Caso de Salman contra Turquía, de 27/06/2000 [ENG]

Preliminary objection dis

EUROPEAN COURT OF HUMAN RIGHTS

CASE OF SALMAN v. TURKEY

(Application no. 21986/93)

JUDGMENT

STRASBOURG

27 June 2000

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In the case of Salman v. Turkey,

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

Mr L. Wildhaber, *President*,

Mr J.-P. Costa,

Mr A. Pastor Ridruejo,

Mr L. Ferrari Bravo,

Mr G. Bonello,

Mr J. Makarczyk,

Mr P. Kuris,

Mrs F. Tulkens,

Mr V. Butkevych,

Mr J. Casadevall,

Mrs N. Vajic,

Mrs H.S. Greve,

Mr A.B. Baka,

Mr R. Maruste,

Mrs S. Botoucharova,

Mr M. Ugrekhelidze,

Mr F. Gölcüklü, ad hoc *judge*,

and also of Mr M. de Salvia, *Registrar*,

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

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

PROCEDURE

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

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

The Commission's request referred to former Articles 44 and 48 and to Rule 32 § 2 of former Rules of Court A[1]. The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 2, 3, 13, 18 and former Article 25 of the Convention.

2. On 20 September 1999 a panel of the Grand Chamber decided that the case would be examined by the Grand Chamber of the Court (Article 5 § 4 of Protocol No. 11 and Rules 100 § 1 and 24 § 6 of the Rules of Court). The Grand Chamber included *ex officio* Mr R. Türmen, the judge elected in respect of Turkey (Article 27 § 2 of the Convention and Rule 24 § 4), Mr L. Wildhaber, the President of the Court, Mrs E. Palm, Vice-President of the Court, 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 (Rules 24 § 3 and 100 § 4).

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

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

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

There appeared before the Court:

(a) *for the Government*

Mr M. Özmen, *Agent*,

Ms Y. Kayaalp,

Mr O. Zeyrek,

Ms M. Gülsen,

Mr H. Çetinkaya, *Advisers*;

(b) *for the applicant*

Ms A. Reidy, *Counsel*,

Ms F. Hampson,

Mr O. Baydemir,

Ms R. Yalçindag,

Mr M. Kilavuz, *Advisers*.

The Court heard addresses by Ms Reidy and Mr Özmen.

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

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The facts of the case, particularly concerning events on 28 and

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

The Commission heard witnesses in Ankara from 1 to 3 July 1996 and in Strasbourg on 4 December 1996 and 4 July 1997. The witnesses included the applicant; her son Mehmet Salman; her brother-in-law Ibrahim Salman; Ahmet Dinçer and Sevki Tasçi, police officers who apprehended Agit Salman; Ömer Inceyilmaz, Servet Ozyilmaz and Ahmet Bal, custody officers on duty over the period of Agit Salman's detention; Ibrahim Yesil, Erol Çelebi and Mustafa Kayma, interrogation team officers who took Agit Salman to the hospital; Tevfik Aydin, the Adana public prosecutor who attended the autopsy; Dr Ali Tansi, the doctor at the Adana State Hospital who declared that Agit Salman was dead; Dr Fatih Sen, who conducted the autopsy; Dr Derek Pounder, Professor at Aberdeen University, a forensic expert called by the applicant, and Dr Bilge Kirangil, a member of the Istanbul Institute of Forensic Medicine which had reviewed the autopsy carried out by Dr Fatih Sen.

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

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

A. The Commission's findings of fact

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

9. On 26 February 1992 Agit Salman was taken into custody by police officers from the anti-terrorism branch of the Adana Security Directorate. Ibrahim Yesil was the officer in charge of interrogating him. Agit Salman was released at 5.30 p.m. on 27 February 1992. He told the applicant and their son Mehmet that he had been beaten and immersed in cold water during the night of his detention. He remained off work for two days with a chill.

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

11. Police officers located Agit Salman at a taxi rank at Yesilova at about 1 a.m. on 28 April 1992. Assistant Superintendent Ahmet Dinçer and officers Sevki Tasçi and Ali Sari took him into custody. The apprehension report of the officers made no mention of any struggle or the necessity to use force to place Agit Salman in the police car. There was an inconsistency between their written statements later given to the public prosecutor on 22 May 1992 when they stated that some pushing and pulling might have occurred and their evidence to the Commission. In their oral

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

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

13. The custody officer on duty, Ömer Inceyilmaz, entered Agit Salman's arrival in the custody area as occurring at 3 a.m. on 28 April 1992. There was no information recorded or evidence accounting for the time which elapsed between his apprehension,

which took place according to the arresting officers' report at 1.30 a.m., and his registration in the custody area at 3 a.m.

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

15. Two other suspects are known to have been apprehended in connection with the same operation: Behyettin El, taken into custody on 25 April 1992, and Ferhan Tarlak, detained also on 28 April 1992. A third suspect, Ahmet Gergin, was also detained in the custody area in relation to the offences under investigation. Ibrahim Yesil took a statement from Behyettin El and Ahmet Gergin on 29 April 1992. Behyettin El stated that he had been interrogated before the arrival of Ferhan Tarlak, which would have been on or before 28 April 1992.

16. No records existed of the movements of detainees to and from their cells, for example, noting the times of interrogations. The police officers concerned in the events denied in their statements to the public prosecutor taken between 18 and 25 May 1992 that Agit Salman had been interrogated during his detention, in particular, as no interrogations would take place before the operation was completed. Ibrahim Yesil, Mustafa Kayma and Hasan Arinç gave oral evidence to the same effect to the Commission's delegates. The Commission found that their assertion that Agit Salman had not been questioned during the twenty four hours following his apprehension to be implausible, inconsistent and lacking in credibility (see the Commission's analysis of the evidence, Commission's report of 1 March 1999, §§ 271-78). Taking into account also the other evidence, it found that Agit Salman had been questioned by the interrogation team during his period of detention.

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

18. According to a statement signed by the police officers who had said they had brought Agit Salman to hospital at 2 a.m. on 29 April 1992, the custody officer had informed them at 1.15 a.m. that Agit Salman was ill. The suspect told them that his heart was giving him trouble and they took him without delay to the State Hospital emergency ward.

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

20. At about 1 p.m. on 29 April 1992 Mehmet Salman was brought by the police to the Security Directorate, where the public prosecutor informed him that his father had died of a heart attack. Ibrahim Salman went to the forensic department on 30 April 1992 to identify the body. The body was released to the family who undertook to bury it the day before May Day. The family washed the body at the cemetery. Ibrahim Salman saw bruises and visible marks in the armpits. There were marks in the back resembling holes. There were marks on one foot, which was swollen. Four colour photographs of the body were taken on behalf of the family.

21. On 21 May 1992 Dr Fatih Sen issued the autopsy report. It repeated the physical findings of the examination record, this time describing the ecchymosis on the front of the chest as purple. The internal examination disclosed that the lungs weighed 300 g each and were oedematic and that the heart, weighing 550 g, was larger than the norm. The brain was oedematic. There was some indication of arteriosclerosis in certain vessels and the parietal layer of the myocard adhered tightly to the heart. The sternum was fractured and the surrounding soft tissues revealed fresh haemorrhage which could have been caused by attempted resuscitation.

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

22. On 22 May 1992 the photographs taken by the family were handed over to the public prosecutor.

23. Statements were taken by the public prosecutor from the interrogating team (Ibrahim Yesil, Hasan Arinç, Mustafa Kayma and Erol Çelebi) on 18 May 1992. Statements were taken from the arresting officers Ahmet Dinçer, Ali Sari and Sevki Tasçi and the custody officers Ahmet Bal, Servet Ozyilmaz and Ömer Inceyilmaz on 22 May 1992. Statements were also taken from Behyettin El and Ferhan Tarlak on 8 May 1992, the applicant on 26 May 1992, Temir Salman (the father of Agit Salman) on 29 May 1992, Hasan Çetin and Abdurrahman Bozkurt, two taxi drivers, on 29 and 30 June 1992 respectively and from Dr Ali Tansi on 30 June 1992.

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

The report took up the findings of the internal and external examination conducted at the autopsy. It concluded that, apart from small, fresh, traumatic abrasions on the ankle and the old purple ecchymosis on the front of the chest, no other traumatic injuries were identified. The fresh haemorrhage around the sternum could be attributed to a resuscitation attempt. There was no evidence to suggest that he had died from any direct

trauma. The superficial traumas on his body could be attributed to his resistance and struggle on arrest or his being put in the police vehicle, although they could have been inflicted directly. They were not independently fatal. The relatively large size of the heart, the sclerosis in the heart arteries and the signs of an old infectious disease on the membrane and muscles of the heart, pointed to a long-standing heart disease. The report concluded that, although the deceased had lived and worked actively prior to his arrest, his death within twenty-four hours of being apprehended could have been caused by cardiac arrest connected with neurohumoral changes brought about by the pressure of the incident in addition to his existing heart disease.

25. On 19 October 1992 the Adana public prosecutor issued a decision not to prosecute. He stated that at about 1.15 a.m. on 29 April 1992 Agit Salman had informed officers that his heart was giving him trouble and he had been taken to Adana State Hospital, where he died. According to the forensic report, Agit Salman had had a long-standing heart disease, any superficial injuries could have occurred during his arrest and death was the result of a heart attack brought on by the pressure of the incident and his heart problem. There was no evidence justifying a prosecution.

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

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

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

29. In an indictment dated 2 May 1994, ten police officers (Ömer Inceyilmaz, Ahmet Dinçer, Ali Sari, Sevki Tasçi, Servet Ozyilmaz, Ahmet Bal, Mustafa Kayma, Erol Çelebi, Ibrahim Yesil, Hasan Arinç) were charged with homicide in case no. 1994/135. Hearings took place before the Adana Assize Court on, *inter alia*, 27 June, 26 September, 31 October and 1 December 1994. The defendants pleaded not guilty. Oral statements were given by six of the ten police officers (Ahmet Dinçer, Sevki Tasçi, Mustafa Kayma, Erol Çelebi, Ibrahim Yesil and Hasan Arinç) maintaining their written statements and denying any ill-treatment of Agit Salman. The court also heard Temir Salman, the father of Agit Salman, the applicant and Dr Ali Tansi, the doctor on duty in the emergency ward at Adana State Hospital. A written statement was obtained from Behyettin El.

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

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

32. The Commission found, in light of the written and oral evidence, the photographs and the medical opinions given by Professor Pounder and Professor Cordner, that Agit Salman had died rapidly, without a prolonged period of breathlessness. There were marks and abrasions on his left ankle for which there was no explanation and there was bruising and swelling on the sole of the left foot, which could not have been caused accidentally. These were consistent with the application of *falaka* (see paragraph 71 below). The bruise in the centre of the chest had not been dated with any accuracy by histopathological means and had not been shown to be dissociated from the broken sternum. These injuries together could not have been caused by cardiac massage. The Commission also disbelieved the oral evidence of officers Ibrahim Yesil, Mustafa Kayma and Erol Çelebi that cardiac massage had been applied, noting that this had first been mentioned as having occurred when evidence was given before its delegates in July 1996, four years after the events. The Commission concluded that Agit Salman had been subjected to torture during interrogation, which had provoked cardiac arrest and thereby caused his death.

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

34. The applicant was summoned a second time. A report dated 9 February 1996, signed by police officers, listed details of the applicant's income and expenditure and confirmed her declaration of means. On this or another date, she was taken before the public prosecutor and again asked about her statement of means. No threats were made during that interview.

B. The Government's submissions on the facts

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

36. Agit Salman had suffered from a pre-existing heart disease. When he was arrested, he sustained minor injuries. The bruise on his chest, which was purple and therefore old, predated his arrest. During his detention in the custody area at Adana Security Directorate, he was not interrogated as the operation had not yet been completed. At about 1 a.m., he called for assistance and told the custody officer that his heart was giving him trouble. The custody officer sought help from the officers of the interrogating team who were waiting nearby for the next stage of the operation. These officers put Agit Salman, who was having difficulty breathing, in a police van and drove him to the hospital. On the way, they stopped the van and Mustafa Kayma briefly applied

mouth-to-mouth resuscitation and cardiac massage. They took Agit Salman to the emergency ward, where they were told that he had died.

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

38. In her evidence before the Commission delegates, Dr Bilge Kirangil had expressed the opinion that the bruise on the chest was at least 2 to 3 days old and unrelated to the broken sternum and that the oedema in the brain was indicative of a prolonged period of breathlessness prior to death. No findings could be drawn from the photographs, which were amateur and of poor quality. She did not consider the lack of proper forensic photographs to be a major deficiency. There had been no findings of ill-treatment in the Institute's report since there was no evidence of such. Cardiac arrest as in this case could be triggered by hormonal or environmental factors, such as extremes of temperature. If a direct blow had caused the bruise and fractured the sternum, she would have expected to see contusion and ecchymosis on the back surface of the sternum and bruising on the front and back surface of the right ventricle of the heart. While the lungs of an individual who had been breathless for thirty minutes could generally be expected to increase to a weight of 500 to 600 g, this was not necessarily the case but depended on the individual (see the summary of Dr Kirangil's evidence, Commission's report, §§ 233-41).

C. The expert medical reports

1. Report of Professor Pounder submitted on 26 November 1996 on behalf of the applicant

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

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

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

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

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

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

There was a 5 cm by 10 cm bruise in the centre of the chest, which was described as old and purple in colour.

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

43. The bruise to the chest directly overlay the fracture to the sternum. The haemorrhage around the fracture suggested that the fracture was produced before and not after death. The production of such a fracture would be sufficient to induce an abnormality in the rhythm of the underlying heart and thus cause a sudden death. Consequently, the fracture of the sternum represented a possible cause of death. While, theoretically, a fracture could be produced by a fall, it would be unusual, requiring impact on a raised object or edge and it would be associated with injuries to other parts of the body. Cardiac massage could also produce a fracture if very considerable force was applied. The fracture could also have been produced by a blow. In that case, bruising of the skin would be expected, even if the death which followed was rapid. Although Dr Fatih Sen characterised the bruise on the chest as old and by implication as resulting from a different event, his own view was that, given that the bruise directly overlay the fracture, it would require compelling medical evidence to conclude that they were unrelated. Dr Sen's opinion on the age of the bruise was based on the subjective, naked-eye assessment of the colour. However, the bruise was described as purple, which was entirely consistent with a fresh bruise. A bruise 2 to 3 days old would have been expected to have developed a yellowish tinge. A simple histopathological test would have clearly established whether it was a fresh bruise or an old bruise. Such a bruise would not have occurred as a result of the hand pressure applied during cardiac massage. His opinion was that, given the contiguity of the bruise and fracture and the absence of any clear evidence that the bruise occurred on a separate occasion, the bruise and fracture occurred at the same time as a result of a blow, which precipitated an abnormality of heart rhythm.

44. The autopsy findings, in particular the weight of the lungs (300 g each, that is, close to the minimum) indicated that the death was very rapid rather than prolonged. In individuals dying slowly with gradual heart failure, a lung weight of 500 to 600 g was common and up to 1,000 g could occur. This was the result of accumulation of fluid in the lungs consequent on the failure of the pumping action of the heart and was expressed clinically by breathlessness and difficulty in breathing. Deaths involving instantaneous collapse were associated with light lung weight as in this case. A relatively slow death would also be associated with a congested liver. Thus, the autopsy findings and histopathological examination weighed heavily against the possibility of a prolonged dying period with symptoms of breathlessness and pointed rather towards a rapid death.

45. As regarded the autopsy procedures, these were seriously deficient. Although the only two theoretical possibilities for the fracture were external heart massage or a

blow, no steps were taken to establish conclusively whether or not massage had been performed. The statement in the autopsy report that it could have been caused by massage did not represent a full and frank statement and could be misread to imply that Dr Sen had knowledge that such resuscitation was attempted whereas he did not. He should have distinguished fact from speculation. There was also a need to include as much descriptive detail as possible concerning the bruise, fracture and heart disease and in this respect the detail was manifestly insufficient.

2. Additional Report of Professor Pounder submitted on 26 November 1996 on behalf of the applicant

46. In the addendum of 26 November 1996, there was an analysis of the four photographs, which were described as being of poor quality. However, the photograph of the soles of the feet nonetheless showed a distinctive purple-red discolouration of the sole of the left foot, with mild swelling. The right little toe had a white glistening band at its base. The discolouration of the instep and sole of the left foot was strongly suggestive of bruising with associated minor swelling and was not consistent with post-mortem gravitational pooling of blood. Bruising of this extent could not be produced as a result of post-mortem injury and injury in such a location was unlikely to be caused by a fall sustained while the victim was alive. Therefore the injury was strongly suggestive of one or more blows to the foot. The mark to the right little toe was strongly suggestive of a ligature mark, although there was no congestion such as to suggest tight application of a ligature while the victim was alive; nor was the appearance suggestive of the passage of electricity. Neither possibility could be excluded and the mark was unusual.

47. The red injuries to the front of the left ankle, taken with the injuries to the sole of the left foot, suggested that the ankles were restrained by a mechanism across the front of both ankles and that, so restrained, the person was struck on the sole of his left foot.

48. The marks in the right armpit were not clearly shown. Their position, alignment and colouration were not what would normally be expected of post-mortem artefactual injury and raised the possibility of an electrical contact mark produced while the victim was alive. Combined with the unusual marking to the right little toe, it raised the suspicion of the use of electricity with one terminal tied round the little toe and the other terminal applied to the right armpit. Whether or not the marks were electrical burns could have been established by histopathological examination.

49. The photograph of the back showed post-mortem artefactual staining, with white areas of contact pallor. There were distinct marks, including a bright red abrasion at the spine at waist level and above this two dark reddish marks. Above these was a horizontal line of pink bruising or abrasion. All these could be post-mortem injuries, caused by the manipulation of the body over a rough or cutting surface. They could also have been caused before death. To distinguish the two would have required dissection.

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

3. Report of Professor Cordner submitted on 12 March 1998 at the request of the Commission

51. This report was drawn up by Professor Cordner, instructed by the Commission's delegates (see paragraph 6 above), on the basis of the domestic medical evidence, the witness testimonies, the reports of Professor Pounder and the photographs supplied by the applicant.

52. As regarded the photographs, the variation in colour or mottling on the foot represented bruising. He considered that the photograph was too blurred to conclude that the white glistening band on the right little toe was associated with a ligature nor could he reach any conclusion that the marks in the right armpit were the result of the application of electrical devices. On the legs, he noted, in addition to the marks which could correspond to the abrasions on the left ankle, small areas of reddening on the front and inner side of the right ankle. He agreed with Professor Pounder's findings on the back and noted in addition other areas of redness. Without the benefit of a dissection and/or histology of the dissection, the nature of the marks was uncertain. They could have been caused before death or be a post-mortem phenomenon. Bruising of the soles of the feet was relatively unusual and represented at least moderately severe force. Beating on the sole of the foot could cause such bruising. A person with such an injury would not be able to walk without at least an obvious limp.

53. As regarded the ageing of the chest bruise, recent authors in forensic medicine agreed that caution should be exercised. It was not practicable to construct an accurate calendar of colour changes as was done in earlier textbooks as there were too many variables. If the purple colour of the chest bruise was relied on to distinguish its age from the “fresh” haemorrhage around the sternal fracture, this was an invalid conclusion. The materials did not permit a distinction in age to be drawn between the two. A recent study issued to show the level of disagreement amongst authors concluded that the only point of agreement was that a bruise with identifiable yellowing was more than 18 hours old. Thus, the purple bruise could be fresh (that is, less than 24 hours old) but could be older.

54. Concerning the broken sternum, there had been no complaint of chest pain so one could infer that it occurred shortly before or around the time of death. His view was that there was a coincidence of two injuries (the bruise and the fracture) which could not be distinguished in age, or there was just one injury. If there was no chest bruise when Agit Salman was taken into custody, the issue was relatively easily resolved. Most pathologists would tend to regard them, prima facie, as one injury or state that there was a rebuttable presumption that they were one injury. As regarded the possibility of the bruising and fractured sternum being caused by an attempt at resuscitation, significant chest bruising was rare in this context. Sternal fractures caused by cardiopulmonary resuscitation were usually associated with fractured ribs and not with surrounding haemorrhage or overlying bruising. If the chest bruise and fracture with accompanying haemorrhage were the result of one trauma, it was not one associated with a resuscitation attempt. A fracture from a fall onto a flat surface would be unusual. A heavy direct fall onto a relatively smooth broad protrusion could cause such an injury but he had no recollection of having seen this as an isolated accidental injury (that is, without injuries to other parts of the body occurring at the same time). A blow from a fist, knee or foot could also cause such an injury.

55. Lungs with oedema sufficient to be regarded as a sign of heart failure and to cause breathlessness of twenty to thirty minutes weighed more than 300 g. The lung weights in this case fitted with a substantially more rapid death. The oedema found in the

brain was not significant, the weight of the victim's brain being slightly under the average brain weight for a man of his age.

56. The finding of underlying heart disease was undisputed. In his view, the best explanation for the death was as follows. Before he died, Agit Salman sustained significant traumas to the sole of his left foot and to the front of his chest, causing bruising and prima facie fracturing the sternum and causing a surrounding haemorrhage. Fear and pain associated with these events resulted in a surge of adrenalin increasing the heart rate and raising blood pressure. This put a severe strain on an already compromised heart, which caused cardiac arrest and a rapid death. Alternatively, the compression of the chest associated with the fracturing of the sternum fatally disturbed the rhythm of the heart without leaving observable damage. The weakness of this opinion lay in the conclusion that the chest injuries represented one trauma rather than two, and this depended partly on circumstantial factors and could not be completely resolved. However, even allowing for the possibility that they were separate injuries, the chest bruise could still be regarded as fresh and as having occurred while in custody, in which case the formal cause of death would be the same, namely, cardiac arrest in a man with heart disease following the occurrence of injuries to the left foot and chest. If the fractured sternum was regarded as due to an attempt at resuscitation, the cause of death would only change if it was concluded that the bruise occurred prior to being taken into custody.

57. The critical task of an autopsy in this case was to evaluate the circumstances in which it was proposed that this man died, in particular, whether it was a natural death in custody or not. In this evaluation, the age of the chest bruise was critical. Even allowing for Dr Sen's view of the age based on colour, the autopsy should have been conducted in a way which allowed another pathologist at another time to come to his or her own view. Important observations had to be justified objectively. In the absence of photographs, histology was the obvious way for Dr Sen to establish the truth of his view. The lack of proper photographs had also seriously impeded the investigation and evaluation of this case. Deficiencies also appeared in the insufficient subcutaneous dissection to seek out bruises not visible externally and the absence of a histological examination of the lesions critical to the proper evaluation of the circumstances of the death.

58. Professor Cordner had met Professor Pounder professionally. He had not met either Dr Kirangil or Dr Sen.

II. RELEVANT DOMESTIC LAW AND PRACTICE

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

A. Criminal prosecutions

60. Under the Turkish Criminal Code all forms of homicide

(Articles 448-55) and attempted homicide (Articles 61-62) constitute criminal offences. It is also an offence for a State employee to subject anyone to torture or ill-treatment (Article 243 in respect of torture and Article 245 in respect of ill-treatment). The

authorities' obligations in respect of conducting a preliminary investigation into acts or omissions capable of constituting such offences that have been brought to their attention are governed by Articles 151 to 153 of the Code of Criminal Procedure. Offences may be reported to the authorities or the security forces as well as to public prosecutors' offices. The complaint may be made in writing or orally. If it is made orally, the authority must make a record of it (Article 151).

If there is evidence to suggest that a death is not due to natural causes, members of the security forces who have been informed of that fact are required to advise the public prosecutor or a criminal court judge

(Article 152). By Article 235 of the Criminal Code, any public official who fails to report to the police or a public prosecutor's office an offence of which he has become aware in the exercise of his duty is liable to imprisonment.

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

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

62. If the suspected offender is a civil servant and if the offence was committed during the performance of his duties, the preliminary investigation of the case is governed by the Law of 1914 on the prosecution of civil servants, which restricts the public prosecutor's jurisdiction *ratione personae* at that stage of the proceedings. In such cases it is for the relevant local administrative council (for the district or province, depending on the suspect's status) to conduct the preliminary investigation and, consequently, to decide whether to prosecute. Once a decision to prosecute has been taken, it is for the public prosecutor to investigate the case.

An appeal to the Supreme Administrative Court lies against a decision of the council. If a decision not to prosecute is taken, the case is automatically referred to that court.

63. By virtue of Article 4, paragraph (i), of Decree no. 285 of 10 July 1987 on the authority of the governor of a state of emergency region, the 1914 Law (see paragraph 62 above) also applies to members of the security forces who come under the governor's authority.

64. If the suspect is a member of the armed forces, the applicable law is determined by the nature of the offence. Thus, if it is a “military offence” under the Military Criminal Code (Law no. 1632), the criminal proceedings are in principle conducted in accordance with Law no. 353 on the establishment of courts martial and their rules of procedure. Where a member of the armed forces has been accused of an ordinary offence, it is normally the provisions of the Code of Criminal Procedure which apply (see Article 145 § 1 of the Constitution and sections 9 to 14 of Law no. 353).

The Military Criminal Code makes it a military offence for a member of the armed forces to endanger a person's life by disobeying an order (Article 89). In such cases

civilian complainants may lodge their complaints with the authorities referred to in the Code of Criminal Procedure (see paragraph 60 above) or with the offender's superior.

B. Civil and administrative liability arising out of criminal offences

65. Under section 13 of Law no. 2577 on administrative procedure, anyone who sustains damage as a result of an act by the authorities may, within one year after the alleged act was committed, claim compensation from them. If the claim is rejected in whole or in part or if no reply is received within sixty days, the victim may bring administrative proceedings.

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

"All acts or decisions of the authorities are subject to judicial review ...

...

The authorities shall be liable to make reparation for all damage caused by their acts or measures."

That provision establishes the State's strict liability, which comes into play if it is shown that in the circumstances of a particular case the State has failed in its obligation to maintain public order, ensure public safety or protect people's lives or property, without it being necessary to show a tortious act attributable to the authorities. Under these rules, the authorities may therefore be held liable to compensate anyone who has sustained loss as a result of acts committed by unidentified persons.

67. Article 8 of Decree no. 430 of 16 December 1990, the last sentence of which was inspired by the provision mentioned above (see paragraph 66), provides:

"No criminal, financial or legal liability may be asserted against ... the governor of a state of emergency region or by provincial governors in that region in respect of decisions taken, or acts performed, by them in the exercise of the powers conferred on them by this legislative decree, and no application shall be made to any judicial authority to that end. This is without prejudice to the rights of individuals to claim reparation from the State for damage which they have been caused without justification."

68. Under the Code of Obligations, anyone who suffers damage as a result of an illegal or tortious act may bring an action for damages

(Articles 41-46) and non-pecuniary loss (Article 47). The civil courts are not bound by either the findings or the verdict of the criminal court on the issue of the defendant's guilt (Article 53).

However, under section 13 of Law no. 657 on State employees, anyone who has sustained loss as a result of an act done in the performance of duties governed by public law may, in principle, only bring an action against the authority by whom the civil servant concerned is employed and not directly against the civil servant (see Article 129 § 5 of the Constitution and Articles 55 and 100 of the Code of Obligations). That is not, however, an absolute rule. When an act is found to be illegal or tortious and, consequently, is no longer an "administrative" act or deed, the civil courts may allow a claim for damages to be made against the official concerned, without prejudice to the victim's right to bring an

action against the authority on the basis of its joint liability as the official's employer (Article 50 of the Code of Obligations).

III. RELEVANT International reports

A. Investigations by the European Committee for the Prevention of Torture (CPT)

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

70. The CPT has issued two public statements.

71. In its public statement adopted on 15 December 1992, the CPT concluded that torture and other forms of severe ill-treatment were important characteristics of police custody. On its first visit in 1990, the following types of ill-treatment were constantly alleged, namely, palestinian hanging, electric shocks, beating of the soles of the feet (*falaka*), hosing with pressurised cold water and incarceration in very small, dark, unventilated cells. Its medical examinations disclosed clear medical signs consistent with very recent torture and other severe ill-treatment of both a physical and psychological nature. The on-site observations in police establishments revealed extremely poor material conditions of detention.

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

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

B. The United Nations Model Autopsy Protocol

73. The “Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions” adopted by the United Nations in 1991 includes a Model Autopsy Protocol aimed at providing authoritative guidelines for the conduct of autopsies by public prosecutors and medical personnel. In its introduction, it noted that an abridged examination or report was never appropriate in potentially controversial cases and that a

systematic and comprehensive examination and report were required to prevent the omission or loss of important details:

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

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

PROCEEDINGS BEFORE THE COMMISSION

75. Mrs Behiye Salman applied to the Commission on 20 May 1993. She alleged that her husband, Mr Agit Salman had died as a result of being tortured while in police custody. She relied on Articles 2, 3, 6, 13, 14 and 18 of the Convention. In the course of the proceedings before the Commission, the applicant further alleged that she had been

hindered in the effective exercise of the right of individual petition as guaranteed by former Article 25 § 1.

76. The Commission declared the application (no. 21986/93) admissible on 20 February 1995. In its report of 1 March 1999 (former Article 31)[1], it expressed the unanimous opinion that there had been a violation of Article 2 on account of the death in custody of the applicant's husband; that there had been a violation of Article 3 in that her husband had been tortured; that there had been a violation of Article 13; that there had been no violations of Articles 14 and 18; and that Turkey had failed to comply with its obligations under former Article 25.

FINAL SUBMISSIONS TO THE COURT

77. In her memorial, the applicant requested the Court to find that the respondent State was in violation of Articles 2, 3, 13, and former Article 25 § 1 of the Convention. She requested the Court to award her just satisfaction under Article 41.

78. The Government requested the Court to dismiss the case as inadmissible on account of the applicant's failure to exhaust domestic remedies. In the alternative, they argued that the applicant's complaints were not substantiated by the evidence.

THE LAW

I. The government's preliminary objection

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

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

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

81. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges applicants to use first the remedies that are

normally available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged. The existence of the remedies must be sufficiently certain, in practice as well as in theory, failing which they will lack the requisite accessibility and effectiveness. Article 35 § 1 also requires that the complaints intended to be brought subsequently before the Court should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements laid down in domestic law, but not that recourse should be had to remedies which are inadequate or ineffective (see the Aksoy v. Turkey judgment of 18 December 1996, *Reports* 1996-VI, pp. 2275-76, §§ 51-52, and the Akdivar and Others v. Turkey judgment of 16 September 1996, *Reports* 1996-IV, p. 1210, §§ 65-67).

82. The Court notes that Turkish law provides administrative, civil and criminal remedies against illegal and criminal acts attributable to the State or its agents (see paragraphs 59 et seq. above).

83. With respect to an action in administrative law under Article 125 of the Constitution based on the authorities' strict liability (see paragraphs 65-66 above), the Court recalls that a Contracting State's obligation under Articles 2 and 13 of the Convention to conduct an investigation capable of leading to the identification and punishment of those responsible in cases of fatal assault might be rendered illusory if in respect of complaints under those Articles an applicant were to be required to exhaust an administrative-law action leading only to an award of damages (see the Yasa v. Turkey judgment of 2 September 1998, *Reports* 1998-VI, p. 2431, § 74).

Consequently, the applicant was not required to bring the administrative proceedings in question and the preliminary objection is in this respect unfounded.

84. As regards a civil action for redress for damage sustained through illegal acts or patently unlawful conduct on the part of State agents (see paragraph 68 above), the Court notes that a plaintiff in such an action must, in addition to establishing a causal link between the tort and the damage he or she has sustained, identify the person believed to have committed the tort. In the instant case, no evidence was forthcoming as to which police officer was responsible for the ill-treatment which was alleged by the applicant to have been inflicted on her husband and, indeed, the report from the Istanbul Forensic Medicine Institute, the highest authority in the country, did not establish that any unlawful acts had occurred (see paragraph 24 above).

85. With regard to the criminal-law remedies (see paragraphs 60-62 above), the Court notes that the applicant appealed unsuccessfully against the decision not to prosecute the police officers involved in her husband's detention. The procedure whereby the Minister of Justice referred the case to the Court of Cassation was an extraordinary remedy, which must normally be considered as falling outside the scope of Article 35 § 1 of the Convention. It is, however, the case that the applicant acted as a party in the proceedings which followed the Court of Cassation's decision to send the case for trial. The trial ended in an acquittal of the police officers on the basis that there was insufficient evidence to establish that they had ill-treated her husband prior to his death or to establish that he had died because of ill-treatment. This was also the basis for the public prosecutor's original decision not to prosecute. The applicant has argued that in these circumstances a further appeal had no reasonable prospect of success and cannot be regarded as a requirement of the principle of exhaustion of domestic remedies.

86. The Court emphasises that the application of the rule of exhaustion of domestic remedies must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting States have agreed to set up. Accordingly, it has recognised that Article 35 § 1 must be applied with some degree of flexibility and without excessive formalism. It has further recognised that the rule of exhaustion is neither absolute nor capable of being applied automatically; for the purposes of reviewing whether it has been observed, it is essential to have regard to the circumstances of the individual case. This means, in particular, that the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting State concerned but also of the general context in which they operate, as well as the personal circumstances of the applicant. It must then examine whether, in all the circumstances of the case, the applicant did everything that could reasonably be expected of him or her to exhaust domestic remedies (see the Akdivar and Others judgment cited above, p. 1211, § 69, and the Aksoy judgment cited above, p. 2276, §§ 53-54).

87. The Court considers that the limb of the Government's preliminary objection concerning civil and criminal remedies raises issues concerning the effectiveness of the criminal investigation that are closely linked to those raised in the applicant's complaints under Articles 2, 3 and 13 of the Convention. It also observes that this case differs from the Aytekin case relied on by the Government as, in that case, the soldier who had shot the applicant's husband had been convicted of unintentional homicide by the Batman Criminal Court. The appeal which was pending before the Court of Cassation concerned both the applicant's and the public prosecutor's claims that he should have been convicted of a more serious degree of homicide. In those circumstances, it could not be said that the investigation conducted by the authorities did not offer reasonable prospects of bringing the person responsible for the death of her husband to justice (see the Aytekin judgment cited above, p. 2827, § 83).

88. Consequently, the Court dismisses the Government's preliminary objection in so far as it relates to the administrative remedy relied on (see paragraph 83 above). It joins the preliminary objection concerning remedies in civil and criminal law to the merits (see paragraphs 104-09 below).

II. the court's assessment of the facts

89. The Court reiterates its settled case-law that under the Convention system prior to 1 November 1998 the establishment and verification of the facts was primarily a matter for the Commission (former Articles 28 § 1 and 31). While the Court is not bound by the Commission's findings of fact and remains free to make its own assessment in the light of all the material before it, it is however only in exceptional circumstances that it will exercise its powers in this area (see, among other authorities, the Akdivar and Others judgment cited above, p. 1214, § 78).

90. The facts in dispute between the parties are closely linked to issues of State responsibility for the treatment and death of Agit Salman while in police custody. The Court will examine together the factual and legal questions as they are relevant to the applicant's complaints under Articles 2, 3 and 13 of the Convention set out below.

III. alleged violations of article 2 of the Convention

91. The applicant alleged that her husband, Agit Salman, had died as a result of torture at the hands of police officers at Adana Security Directorate. She also complained that no effective investigation had been conducted into the circumstances of the murder. She argued that there had been a breach of Article 2 of the Convention, which provides:

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection."

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

A. Submissions of those who appeared before the Court

1. The applicant

93. The applicant submitted that her husband had been killed while in custody. The weight of the medical evidence established that he had been subjected to force which had led to cardiac arrest. The authorities had been unable to provide any satisfactory explanation as to how Agit Salman had died but had developed a story clearly designed to cover up the truth. She submitted that, where an individual was taken into custody in good health and died, that death must be attributable to the actions of the authorities in the absence of a plausible explanation. No such explanation had been provided for the chest bruise, the broken sternum, the bruising to the left foot, the grazes on the left ankle and the wounds to the armpit.

94. The applicant also asked the Court to endorse the Commission's opinion that there had been a violation of Article 2 of the Convention on the ground that the investigation into the death of her husband had been so inadequate and ineffective as to amount to a failure to protect the right to life. In particular, the investigation was ineffective in providing the necessary medical evidence concerning Agit Salman. For example, there was a lack of histopathological analysis of the bruises and no forensic photographs were taken contrary to the recommendations of the United Nations Model Autopsy Protocol (see paragraphs 73-74 above). Both

Dr Sen and the Istanbul Forensic Medicine Institute drew subjective conclusions without giving equal weight to the possible causes which cast a negative light on the

authorities. Similarly, the public prosecutors made no effort to test the veracity of the police officers' statements or to ensure that the necessary evidence for criminal proceedings was obtained.

2. The Government

95. The Government maintained that the applicant's allegations were unfounded. The autopsy and the Istanbul Forensic Medicine Institute report established that Agit Salman died of a cardiac arrest brought on by the excitement surrounding his apprehension and detention. He suffered breathlessness in his cell and was taken to hospital by police officers, who tried to resuscitate him en route, causing the broken sternum. The allegations that he suffered torture are unsubstantiated and based on unreliable photographs and speculations of doctors who did not examine the body. The Government emphasised that the Istanbul Forensic Medicine Institute was a body of the highest professional excellence whose findings could not be put in doubt.

96. The Government contended that the investigation was adequate and effective. Statements were taken from all relevant witnesses and officials and all appropriate medical and forensic examinations were performed, including the verification of the cause of death by obtaining an expert opinion from the Istanbul Forensic Medicine Institute. The Ministry of Justice referred the case to the Court of Cassation, which quashed the decision not to prosecute the police officers and sent the case for trial. The evidence was examined by the court which acquitted the officers. All necessary steps had therefore been taken in investigating the incident.

B. The Court's assessment

1. The death of Agit Salman

97. Article 2, which safeguards the right to life and sets out the circumstances when deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention, to which no derogation is permitted. Together with Article 3, it also enshrines one of the basic values of the democratic societies making up the Council of Europe. The circumstances in which deprivation of life may be justified must therefore be strictly construed. The object and purpose of the Convention as an instrument for the protection of individual human beings also requires that Article 2 be interpreted and applied so as to make its safeguards practical and effective (see the McCann and Others v. the United Kingdom judgment of 27 September 1995, Series A no. 324, pp. 45-46, §§ 146-47).

98. The text of Article 2, read as a whole, demonstrates that it covers not only intentional killing but also the situations where it is permitted to “use force” which may result, as an unintended outcome, in the deprivation of life. The deliberate or intended use of lethal force is only one factor, however, to be taken into account in assessing its necessity. Any use of force must be no more than “absolutely necessary” for the achievement of one or more of the purposes set out in sub-paragraphs (a) to (c). This term indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is “necessary in a democratic society” under paragraphs 2 of Articles 8 to 11 of the Convention. Consequently, the force used must be strictly proportionate to the achievement of the permitted aims (see the McCann and Others judgment cited above, p. 46, §§ 148-49).

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

100. In assessing evidence, the Court has generally applied the standard of proof "beyond reasonable doubt" (see the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, pp. 64-65, § 161). However, such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during such detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation.

101. The Court finds that the Commission's evaluation of the facts in this case accords with the above principles.

102. Agit Salman was taken into custody in apparent good health and without any pre-existing injuries or active illness. No plausible explanation has been provided for the injuries to the left ankle, bruising and swelling of the left foot, the bruise to the chest and the broken sternum. The evidence does not support the Government's contention that the injuries might have been caused during the arrest, or that the broken sternum was caused by cardiac massage. The opinion of Dr Kirangil that the chest bruise pre-dated the arrest and that Agit Salman died of a heart attack brought on by the stress of his detention alone and after a prolonged period of breathlessness was rebutted by the evidence of Professors Pounder and Cordner. In accepting their evidence as to the rapidity of death and the probability that the bruise and broken sternum were caused by the same event – a blow to the chest – the Commission did not fail to accord Dr Kirangil's evidence proper weight nor did it give undue preference to the evidence of Professors Cordner and Pounder. It may be observed that Dr Kirangil signed the Istanbul Forensic Medicine Institute report which was in issue before the Commission and on that basis could not claim to be either objective or independent. There is no substance, moreover, in the allegations of collusion between the two professors made by the Agent of the Government at the hearing.

103. The Court finds, therefore, that the Government have not accounted for the death of Agit Salman by cardiac arrest during his detention at Adana Security Directorate and that the respondent State's responsibility for his death is engaged.

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

2. Alleged inadequacy of the investigation

104. The Court reiterates that the obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined

in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see, *mutatis mutandis*, the McCann and Others judgment cited above, p. 49, § 161, and the Kaya v. Turkey judgment of 19 February 1998, *Reports* 1998-I, p. 329, § 105).

105. In that connection, the Court points out that the obligation mentioned above is not confined to cases where it is apparent that the killing was caused by an agent of the State. The applicant and the father of the deceased lodged a formal complaint about the death with the competent investigation authorities, alleging that it was the result of torture. Moreover, the mere fact that the authorities were informed of the death in custody of Agit Salman gave rise *ipso facto* to an obligation under Article 2 to carry out an effective investigation into the circumstances surrounding the death (see, *mutatis mutandis*, the Ergi v. Turkey judgment of 28 July 1998, *Reports* 1998-IV, p. 1778, § 82, and the Yasa judgment cited above, p. 2438, § 100). This involves, where appropriate, an autopsy which provides a complete and accurate record of possible signs of ill-treatment and injury and an objective analysis of clinical findings, including the cause of death.

106. Turning to the particular circumstances of the case, the Court observes that the autopsy examination was of critical importance in determining the facts surrounding Agit Salman's death. The difficulties experienced by the Commission in establishing any of those facts, elements of which were still disputed by the parties before the Court, derives in a large part from the failings in the post-mortem medical examination. In particular, the lack of proper forensic photographs of the body and the lack of dissection and histopathological analysis of the injuries and marks on the body obstructed the accurate analysis of the dating and origin of those marks, which was crucial to establishing whether Agit Salman's death had been provoked by ill-treatment in the twenty-four hours preceding his death. The unqualified assumption by Dr Sen that the broken sternum could have been caused by cardiac massage was included in his report without seeking any verification as to whether such massage had been applied and was in the circumstances misleading. The examination of Dr Sen's findings by the Istanbul Forensic Medicine Institute did not remedy these shortcomings. It compounded them by confirming that the autopsy disclosed that Agit Salman had died of a heart attack provoked by the combination of a pre-existing heart disease and the excitement of his apprehension.

107. The lack of medical support for the applicant's allegations of torture was the basis for the public prosecutor's decision of 19 October 1992 not to prosecute and the Adana Assize Court's decision of 26 December 1994 to acquit the police officers. The Court considers that the defects in the autopsy examination fundamentally undermined any attempt to determine police responsibility for Agit Salman's death. Furthermore, the indictment named indiscriminately all the officers known to have come into contact with Agit Salman from the time of his arrest to his death, including the three custody officers on duty over the period. No evidence was adduced concerning the more precise identification of the officers who did, or could have, ill-treated Agit Salman.

108. In these circumstances, an appeal to the Court of Cassation, which would only have had the power to remit the case for reconsideration by the first-instance court, had no effective prospect of clarifying or improving the evidence available. The Court is not persuaded therefore that the appeal nominally available to the applicant in the criminal-law proceedings would have been capable of altering to any significant extent the course

of the investigation that was made. That being so, the applicant must be regarded as having complied with the requirement to exhaust the relevant criminal-law remedies.

109. The Court concludes that the authorities failed to carry out an effective investigation into the circumstances surrounding Agit Salman's death. This rendered recourse to civil remedies equally ineffective in the circumstances. It accordingly dismisses the criminal and civil limb of the Government's preliminary objection (see paragraphs 84-88 above) and holds that there has been a violation of Article 2 in this respect.

IV. alleged violations of article 3 of the Convention

110. The applicant complained that her husband was tortured before his death. She invoked Article 3 of the Convention which provides:

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

111. The applicant submitted that her husband was subjected to treatment amounting to torture whilst in the custody of Adana Security Directorate. She relied on the marks on his feet and ankles as showing that he had been subjected to *falaka*. He had also received a blow to the chest powerful enough to break the sternum. No other plausible explanation for the injuries on his body had been forthcoming from the authorities. She further argued that the claim that he had been tortured had never been properly investigated by the authorities, in violation of the procedural aspect of Article 3 of the Convention.

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

113. The Court has found above that the Government have not provided a plausible explanation for the marks and injuries found on Agit Salman's body after he was taken into custody in apparent good health (see paragraph 102 above). Moreover, the bruising and swelling on the left foot combined with the grazes on the left ankle were consistent with the application of *falaka*, which the European Committee for the Prevention of Torture reported was one of the forms of ill-treatment in common use, *inter alia*, at the Adana Security Directorate. It was not likely to have been caused accidentally. The bruise to the chest overlying a fracture of the sternum was also more consistent with a blow to the chest than a fall. These injuries, unaccounted for by the Government, must therefore be considered attributable to a form of ill-treatment for which the authorities were responsible.

114. In determining whether a particular form of ill-treatment should be qualified as torture, consideration must be given to the distinction, embodied in Article 3, between this notion and that of inhuman or degrading treatment. As noted in previous cases, it appears that it was the intention that the Convention should, by means of this distinction, attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering (see the Ireland v. the United Kingdom judgment cited above, pp. 66-67, § 167). In addition to the severity of the treatment, there is a purposive element, as recognised in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which came into force on 26 June 1987, which defines torture

in terms of the intentional infliction of severe pain or suffering with the aim, *inter alia*, of obtaining information, inflicting punishment or intimidating (Article 1 of the United Nations convention).

115. Having regard to the nature and degree of the ill-treatment (*falaka* and a blow to the chest) and to the strong inferences that can be drawn from the evidence that it occurred during interrogation about Agit Salman's suspected participation in PKK activities, the Court finds that it involved very serious and cruel suffering that may be characterised as torture (see also *Selmouni* cited above, §§ 96-105).

116. The Court concludes that there has been a breach of Article 3 of the Convention.

117. It does not deem it necessary to make a separate finding under Article 3 of the Convention in respect of the alleged deficiencies in the investigation.

V. alleged violation of article 13 of the Convention

118. The applicant complained that she had not had an effective remedy within the meaning of Article 13 of the Convention, which provides:

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

119. The Government argued that the investigation into the incident and the prosecution and trial of the police officers provided an effective remedy into the applicant's allegations. Furthermore, she had failed to avail herself of the possibility of appeal against the acquittal of the police officers and had therefore not made use of the available effective remedies.

120. The Commission, with whom the applicant agreed, was of the opinion that the investigation and criminal trial were rendered ineffective by the inadequate forensic investigation. The applicant also contended that the attempt of the authorities to concoct a story to conceal what had occurred gave rise to a serious aggravation of the violation of Article 13 in this case.

121. The Court reiterates that Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an “arguable complaint” under the Convention and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be “effective” in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State (see the Aksoy judgment cited above, p. 2286, § 95; the Aydin v. Turkey judgment of 25 September 1997, *Reports* 1997-VI, pp. 1895-96, § 103; and the Kaya judgment cited above, pp. 329-30, § 106).

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

122. On the basis of the evidence adduced in the present case, the Court has found that the respondent State is responsible under Articles 2 and 3 of the Convention for the death and torture in custody of the applicant's husband. The applicant's complaints in this regard are therefore “arguable” for the purposes of Article 13 (see the Boyle and Rice v. the United Kingdom judgment of 27 April 1988, Series A no. 131, p. 23, § 52, and the Kaya and Yasa judgments cited above, pp. 330-31, § 107, and p. 2442, § 113, respectively).

123. The authorities thus had an obligation to carry out an effective investigation into the circumstances of the death of the applicant's husband. For the reasons set out above (see paragraphs 104-09), no effective criminal investigation can be considered to have been conducted in accordance with Article 13, the requirements of which may be broader than the obligation to investigate imposed by Article 2 (see the Kaya judgment cited above, pp. 330-31, § 107). The Court finds, therefore, that the applicant has been denied an effective remedy in respect of the death of her husband and thereby access to any other available remedies at her disposal, including a claim for compensation.

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

VI. Alleged practice by the authorities of infringing articles 2, 3 and 13 of the convention

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

125. Having regard to its findings under Articles 2, 3 and 13 above, the Court does not find it necessary to determine whether the failings identified in this case are part of a practice adopted by the authorities.

VII. alleged violation of FORMER article 25 of the Convention

126. Finally, the applicant complained that she had been subjected to serious interference with the exercise of her right of individual petition, in breach of former Article 25 § 1 of the Convention (now Article 34), which provided:

“The Commission may receive petitions addressed to the Secretary General of the Council of Europe from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in [the] Convention, provided that the High Contracting Party against

which the complaint has been lodged has declared that it recognises the competence of the Commission to receive such petitions. Those of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right."

127. The applicant submitted that she was summoned three times by the authorities. On the first occasion, she was blindfolded and beaten, forced to sign a document and told explicitly to drop her case before the Commission. On the two other occasions, she was questioned at length about her application for legal aid to the Commission. She submitted that this disclosed an interference with the free exercise of her right of individual petition.

128. The Commission, whose delegates heard evidence from the applicant, accepted that she had been summoned on at least two occasions. This was substantiated by the documents provided by the Government, which showed that officers of the anti-terrorism branch had questioned her about her application, and not merely her legal aid claim. The Commission also found that her claims that she had been blindfolded, struck and kicked at the anti-terrorism branch headquarters were credible and substantiated, although it did not make any specific finding of ill-treatment in so far as any questioning of an applicant about her application by the police was, in its view, incompatible with the State's obligations under former Article 25 of the Convention.

129. The Government asserted that the applicant was contacted by the authorities in order to verify the declaration of means she had submitted in her application for legal aid to the Commission. She was asked only about her possessions and income and not subjected to any intimidation or pressure. In any event, she could not seriously claim to have been intimidated as she had been free to pursue the domestic proceedings against the police officers without any hindrance or fear.

130. The Court reiterates that it is of the utmost importance for the effective operation of the system of individual petition instituted by former Article 25 (now Article 34) that applicants or potential applicants should be able to communicate freely with the Convention organs without being subjected to any form of pressure from the authorities to withdraw or modify their complaints (see the Akdivar and Others judgment cited above, p. 1219, § 105; the Aksoy judgment cited above, p. 2288, § 105; the Kurt v. Turkey judgment of 25 May 1998, *Reports* 1998-III, p. 1192, § 159; and the Ergi judgment cited above, p. 1784, § 105). In this context, "pressure" includes not only direct coercion and flagrant acts of intimidation but also other improper indirect acts or contacts designed to dissuade or discourage applicants from pursuing a Convention remedy (see the above-mentioned Kurt judgment, loc. cit.).

Furthermore, whether or not contacts between the authorities and an applicant are tantamount to unacceptable practices from the standpoint of former Article 25 § 1 must be determined in the light of the particular circumstances of the case. In this respect, regard must be had to the vulnerability of the complainant and his or her susceptibility to influence exerted by the authorities (see the Akdivar and Others and Kurt judgments cited above, p. 1219, § 105, and pp. 1192-93, § 160, respectively). In previous cases, the Court has had regard to the vulnerable position of applicant villagers and the reality that in south-east Turkey complaints against the authorities might well give rise to a legitimate fear of reprisals, and it has found that the questioning of applicants about their applications to the Commission amounts to a form of illicit and unacceptable pressure

which hinders the exercise of the right of individual petition in breach of former Article 25 of the Convention (ibid.).

131. In the instant case, it is not in dispute between the parties that the applicant was questioned by police officers from the Adana anti-terrorism branch on 24 January 1996 and by police officers again on 9 February 1996. The document recording the first interview shows that the applicant was questioned, not only about her declaration of means, but also about how she introduced her application to the Commission and with whose assistance. Furthermore, the Government have not denied that the applicant was blindfolded while at the Adana anti-terrorism branch headquarters.

132. The Court finds that blindfolding would have increased the applicant's vulnerability, causing her anxiety and distress, and discloses, in the circumstances of this case, oppressive treatment. Furthermore, there is no plausible explanation as to why the applicant was questioned twice about her legal aid application and in particular why the questioning was conducted on the first occasion by police officers of the anti-terrorism branch, whom the applicant had claimed were responsible for the death of her husband. The applicant must have felt intimidated by these contacts with the authorities. This constituted undue interference with her petition to the Convention organs.

133. The respondent State has therefore failed to comply with its obligations under former Article 25 § 1 of the Convention.

VIII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

134. Article 41 of the Convention provides:

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

A. Pecuniary damage

135. The applicant claimed loss of earnings of 39,320.64 pounds sterling (GBP). She submitted that her husband, who worked as a taxi driver at the time of his death and was 45 years old, earned the equivalent of GBP 242.72 per month. Taking into account the average life expectancy in Turkey in that period, the calculation according to actuarial tables resulted in the capitalised sum quoted above.

136. The Government made no observations on the amount claimed, refuting that any violations requiring an award of just satisfaction had occurred.

137. As regards the applicant's claim for loss of earnings, the Court's case-law establishes that there must be a clear causal connection between the damage claimed by the applicant and the violation of the Convention and that this may, in appropriate cases, include compensation in respect of loss of earnings (see, among other authorities, the Barberà, Messegué and Jabardo v. Spain judgment of 13 June 1994 (*Article 50*), Series A no. 285-C, pp. 57-58, §§ 16-20, and *Çakici v. Turkey* [GC], no. 23657/94, § 127, ECHR 1999-IV). The Court has found (see paragraph 103 above) that the authorities were liable under Article 2 of the Convention for Agit Salman's death. In these circumstances, there

was a direct causal link between the violation of Article 2 and the loss by his widow and children of the financial support which he provided for them. The Court notes that the Government have not queried the amount claimed by the applicant. Having regard, therefore, to the detailed submissions by the applicant concerning the actuarial basis of calculation of the appropriate capital sum to reflect the loss of income due to Agit Salman's death, the Court awards the sum of GBP 39,320.64 to the applicant for pecuniary damage, to be converted into Turkish liras at the rate applicable at the date of payment.

B. Non-pecuniary damage

138. The applicant claimed, having regard to the severity and number of violations, GBP 60,000 in respect of her husband and GBP 10,000 in respect of herself for non-pecuniary damage.

139. The Government made no observations on the amounts claimed, refuting that any violations requiring an award of just satisfaction had occurred.

140. The Court recalls that it has found that the authorities were responsible for the death of the applicant's husband and that he had been tortured in police custody before he died. In addition to violations of Articles 2 and 3 in that respect, it has also found that the authorities failed to provide an effective investigation and remedy in respect of these matters, contrary to the procedural obligation under Article 2 of the Convention and in breach of Article 13. In addition, the applicant was subjected to intimidation while pursuing her application. In these circumstances and having regard to the awards made in comparable cases, the Court awards, on an equitable basis, the sum of GBP 25,000 for the non-pecuniary damage suffered by Agit Salman and to be held by the applicant as surviving spouse, and the sum of GBP 10,000 for the non-pecuniary damage suffered by the applicant in her personal capacity, such sums to be converted into Turkish liras at the rate applicable at the date of payment.

C. Costs and expenses

141. The applicant claimed a total of GBP 28,779.58 for fees and costs incurred in bringing the application, less the amounts received from the by way of legal aid from the Council of Europe. This included fees and costs incurred in respect of attendance at the taking of evidence before the Commission's delegates at hearings in Ankara and Strasbourg and attendance at the hearing before the Court in Strasbourg. A sum of GBP 10,035 is listed as fees and administrative costs incurred in respect of the Kurdish Human Rights Project (KHRP) in its role as liaison between the legal team in the United Kingdom and the lawyers and the applicant in Turkey, which included GBP 2,800 for translation costs. A sum of GBP 4,235.98 was claimed in respect of work undertaken by lawyers in Turkey.

142. The Government made no comments on the fees claimed.

143. Save as regards the translation costs, the Court is not persuaded that the fees claimed in respect of the KHRP were necessarily incurred. Deciding on an equitable basis and having regard to the details of the claims submitted by the applicant, it awards the

applicant the sum of GBP 21,544.58 together with any value-added tax that may be chargeable, less the 11,195 French francs received by way of legal aid from the Council of Europe, such sum to be paid into the applicant's sterling bank account in the United Kingdom as set out in her just satisfaction claim.

D. Default interest

144. According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 7.5% per annum.

FOR THESE REASONS, THE COURT

1. *Dismisses* by sixteen votes to one the Government's preliminary objection;

2. *Holds* by sixteen votes to one that there has been a violation of Article 2 of the Convention in respect of the death of Agit Salman in custody;

3. *Holds* unanimously that there has been a violation of Article 2 of the Convention in that the authorities failed to carry out an adequate and effective investigation into the circumstances of Agit Salman's death in custody;

4. *Holds* unanimously that there has been a violation of Article 3 of the Convention;

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

6. *Holds* unanimously that the respondent State has failed to comply with its obligations under former Article 25 § 1 of the Convention;

7. *Holds* by sixteen votes to one

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

(i) GBP 39,320.64 (thirty-nine thousand three hundred and twenty pounds sterling sixty-four pence) for pecuniary damage;

(ii) GBP 35,000 (thirty-five thousand pounds sterling) for non-pecuniary damage;

(b) that simple interest at an annual rate of 7.5% shall be payable on these sums from the expiry of the above-mentioned three months until settlement;

8. *Holds* by sixteen votes to one

(a) that the respondent State is to pay the applicant, within three months and into the latter's bank account in the United Kingdom, in respect of costs and expenses, GBP 21,544.58 (twenty-one thousand five hundred and forty-four pounds sterling fifty-eight pence) together with any value-added tax that may be chargeable, less FRF 11,195 (eleven thousand one hundred and ninety-five French francs) to be converted into pounds sterling at the rate applicable at the date of delivery of this judgment;

(b) that simple interest at an annual rate of 7.5% shall be payable on these sums from the expiry of the above-mentioned three months until settlement;

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

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 27 June 2000.

Luzius Wildhaber

President

Michele de Salvia

Registrar

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

(a) concurring opinion of Mrs Greve joined by Mr Bonello;

(b) dissenting opinion of Mr Gölcüklü.

L. W.

M. de S.

CONCURRING OPINION OF JUDGE GREVE

JOINED BY JUDGE BONELLO

I have voted with my colleagues in the majority in this case. The facts of the case suffice for the court's finding of violations as pronounced in the judgment. I do however, find it necessary to elaborate on a few aspects of the judgment where I believe the majority have made inferences beyond what is merited by the facts.

1. Agit Salman was subjected to torture at the Adana Security Directorate but beyond this few conclusions as to the circumstances can be reached

In paragraph 115 the majority concludes that Agit Salman was ill-treated when interrogated about his suspected participation in PKK activities. I cannot share this inference. There is absolutely *no* information in the case file supporting a presumption that Agit Salman was tortured *during* interrogation and no possibility of establishing the issues addressed under the assumed interrogation. The Turkish authorities denied that Agit Salman was interrogated at all when in the custody of the Adana Security Directorate.

What can be established from the evidence available to the Court is this: The nature and degree of the ill-treatment inflicted on Agit Salman *when in the custody of the Adana Security Directorate* involved very serious and cruel suffering that may be characterised as torture. The body of Agit Salman showed injuries, some of which are compatible with him having been subjected to *falaka*, and a blow to the chest. It is known that Agit Salman was wanted by the Security Directorate as he was suspected of alleged participation in PKK activities. Whether his ill-treatment and death occurred prior to interrogation as claimed by the Turkish authorities, or in connection with interrogation – or after interrogation for that matter – is of no relevance to the Court's conclusion concerning torture.

2. The post-mortem examination of Agit Salman gives limited information and leaves a number of questions unanswered

The investigation carried out by the Commission in the case of Agit Salman was based on the understanding that his body had been subjected to an autopsy, that is, an autopsy as this term is normally understood (see in this context, for example, how "autopsy" is described in the United Nations Model Autopsy Protocol as referred to in paragraphs 73 of the judgment and also in Recommendation no. R (99) 3 of the Committee of Ministers of the Council of Europe to member States on the harmonisation of medico-legal autopsy rules of 2 February 1999).

There are strong reasons in Agit Salman's case for referring to a post-mortem medical examination of Agit Salman rather than an autopsy. In particular, the significance of information in the case may be overlooked or confused due to the general inferences which may be made from a reference to an autopsy.

Concerning the "autopsy" of Agit Salman, the following information which raises serious questions concerning the content of the examination is available:

(a) The autopsy report dated 29 April 1992 states that Agit Salman had died at Adana State Hospital on that very day and that his death occurred "in suspicious circumstances". The autopsy had been requested in a letter of that date by the Adana public prosecutor. The report states, *inter alia*, that "In the framework of the autopsy performed at ... in the presence of ..., *parts of the deceased have been received for examination* ..., *there is no objection to burial* and *the detailed report will be produced later*, ... as *no other* ... *reason for examination is observed* [emphasis added]". The report is signed by the public prosecutor Tevfik Aydin and the forensic medical expert Dr Fatih Sen.

(b) Concerning the autopsy, Dr Sen later gave the following witness statement:

"*In most of our autopsies, we weigh every organ individually*: the brain, the heart, the liver, the spleen, the kidneys, all included. The weight of the heart of a normal adult male varies between 350 g and 450 g. Since we found a heart of 550 g in this case, a size greater than normal, I concluded that the heart was larger than normal. This is an objective evaluation, made *entirely visually* – that the heart was oversized [emphasis added].

Well, in cases where we cannot arrive at the cause of death macroscopically, that is visually, we take small pieces of the organs for microscopic examination. As you will see in the report, these include almost all organs: from lungs, the coronary arteries of the

heart, the heart muscle, the liver, the spleen, the suprarenal gland, the kidneys, the brain, the cerebellum and the spinal cord.

As the result of the examination of the corpse we made on 29 April 1992 and the autopsy conducted the same day, I indicated all the macroscopic (*what can be seen with the eye*) and the microscopic (laboratory) examinations in the conclusion of my autopsy report [emphasis added]."

This leaves open the question, at the very least, whether in the case of Agit Salman all organ samples were actually removed from the body and weighed separately or whether the weights were estimated visually. The latter may be the most likely, considering also the remarkably short time-span between Agit Salman's death, some time between 1.20 a.m. and 2 a.m. on 29 April 1992, and the release of his body for burial. The body was released only after all relevant examinations had been carried out, at about noon that same day, some ten hours after death had occurred – that is, ten hours of which only a few were ordinary working hours. Agit Salman's son had been sought by the security forces at approximately 12 noon to be questioned about his father's health, only to be told that his father had died and that he was expected to take the body with him from the morgue.

In his witness statement, Dr Sen described his working conditions as follows:

"[I] was a physician working alone in Adana at the time. I was carrying out the forensic work for the entire Adana region alone. I did not have a single assistant either. I found the interpretation and presentation of a report on this issue [the death of Agit Salman] by only one person to be inadequate. Since that was my opinion, I stated in my report that it should be sent to the Istanbul Forensic Medicine Institute."

The public prosecutor Tevfik Aydin also gave information about his workload in his witness statement, saying:

"I think we heard about it [the death] either through a police message or when the hospital officials reported it to our clerk. If we are available at that moment we go immediately but if, let us say, I am in another hospital examining a body or if I am inspecting the scene of a road accident, I go whenever I have finished that business. It sometimes happens that we receive notification of a death from two, three or four places at the same time. So we attend to those calls one after the other, depending on how we can work out the itinerary."

The photographs taken of Agit Salman before he was buried show that, while an ordinary autopsy had been carried out – with the removal of entire organs, the opening of the skull, etc. – the medical examination was carried out with an extraordinary effort to ensure a minimal impact on the appearance of the body when released for burial, and the time required for such an exercise is not consistent with an ordinary and rougher approach.

If the "autopsy" was limited, the subsequent elaborate considerations of the exact meaning to be given to the weight of Agit Salman's heart and lungs, in particular, are likely to be flawed.

(c) The detailed "autopsy report" in Agit Salman's case is only dated 21 May 1992. In contradistinction to an ordinary autopsy report, the conclusion in this report is based not

solely on the medical findings in the autopsy as such but also on “the findings of the judicial investigation”. About the latter, Dr Sen has explained:

“The information given in the record of examination of the corpse is judicial investigation information for us. In the conclusion to our autopsy report, we rely on that information as well. As you may notice, we use the words 'judicial investigation'. In the autopsy report, the reference to the judicial investigation concerns the information supplied to us from outside, in the record of the examination of the corpse. We call this judicial investigation.”

The autopsy report does not itself contain this added information and its content thus cannot be read out of the report.

(d) Some of the injuries/irregularities to which the photographs of Agit Salman bear witness, and which his wife and brother described in their statements, are not recorded in the “autopsy” documents. When the “autopsy” was performed, it was not known to the authorities that the dead person would later be photographed or that there would be an international court case examining Agit Salman's death.

The day after Agit Salman's death and examination an *identification report* ascertained that his body had been examined by the public prosecutor on duty before it was transported to the morgue for autopsy. On the day of the death and the “autopsy”, it was noted that “it was discovered that it was not possible to show the body to someone who knew the deceased and get a clear identification, and the relatives of the deceased applied to the prosecution today and because of their presence” were brought to the morgue for identification. This is not correct. The security forces had picked up Agit Salman's son to inform him of his father's death and told the son that he was expected to take his father's body with him, only some ten hours after Agit Salman had died.

To conclude, I find the post-mortem medical examination of Agit Salman and the investigation into his death to be so dismal that, at best, they gave no proper guidance as to the true causes of Agit Salman's death, and, at worst, were utterly misleading. In short, they were not in conformity with the State's obligation to investigate loss of life in detention. The investigation/examination may have been superficial simply because the true cause of death was not considered to be important in a case where the next of kin were not expected to pursue the matter. One should thus not jump to the conclusion that the shortcomings stem from a premeditated cover-up. This, however, does not limit the responsibility of the Turkish authorities to ensure proper investigations in a case like this.

3. The sole fact that someone has acted as a medico-legal expert does not deprive the expert of independence and impartiality

As emphasised in the above-mentioned Recommendation no. R (99) 3, it is important that medico-legal experts exercise their functions with total independence and impartiality, and that they should be objective in the exercise of their functions. The sole fact that someone has acted as a medico-legal expert cannot be a reason for questioning that person's objectivity or independence. I thus cannot share my colleagues' negative remarks in paragraph 102 of the judgment concerning Dr Kirangil of the Istanbul Institute of Forensic Medicine.

DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

(Translation)

I regret that I am unable to share the view of the majority in this case for the reasons set out below.

1. I agree that the Minister of Justice's appeal to the Court of Cassation against the decision not to prosecute was not available to the applicant and that the appeal was an extraordinary one. However, I do not agree with the opinion of the majority that once the criminal proceedings were initiated as a result of the appeal by the Minister of Justice, the applicant was dispensed from exhausting the whole criminal procedure because that procedure was an extraordinary one owing to the nature of the initiating appeal. That conclusion does not reflect the facts of Turkish law. I would like to underline that, notwithstanding the nature of the initiating motion or appeal, the criminal proceedings in the Turkish courts follow the general ordinary rules, as they did in the instant case.

For this very reason, the applicant did not hesitate to intervene in the criminal proceedings and did not feel this to be superfluous merely because the proceedings in question were extraordinary ones owing to the nature of the initiating appeal. In view of the fact that the proceedings ensuing from the appeal of the Minister of Justice were of an entirely ordinary nature and that the applicant, acting in the full capacity of an intervener, carried on with the proceedings in the court of first instance, it cannot be said that the applicant was not required to seek a remedy under domestic law.

2. In my view, the underlying problem is that the applicant started to follow the rules of domestic law by intervening in the criminal proceedings but did not pursue the proceedings when it came to the appellate stage. Apparently, she simply gave up without having any acceptable reason for doing so. The applicant did not invoke any development that had taken place during the proceedings which would justify her not exhausting the legal remedies. In this regard, I am not convinced that the acquittal would amount to a reasonable excuse for the applicant's not pursuing the appellate review, given the fact that the appellate review would be carried out by the Court of Cassation, the court which quashed the non-prosecution decision prior to the criminal proceedings at first instance.

3. This also means that the appellate review which would be carried out by the Court of Cassation cannot be regarded as unavailable or ineffective. The Court of Cassation's decision quashing the non-prosecution decision at the outset of the whole procedure sufficiently proved the contrary.

It must also be noted that the Court of Cassation's examination is in no way confined to reviewing the legality of the decision of the first-instance

court. The court is equally competent to examine the merits of the case. It therefore cannot be said beforehand that the Court of Cassation would not enter into the merits of the case, thus leaving out the assessment of the evidence already gathered at first instance. It must be stressed that supervision of the assessment of evidence by the first-instance court is the prime issue in the appellate review carried out by the Court of Cassation.

I am not convinced that the state of the evidence would affect the appellate review adversely. I find no basis for such an assumption. Given that the Commission based its conclusions mainly on the evidence collected by the domestic authorities, it was equally possible for the Court of Cassation to evaluate the same body of evidence as the

Commission and reach a similar conclusion. I therefore do not agree with the view of the majority that the appellate review of the Court of Cassation would have been ineffective.

4. I should have been satisfied if the majority of the Court had set out the reasons for departing from the grounds of the judgment of 23 September 1998 in the case of Aytekin v. Turkey (*Reports of Judgments and Decisions* 1998-VII). In that case, the Court gave significant weight to the intervention of the applicant, Mrs Gülten Aytekin, in the criminal proceedings. The Court also concluded that, as a consequence of that intervention, the applicant should have pursued the compensation remedies before the administrative courts in parallel to the criminal proceedings in which she had intervened (loc. cit., p. 2828, § 84). It is clear that this conclusion is independent of the conviction by the domestic court, because the Court said “in parallel to the criminal proceedings” to mean that it should have been pursued prior to the conviction.

In the Aytekin judgment, the Court pointed out the prospect of redress underlying the criminal proceedings (ibid.). Proceedings under the ordinary rules of procedure took place in the Aytekin case similar to those in the Salman case. There was therefore nothing in the procedure to prevent Mrs Behiye Salman from achieving a similar result to that in the Aytekin case, only Mrs Salman gave up and left the legal steps incomplete.

In my opinion, it is not legally well-founded to assume that the Court of Cassation would – in any event – have upheld the acquittal by the court below. That could not be predicted in the absence of the necessary appeal by Mrs Salman.

In conclusion, I must state that the circumstances of the present case do not justify departing from the standards of the Aytekin judgment. I am thus unable to share the view of the majority set out in paragraphs 82 and 83 of the judgment.

5. As to the violation of Article 2, I voted for finding a violation, but only with respect to the manner in which the investigation into Agit Salman's death was conducted. As to the responsibility for Agit Salman's death, I share entirely the partly dissenting opinion on the point of

Mr Alkema, a member of the Commission (see the Commission's report in this case). There is no doubt that, as he said, “the conditions for applicability of Article 2 set out in paragraph 312 of the report (intentional killing or the outcome of permitted use of force) have ... not been met”. He continued: “To quote from paragraph 284: 'There was no disagreement amongst the various doctors and experts that Agit Salman had an underlying heart disease'. This heart condition ... was apparently not known to those responsible for Agit Salman's arrest and detention.”

It could be accepted that the circumstances of the treatment that Agit Salman was subjected to could have caused the heart failure and consequently Agit Salman's death. There is, however, no proof of *intentional killing*. The force applied to Agit Salman might amount to a violation of Article 3. But there is no evidence that the officers in charge could and ought to have foreseen that their ill-treatment would be lethal in effect. Thus, the conditions for applying Article 2 exclusively to this ill-treatment are not fulfilled.

6. As regards the finding of a violation of Article 13 of the Convention, I refer to my dissenting opinion in the case of Ergi v. Turkey (judgment of 28 July 1998, *Reports* 1998-IV).

Further, once the conclusion has been reached that there has been a violation of Article 2 of the Convention on the grounds that there was no effective investigation into the death that has given rise to the complaint, no separate question arises under Article 13. The fact that there was no satisfactory and adequate investigation into the death which resulted in the applicant's complaints, both under Article 2 and Article 13, automatically means that there was no effective remedy before a national court. On that subject, I refer to my dissenting opinion in the case of Kaya v. Turkey (judgment of 19 February 1998, *Reports* 1998-I) and the opinion expressed by a large majority of the Commission (see Aytekin v. Turkey, application no. 22880/93, Commission's report of 18 September 1997; Ergi v. Turkey, application no. 23818/94, Commission's report of 20 May 1997; and Yasa v. Turkey, application no. 22495/93, Commission's report of 8 April 1997).

7. As to the application of Article 41 of the Convention, I dissent from the majority judgment, firstly, as regards just satisfaction and, secondly, as regards the manner of reimbursing costs, for the following reasons.

8. To begin with, the compensation. In the great majority of cases the Court has pointed out and clearly affirmed the speculative and fictitious nature of claims in respect of pecuniary damage where primarily “actuarial calculations” were entailed and consequently has nearly always dismissed this type of claim.

9. In the rare, exceptional cases in which it awarded the applicant a specified sum for pecuniary damage, it determined the amount on an *equitable* basis, never exceeding reasonable limits and thereby avoiding any speculative calculation.

10. In the instant case the Court – ignoring its settled case-law – has not only undertaken speculative “actuarial calculations” but has moreover considered it just and reasonable to award the applicant an unprecedented and more than excessive sum (39,320.64 pounds sterling (GBP) plus GBP 35,000). The average sum is between GBP 15,000 and GBP 20,000. I consider that the credibility and persuasive force of judicial decisions stem from consistency of case-law and adherence to it, which means avoiding extremes.

By way of justifying what has just been said, I take the liberty of referring to earlier judgments of the Court, as illustrations. I set out the relevant paragraphs in full below[1].

Kurt judgment of 25 May 1998

(Forced disappearance – Violation)

[A. Non-pecuniary damage]

[Claim]

“171. The applicant maintained that both she and her son had been victims of specific violations of the Convention as well as a practice of such violations. She requested the Court to award a total amount of *70,000 pounds sterling* (GBP) which she justified as follows: GBP 30,000 for her son in respect of his disappearance and the absence of safeguards and effective investigative mechanisms in that regard; GBP 10,000 for herself to compensate for the suffering to which she had been subjected on account of her son's disappearance and the denial of an effective remedy with respect

to his disappearance; and GBP 30,000 to compensate both of them on account of the fact that they were victims of a practice of 'disappearances' in south-east Turkey."

[Award]

"174. The Court recalls that it has found the respondent State in breach of Article 5 in respect of the applicant's son. It considers that an award of compensation should be made in his favour having regard to the gravity of the breach in question. It awards the sum of *GBP 15,000*, which amount is to be paid to the applicant and held by her for her son and his heirs."

Tekin judgment of 9 June 1998

(Violation of Article 3)

[A. Damage]

[Claim and award]

"75. The applicant claimed compensation in respect of non-pecuniary damage of *25,000 pounds sterling* (GBP) and aggravated damages of *GBP 25,000*."

...

"77. The Court considers that an award should be made in respect of non-pecuniary damage bearing in mind its findings of violations of Articles 3 and 13 of the Convention. Having regard to the high rate of inflation in Turkey, it expresses the award in pounds sterling, to be converted into Turkish liras at the rate applicable on the date of settlement (see the above-mentioned Selçuk and Asker judgment, p. 917, § 115). It awards the applicant *GBP 10,000*.

78. The Court rejects the claim for 'aggravated damages' (see the above-mentioned Selçuk and Asker judgment, p. 918, § 119)."

Ergi judgment of 28 July 1998

(Violation of Articles 3 and 13)

[A. Non-pecuniary damage]

[Claim]

"107. The applicant submitted that he, his deceased sister and the latter's daughter had been the victims both of individual violations and of a practice of such violations. He claimed *30,000 pounds sterling* (GBP) in compensation for non-pecuniary damage. In addition, he sought *GBP 10,000* for aggravated damages resulting from the existence of a practice of violation of Article 2 and of a denial of effective remedies in south-east Turkey in aggravated violation of Article 13."

[Award]

"110. The Court observes from the outset that the initial application to the Commission was brought by the applicant not only on his own and his sister's behalf but also on behalf of his niece, Havva Ergi's daughter. ... Having regard to the gravity of the

violations (see paragraphs 86 and 98 above) and to equitable considerations, it awards the applicant *GBP 1,000* and Havva Ergi's daughter *GBP 5,000*, which amount is to be paid to the applicant's niece or her guardian to be held on her behalf.

111. On the other hand, it dismisses the claim for aggravated damages."

***Ogur* judgment of 20 May 1999**

(Violation of Article 2)

[A. Damage]

[Claim]

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

[Award]

"98. ...

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

As regards pecuniary damage, the file contains no information on the applicant's son's income from his work as a night-watchman, the amount of financial assistance he gave the applicant, the composition of her family or any other relevant circumstances. That being so, the Court cannot allow the compensation claim submitted under this head (Rule 60 § 2).

As to non-pecuniary damage, the Court considers that the applicant undoubtedly suffered considerably from the consequences of the double violation of Article 2. ... On an equitable basis, the Court assesses that non-pecuniary damage at *FRF 100,000*." (FRF 100,000 being approximately 10,000 pounds sterling)

***çakici* judgment of 8 July 1999**

(Violation of Articles 2, 3, 5 and 13)

[A. Pecuniary damage]

[Claim]

"123. The applicant requested that pecuniary damages be paid for the benefit of his brother's surviving spouse and children. He claimed a sum of 282.47 pounds sterling (GBP) representing 4,700,000 Turkish liras (TRL), which it is alleged was taken from Ahmet Çakici on his apprehension by a first lieutenant and *GBP 11,534.29* for loss of earnings, this capital sum being calculated with reference to Ahmet Çakici's estimated monthly earnings of *TRL 30,000,000*."

[Award]

"125. The Court observes that the applicant introduced this application on his own behalf and on behalf of his brother. In these circumstances, the Court may, if it considers it appropriate, make awards to the applicant to be held by him for his brother's heirs (see the Kurt judgment cited above, p. 1195, § 174).

...

127. As regards the applicant's claims for loss of earnings, the Court's case-law establishes that there must be a clear causal connection between the damage claimed by the applicant and the violation of the Convention and that this may, in the appropriate case, include compensation in respect of loss of earnings (see, amongst other authorities, the Barberà, Messegué and Jabardo v. Spain judgment of 13 June 1994 (*Article 50*), Series A no. 285-C, pp. 57-58, §§ 16-20). The Court has found (paragraph 85 above) that it may be taken as established that Ahmet Çakici died following his apprehension by the security forces and that the State's responsibility is engaged under Article 2 of the Convention. In these circumstances, there is a direct causal link between the violation of Article 2 and the loss by his widow and children of the financial support which he provided for them. The Court notes that *the Government have not queried the amount claimed by the applicant*. Having regard therefore to the detailed submissions by the applicant concerning the actuarial basis of calculation of the appropriate capital sum to reflect the loss of income due to Ahmet Çakici's death, the Court awards the sum of *GBP 11,534.29* to be held by the applicant on behalf of his brother's surviving spouse and children."

[B. Non-pecuniary damage]

[Claim]

"128. The applicant claimed *GBP 40,000* for non-pecuniary damage in relation to the violations of the Convention suffered by his brother ..."

[Award]

"130. The Court recalls that in the Kurt judgment (cited above, p. 1195, §§ 174-75) the sum of GBP 15,000 was awarded for violations of the Convention under Articles 5 and 13 in respect of the disappearance of the applicant's son while in custody, which sum was to be held by the applicant for her son and his heirs, while the applicant received an award of GBP 10,000 in her own favour, due to the circumstances of the case which had led the Court to find a breach of Articles 3 and 13. In the present case, the Court has held, in addition to breaches of Articles 5 and 13, that there has been a violation of the right to respect for life guaranteed under Article 2 and torture contrary to Article 3. *Noting the awards made in previous cases from south-east Turkey concerning these provisions* (see, concerning Article 3, the Aksoy judgment cited above, pp. 2289-90, § 113, the Aydin judgment cited above, p. 1903, § 131, the Tekin judgment cited above, pp. 1521-22, § 77; and, concerning Article 2, the Kaya judgment cited above, p. 333, § 122, the Güleç v. Turkey judgment of 27 July 1998, *Reports* 1998-IV, p. 1734, § 88, the Ergi v. Turkey judgment of 28 July 1998, *Reports* 1998-IV, p. 1785, § 110, the Yasa judgment cited above, pp. 2444-45, § 124, and *Ogur v. Turkey* [GC], no. 21594/93, § 98, ECHR 1999-III) and having regard to the circumstances of this case, the Court has decided to award the sum of *GBP 25,000* in total in respect of non-pecuniary damage to be held by the applicant for his brother's heirs ..."

***Mahmut Kaya* judgment of 28 March 2000**

(Violation of Articles 2, 3 and 13)

[A. Pecuniary damage]

[Claim]

"133. The applicant claimed 42,000 pounds sterling (GBP) in respect of the pecuniary damage suffered by his brother who is now dead. He submitted that his brother, aged 27 at the time of his death and working as a doctor with a salary equivalent to GBP 1,102 per month, can be said to have sustained a capitalised loss of earnings of GBP 253,900.80. However, *in order to avoid any unjust enrichment*, the applicant claimed the lower sum of *GBP 42,000*."

[Award]

"135. The Court notes that the applicant's brother was unmarried and had no children. It is not claimed that the applicant was in any way dependent on him. This does not exclude an award in respect of pecuniary damage being made to an applicant who has established that a close member of the family has suffered a violation of the Convention. ... In the present case, however, the claims for pecuniary damage relate to alleged losses accruing subsequent to the death of the applicant's brother. They do not represent losses actually incurred either by the applicant's brother before his death or by the applicant after his brother's death. *The Court does not find it appropriate in the circumstances of this case to make any award to the applicant under this head*."

[B. Non-pecuniary damage]

[Claim]

"136. The applicant claimed, having regard to the severity and number of violations*, GBP 50,000* in respect of his brother and GBP 2,500 in respect of himself."

[Award]

"138. As regards the claim made by the applicant in respect of non-pecuniary damage on behalf of his deceased brother, the Court notes that awards have previously been made to surviving spouses and children and, where appropriate, to applicants who were surviving parents or siblings. ... The Court notes that there have been findings of violations of Articles 2, 3 and 13 in respect of the failure to protect the life of Hasan Kaya ... It finds it appropriate in the circumstances of the present case to award *GBP 15,000*, which is to be paid to the applicant and held by him for his brother's heirs.

139. The Court accepts that the applicant has himself suffered non-pecuniary damage which cannot be compensated solely by the findings of violations. Making its assessment on an equitable basis, the Court awards the sum of GBP 2,500, to be converted into Turkish liras at the rate applicable at the date of payment."

***Kiliç* judgment of 28 March 2000**

(Violation of Article 2)

[A. Pecuniary damage]

[Claim]

"100. The applicant claimed 30,000 pounds sterling (GBP) in respect of the pecuniary damage suffered by his brother who is now dead. He submitted that his brother, aged 30 at the time of his death and working as a journalist with a salary equivalent to GBP 1,000 per month, could be said to have sustained a capitalised loss of earnings of GBP 182,000. However, *in order to avoid any unjust enrichment*, the applicant claimed the lower sum of *GBP 30,000*."

[Award]

"102. The Court notes that the applicant's brother was unmarried and had no children. It is not claimed the applicant was in any way dependent on him. This does not exclude an award in respect of pecuniary damage being made to an applicant who has established that a close member of the family has suffered a violation of the Convention (see the Aksoy [v. Turkey] judgment [of 18 December 1996, *Reports* 1996-VI], pp. 2289-90, § 113, where the pecuniary claims made by the applicant prior to his death for loss of earnings and medical expenses arising out of detention and torture were taken into account by the Court in making an award to the applicant's father who had continued the application). *In the present case, however, the claims for pecuniary damage relate to alleged losses accruing subsequent to the death of the applicant's brother*. They do not represent losses actually incurred either by the applicant's brother before his death or by the applicant after his brother's death. *The Court does not find it appropriate in the circumstances of this case to make any award to the applicant under this head*.

[B. Non-pecuniary damage]

[Claim]

103. The applicant claimed, having regard to the severity and number of violations, *GBP 40,000* in respect of his brother and *GBP 2,500* in respect of himself."

[Award]

"105. As regards the claim made by the applicant in respect of non-pecuniary damage on behalf of his deceased brother, the Court notes that awards have previously been made to surviving spouses and children and, where appropriate, to applicants who were surviving parents or siblings. ... The Court notes that there have been findings of violations of Article 2 and 13 in respect of failure to protect the life of Kemal Kiliç, who died instantaneously, after a brief scuffle with unknown gunmen. It finds it appropriate in the circumstances of the present case to award *GBP 15,000*, which amount is to be paid to the applicant and held by him for his brother's heirs."

***Ertak* judgment of 9 May 2000**

(Violation of Article 2)

[A. Damage]

[Claim]

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

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

[Award]

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

151. As regards non-pecuniary damage, ... the Court has held that there has been a substantive and a procedural violation of Article 2. Noting the awards made in previous cases involving the application of the same provision in south-eastern Turkey (see the Kaya judgment cited above, p. 333, § 122; the Güleç judgment cited above, p. 1734, § 88; the Ergi v. Turkey judgment of 28 July 1998, *Reports* 1998-IV, p. 1785, § 110; the Yasa judgment cited above, pp. 2444-45, § 124; and *Ogur v. Turkey* [GC], no. 21594/93, § 98, ECHR 1999-III) and having regard to the circumstances of this case, the Court awards the sum of *GBP 20,000* in respect of non-pecuniary damage, to be held by the applicant on behalf of his son's widow and four children ..."

11. Lastly, I cannot accept that the legal costs awarded under Article 41 should be paid into the applicant's "*bank account in the United Kingdom*".

This point is an aspect of the general issue of payment of "costs and expenses". To make clear what I mean, I must go back to certain earlier facts and arguments.

The manner of implementing former Article 50 (now Article 41) as regards legal costs (including counsel's fees) was discussed in depth by the old Court because some applicants' lawyers (always the same ones) continually sought, very insistently, to have the costs paid to them direct into their bank account abroad in a foreign currency. The Court always dismissed those applications except in one or two cases in which it agreed to payment in a foreign currency (but always in the country of the respondent State). After deliberating, *the Court decided that costs would be paid (1) to the applicant, (2) in the country of the respondent State, and (3) in the currency of the respondent State* (if there was a high rate of inflation in the respondent State, the sum was to be expressed in a foreign currency and converted into that State's currency at the date of payment – see the

Tekin v. Turkey judgment of 9 June 1998, *Reports* 1998-IV, pp. 1521-22, § 77). In accordance with that decision, all other types of application have been categorically rejected. Whereupon, counsel for the applicant began to seek to have costs paid *to the applicant*, a national of the respondent State and resident in its territory, *in his bank account abroad and in a foreign currency*. They have never succeeded. Despite numerous applications of this kind (always by the same counsel), not a single decision has yet been taken allowing such an application.

Is it not astonishing that almost all the applicants living in very humble circumstances in a small village or hamlet in a remote corner of south-eastern Anatolia should have bank accounts in a town of another European State?

12. If certain counsel have problems with their clients, that is none of the respondent State's business, since the contract between the lawyer and his client is a private one which concerns them alone and the respondent State is not a party to disputes concerning them.

13. I must point out that in the system established by the Convention, *the Court has no jurisdiction to issue orders to the Contracting States as to the manner in which its judgments are to be executed*.

In my opinion, any payment under Article 41 must be made to the applicant as before, in the currency of the country and in the country concerned.

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

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