there is insufficient evidence to establish that the security forces came under any armed attack at the scene of the incident.

82. The Court notes, further, that according to Celal Uymaz, the gendarmerie lieutenant-colonel appointed by the governor as investigating officer in the case, the security forces are under instructions, in circumstances such as those of the instant case, to give at least three verbal warnings to the suspects by loud hailer (see paragraph 42 above). In the Court's view, such precautions are all the more necessary where, as in this instance, the operations take place in darkness and fog, on hilly ground.

Only one of the witnesses questioned, however, stated that verbal warnings had been given on this occasion (see paragraph 37 above), while another indicated that no warning had been given and a third witness said that he could not remember what had happened (see paragraphs 33 and 38 above).

The Court concludes that there is not sufficient evidence to establish that the security forces gave the warnings usual in such cases.

83. Several witnesses explained the death of the applicant's son as having been caused by a warning shot (see paragraphs 29, 33-34, 38 and 41-42 above), and the Government added, in their memorial, that as the shot had struck Musa Ogur in the nape of the neck, he had been running away.

The Court points out that, by definition, warning shots are fired into the air, with the gun almost vertical, so as to ensure that the suspect is not hit (see paragraph 39 above). That was all the more essential in the instant case as visibility was very poor. It is accordingly difficult to imagine that a genuine warning shot could have struck the victim in the neck. In this context, it should also be noted that according to one of the members of the security forces, the men had taken up position fifty metres apart from each other but were not linked by radio; that must necessarily have made it difficult to transmit orders and to control the operations (see paragraph 38 above).

The Court consequently considers that, even supposing that Musa Ogur was killed by a bullet fired as a warning, the firing of that shot was badly executed, to the point of constituting gross negligence, whether the victim was running away or not.

84. In sum, all the deficiencies so far noted in the planning and execution of the operation in issue suffice for it to be concluded that the use of force against Musa Ogur was neither proportionate nor, accordingly, absolutely necessary in defence of any person from unlawful violence or to arrest the victim. There has therefore been a violation of Article 2 on that account.

2. The investigations by the national authorities

85. The applicant stated that the Administrative Council – composed of persons who are not lawyers and are answerable to the executive – did everything to protect those responsible for the incident of 24 December 1990, relying on the law governing the prosecution of civil servants (see paragraph 52 above). In her submission, the administrative authorities' efforts to protect those responsible for the crime were obvious. In that connection, she referred to several witness statements, including that of the investigating officer, who had said that he had not considered it necessary to identify and question the members of the security forces who had taken part in the operation (see paragraph 43 above), and the one made by Mehmet Akay, according to which revealing the identity of the soldiers in question could have put their lives at risk (see paragraph 35 above).

86. The Commission considered that the investigation carried out at national level into the death of the applicant's son had not been conducted by independent authorities, had not been thorough and had taken place

without the applicant's being able to take part. In the Commission's view, such a situation amounted to a breach by the State of its obligation to "protect the right to life by law".

87. The Government did not make any observations on the circumstances in which the investigation into Musa Ogur's death was carried out.

88. 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, in particular by agents of the State. This investigation should be capable of leading to the identification and punishment of those responsible (see, among other authorities, the Yasa judgment cited above, p. 2438, § 98, and the Assenov and Others v. Bulgaria judgment of 28 October 1998, *Reports* 1998-VIII, p. 3290, § 102).

89. The Court observes that when he inspected the scene of the incident, the Sirnak public prosecutor confined himself to noting findings in respect of the victim's body, making an inspection and a sketch of the scene, reconstructing the events and interviewing three witnesses, all of them night-watchmen colleagues of the victim (see paragraph 20 above).

In his report the prosecutor indicated, in particular: “Since the gunshot wound was the certain cause of death and no other finding was made that could suggest any other cause, it was not considered necessary to carry out a full post-mortem” (see paragraph 20 above). It should be pointed out here, however, that in a case of this kind a proper post-mortem examination – if it had been carried out – could have provided valuable information about the approximate positions of the person who fired and the victim, and the distance between them, at the moment of the shot.

The same report merely mentions the discovery of eight cartridges, three shotguns and a quantity of powder, but none of that evidence was subsequently subjected to detailed examination. On the subject of the cartridges the report does no more than state that they “must have been two or three days old”; in respect of the powder, it states that it was “impossible to say whether it was fresh powder or not” (see paragraph 20 above). Here too a proper examination, in particular a ballistic test, could have revealed exactly when those items had been used.

As to the witnesses questioned at the scene by the prosecutor, they were all members of the night-watchmen’s team. No member of the security forces that took part in the operation was interviewed on that occasion.

Lastly, the expert report prepared at the prosecutor’s request contains information that is very imprecise and findings mostly unsupported by any established facts.

90. The subsequent investigation carried out by the administrative investigation authorities scarcely remedied the deficiencies noted above in that, again, no post-mortem or other forensic examination, notably in the form of ballistic tests, was ordered and no members of the security forces that took part in the operation were questioned, although their names were known (see paragraphs 43 and 49 above). Thus no serious attempt to identify the person who had fired the fatal shot was made, although several of the witness statements indicated that the shot came from the security forces.

91. At all events, serious doubts arise as to the ability of the administrative authorities concerned to carry out an independent investigation, as required by Article 2 of the Convention. The Court notes that the investigating officer appointed by the governor was a gendarmerie lieutenant-colonel and, as such, was subordinate to the same chain of command as the security forces he was investigating. As to the Administrative Council, whose responsibility it was to decide whether proceedings should be instituted against the security forces concerned, it was composed of senior officials from the province and was chaired by the governor, who in this instance was administratively in charge of the operation by the security forces. In this connection, the evidence of one of the members of the Sirnak Administrative Council should be noted, according to which, in practice, it was not possible to oppose the governor: either the members signed the decision prepared by him or they were replaced by other members who were willing to do so (see paragraph 48 above).

92. It must be noted, lastly, that during the administrative investigation the case file was inaccessible to the victim’s close relatives, who had no means of learning what was in it (see paragraph 15 above). The Supreme Administrative Court ruled on the decision of 15 August 1991 on the sole basis of the papers in the case, and this part of the proceedings was likewise inaccessible to the victim’s relatives. Nor was the decision of 15 August 1991 served on the applicant’s lawyer, with the result that the applicant was deprived of the possibility of herself appealing to the Supreme Administrative Court.

93. In conclusion, the investigations in this case cannot be regarded as effective investigations capable of leading to the identification and punishment of those responsible for the events in question. There has therefore been a violation of Article 2 on this account also.

II. application of article 41 of the Convention

94. The applicant sought just satisfaction under Article 41 of the Convention, which 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. Damage

95. In respect of the damage she had sustained, the applicant claimed 500,000 French francs (FRF), of which FRF 400,000 was for pecuniary damage and FRF 100,000 for non-pecuniary damage. She pointed out that she had had no means of support since the death of her son, who had maintained the family by working as a night-watchman.

96. The Government submitted that no compensation was due to the applicant as she had not exhausted domestic remedies or been the victim of a breach of Article 2. In the alternative, the Government submitted that the applicant's claims should first be brought in the Turkish administrative courts, which could allow them if appropriate. The Court should therefore not give a ruling. At all events, the claims in question were unconscionable, excessive and wholly without foundation, in the absence of sufficient particulars concerning the assessment of the pecuniary and non-pecuniary damage and the socio-economic circumstances of the applicant and of her region.

97. The Delegate of the Commission wished to leave the matter to the Court's discretion.

98. The Court has already held that if a victim, after exhausting the domestic remedies in vain before complaining to the Convention institutions of a violation of his rights, were obliged to do so a second time before being able to obtain just satisfaction from the Court, the total length of the procedure instituted by the Convention would scarcely be in keeping with the idea of the effective protection of human rights. Such a requirement would lead to a situation incompatible with the aim and object of the Convention (see the De Wilde, Ooms and Versyp v. Belgium judgment of 10 March 1972 (*Article 50*), Series A no. 14, p. 9, § 16).

Having regard to its conclusions as to compliance with Article 2 and to the fact that the events complained of took place more than eight years ago, the Court considers that it is required to rule on the applicant's claim for just satisfaction.

As regards pecuniary damage, the file contains no information on the applicant's son's income from his work as a night-watchman, the amount of financial assistance he gave the applicant, the composition of her family or any other relevant circumstances.

That being so, the Court cannot allow the compensation claim submitted under this head (Rule 60 § 2).

As to non-pecuniary damage, the Court considers that the applicant undoubtedly suffered considerably from the consequences of the double violation of Article 2. She not only lost her son but also had to witness helplessly a flagrant lack of diligence on the part of the authorities in their conduct of the investigation. On an equitable basis, the Court assesses that non-pecuniary damage at FRF 100,000.

B. Costs and expenses

99. In respect of the costs and expenses relating to her representation before the national authorities and then before the Convention institutions, the applicant claimed FRF 240,000. That sum would also cover the expenses occasioned by the witness hearings in Ankara and Strasbourg – for which the applicant's lawyer was assisted by three advisers – and substantial costs for translating documents emanating from Strasbourg.

100. The Government considered this a "colossal" sum that was unsupported by any voucher worthy of the name.

101. The Delegate of the Commission wished to leave the matter to the Court's discretion.

102. The Court notes that the applicant gave no breakdown of the number of hours of work for which her lawyer sought payment. Under Rule 60 § 2 of the Rules of Court, it therefore cannot allow the claim as it stands. Making its assesment on an equitable basis, it awards FRF 30,000 in respect of costs and expenses, from which FRF 18,830 received by the applicant in legal aid must be deducted.

C. Default interest

103. The Court considers it appropriate to adopt the statutory rate of interest applicable in France at the date of adoption of the present judgment, namely 3.47% per annum.

FOR THESE REASONS, THE COURT

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

2. *Holds* by sixteen votes to one that there has been a violation of Article 2 of the Convention as regards the planning and execution of the operation that led to the death of the applicant's son;

3. *Holds* unanimously that there has been a violation of Article 2 of the Convention as regards the investigations carried out by the national authorities;

4. *Holds* by sixteen votes to one

(a) that the respondent State is to pay the applicant, within three months, the following sums, to be converted into Turkish liras at the rate applicable at the date of settlement:

(i) 100,000 (one hundred thousand) French francs for non-pecuniary damage;

(ii) 30,000 (thirty thousand) French francs for costs and expenses, plus any amount which may be due in value-added tax, less 18,830 (eighteen thousand eight hundred and thirty) French francs;

(b) that simple interest at an annual rate of 3.47% shall be payable on those sums from the expiry of the above-mentioned three months until settlement;

5. *Dismisses* by sixteen votes to one the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 20 May 1999.

Luzius Wildhaber

President

Paul Mahoney

Deputy Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) partly dissenting opinion of Mr Bonello;

(b) partly dissenting opinion of Mr Gölcüklü.

L.W.

P.J.M.

PARTLY DISSENTING OPINION OF JUDGE BONELLO

In this case the Court has found a multiple violation of the fundamental right to life, in that the Turkish authorities are to be held responsible both for the measures that led to the death of the applicant's son and for failing to conduct any serious investigation into that killing by the security forces.

The Court awarded the dead man's mother some compensation for non-pecuniary damage, but refused to consider the claim for pecuniary damage in the following terms: "As regards pecuniary damage, the file contains no information on the applicant's son's income from his work as a night-watchman, the amount of financial assistance he gave the applicant, the composition of her family or any other relevant circumstances. That being so, the Court cannot allow the compensation claim submitted under this head (Rule 60 § 2)."

I am profoundly distressed by such reasoning. This was a particularly appalling case of State homicide. At best, a callous lesson in reckless killing, followed by an impertinent cover-up that masqueraded as an investigation. The majority reacted to this outrage by finding refuge in the arms of what, to me, appear as infelicitous legalisms. Often there is nothing like the by-products of law to pervert the course of justice.

The applicant's son was 30 years old when he was killed, and worked regularly as a night-watchman at a mine. According to a statement which the Government did not contest, "his family lived on the income he earned... No indemnity was paid to the applicant (his mother) out of the Social Security Fund (after his death) ..."[1]. The mother of the dead victim claimed 500,000 French francs for pecuniary damage in the present proceedings. She received zero French francs.

It is unchallenged that the applicant failed to provide "itemised particulars of all claims made, together with the relevant supporting documents or vouchers" as required by Rule 60 § 2 of the Rules of Court. But I do not believe that this should, in the circumstances, have led to a total rejection of the applicant's claim.

Firstly, the rule in question lays down that, in default of proper documentation in support of the claim, the Court "may reject the claim in whole or in part". This makes it clear that the Court enjoys an absolute discretion whether to allow the claim or not. In this particularly shocking case the Court of Human Rights did exercise that discretion. It exercised it in favour of the violator of human rights, and against the victim of that violation.

Secondly, the same rule empowers the Court, at any stage of the proceedings, to "invite any party to submit comments on the claim for just satisfaction"[1]. I believe that, having noticed a deficiency in the evidence relating to pecuniary damage, the Court could, and ought to, have invited the applicant to submit details of her claim.

It would certainly not have been the first time that the Court left the determination of "just satisfaction" to a later stage, after judgment on the merits. Many, many times in its history, when the Court considered that the file contained insufficient data on the damage suffered by the victim, it either made a finding that "the question of the application of Article 50 [now Article 41] is not ready for decision" or proceeded to assess the damages "on an equitable basis". The Court could have followed these numerous precedents, but failed to do so.

In fact, I believe that the majority were clearly in a position to assess, on an equitable basis, the compensation due to the applicant in respect of pecuniary damage. Courts make findings derived from two inputs: evidence and presumptions. In this case, in the absence of evidence, the Court could, and ought to, have presumed that the dead man was earning at least the legal minimum wage current in south-east Turkey.

That was a safe and reasonable presumption which stared the majority in the face, one that shifted onto the Government the burden of proving otherwise. Contrary to what the judgment says, the record shows that the dead man's family "lived on the income he earned". The practice of assessing damages "on an equitable basis", so often resorted to by the Court, would surely have suffered no lethal harm had the Court relied on the legal minimum wage the applicant's son must necessarily have been earning before his tragic death as the basis for its calculations.

As recently as last year, in a case in which the applicants had failed to produce evidence on the pecuniary damage alleged, the Court dealt with the matter in a manner diametrically opposed to the way it employed in the present case: it assessed the amount to be awarded for pecuniary damage of its own motion "on principles of equity". The Court said:

"… [S]ince the applicants have not substantiated their claim as to the quantity and value of their lost property with any documentary or other evidence ... the Court's assessment of the amounts to be awarded must, by necessity, be speculative and based on principles of equity."[1]

The Court awarded the applicants approximately 40,000 pounds sterling.

I fail to see why the Court should now suddenly turn its case-law inside out, or why the "principles of equity" should be enlisted when they favour some and be scrapped when they favour others.

After all, the Court has repeatedly, in the absence of data to substantiate an applicant's claim for pecuniary damage, resorted to its own quantification of pecuniary damage on an equitable basis. In a recent case, an architect lamented that the length of administrative proceedings had damaged his professional reputation, and that this had resulted in a loss of clients. Like Mrs Ogur, he too claimed for unevidenced pecuniary damage. Like Mrs Ogur, he too failed to substantiate his claim. But unlike Mrs Ogur, he was awarded compensation for pecuniary damage on "an equitable basis"[2]. I will try hard not to conclude that, in the eyes of the majority, loss of life is less worthy of empathy than loss of clients.

In this case, a State which had solemnly undertaken to cherish the right to life, has wantonly plucked and tossed away the being of a young man, paying the price of a small car – almost an entertainment tax on homicide. In the Strasbourg market it seems that life comes cheap, and killing is a tremendous bargain.

Partly dissenting opinion of JUDGE GÖLCÜKLÜ

(*Translation*)

I agree with and confine myself to the findings and reasoning of the majority of the Court as to the inadequacy of the investigations carried out at national level into the death of the applicant's son.

To my great regret, however, I cannot share the opinion of the majority as to the particular circumstances of the death of the applicant's son, Musa Ogur, or agree with the conclusions they reach on the basis of the facts as established and assessed by the Commission. I consider that it was open to the Court, even if it adopted the Commission's findings as to the facts, to interpret these differently and in that way to reach a different conclusion from that of the Commission. I must point out at the outset that the Commission itself accepted that "… having regard to the above findings (see in particular paragraphs 117 and 134), … the circumstances surrounding the death of the applicant's son are far from clear" (Commission's report, paragraph 146). Given such a statement, how is it possible to reach the conclusion that "the use of force against Musa Ogur was neither proportionate nor, accordingly, absolutely necessary in defence of any person

from unlawful violence or to arrest the victim" (paragraph 84 of the judgment)? In my opinion, there was no "use of force" against Musa Ogur; it was quite legitimate and absolutely necessary for the security forces to organise an operation against the PKK terrorists in a region where the PKK's growing, reckless terrorism has cost the lives of tens of thousands of innocent human beings. The facts and circumstances surrounding Musa Ogur's death must therefore be assessed against the general background of events and the particular situation in south-east Turkey.

In its judgment in the case of McCann and Others v. the United Kingdom, the Court held:

"… the use of force by agents of the State in pursuit of one of the aims delineated in paragraph 2 of Article 2 of the Convention may be justified under this provision where it is based on an honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken. To hold otherwise would be to impose an unrealistic burden on the State and its law-enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and those of others.

It follows that, having regard to the dilemma confronting the authorities in the circumstances of the case, the actions of the soldiers do not, in themselves, give rise to a violation of this provision." (judgment of 27 September 1995, Series A no. 324, pp. 58-59, § 200)

Mutatis mutandis, those considerations are as valid and as relevant in the instant case. Even if the facts disputed by the parties are left out of account, it is certain that the bad atmospheric and geographical conditions – hilly,

sloping ground, darkness at daybreak, thick fog, snowstorm, etc. – further complicated the operation, which was already a high-risk operation. Allowance must also be made for the fact that the Cudi mountains are one of the areas most commonly frequented by members of the PKK (see paragraphs 33, 35, 75, 80, 82 and 85 of the judgment). In sum, the Court did not take sufficient account of the particular circumstances in which the alleged events occurred or of the findings made in the national investigation, which were in no way contradicted by the Commission's investigation.

In any event, the Commission's investigation could not yield the expected results, since none of the eyewitnesses summoned by the applicant party appeared before the Commission or, therefore, was examined. The applicant was wholly absent throughout the proceedings both before the Commission and before the national authorities (Commission's report, paragraph 87).

A final point which is also of importance in the case: the total absence of any initiative by the applicant, who, although represented from the outset by a lawyer, did not avail herself of any domestic remedies, preferring to remain inactive and to wait. On this point I should like to recall to mind the Aytekin v. Turkey judgment of 23 September 1998, in which the Court penalised a party who had failed to exhaust all the existing domestic remedies, despite taking part in the proceedings. If, in the Aytekin case, the Court was able to find that domestic remedies had not been exhausted it should *a fortiori* in the Ogur case have been much more demanding and categorical, since it was not found that the applicant party had made any attempt to exhaust those remedies.

I therefore consider that, in the light of these facts, it is not possible to maintain that the use of force within the meaning of Article 2 of the Convention was not absolutely necessary and proportionate to the aim pursued and that there was therefore a violation.

As to the application of Article 41 of the Convention, the Court assessed non-pecuniary damage at FRF 100,000. That seems to me to be difficult to justify because when, in similar cases, the (old) Court found a violation of a violation of Article 2 of the Convention, the compensation awarded under the head of non-pecuniary damage amounted to about FRF 50,000 to 60,000, which was an equitable sum in view of the cost of living in the country and the purchasing power of the Turkish lira. The Court, for instance, awarded GBP 6,000 in the Yasa v. Turkey case (judgment of 2 September 1998), FRF 50,000 in the Güleç v. Turkey case (judgment of 27 July 1998) and GBP 6,000 in the Ergi v. Turkey case (judgment of 28 July 1998).

Notes by the Registry

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

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

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

1. The names of the infantry squads in question are given in full in the report.

1. *Note by the Registry*. For practical reasons this annex will appear only with the final printed version of the judgment (in the official reports of selected judgments and decisions of the Court), but a copy of the Commission's report is obtainable from the Registry.

1. Applicant's memorial of 23 March 1998.

1. Rule 60 § 3.

1. Selçuk and Asker v. Turkey judgment of 24 April 1998, *Reports of Judgments and Decisions* 1998-II, p. 915, § 106.

2. Doustaly v. France judgment of 23 April 1998, *Reports* 1998-II. There are various other recent cases on record in which the Court, in the absence of a quantified claim,

awarded *pecuniary* damages “on an equitable basis”: see Allenet de Ribemont v. France, 10 February 1995; Hentrich v. France (*Article 50*), 3 July 1995; Gaygusuz v. Austria, 16 September 1996; Canea Catholic Church v. Greece, 16 December 1997; Estima Jorge v. Portugal, 21 April 1998; and Vasilescu v. Romania, 22 May 1998.