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

CASE OF KAYA v. TURKEY

(158/1996/777/978)

JUDGMENT

STRASBOURG

19 February 1998

List of Agents

Belgium: Etablissements Emile Bruylant (rue de la Régence 67,
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SUMMARY[1]

Judgment delivered by a Chamber

Turkey – alleged unlawful killing by security forces and failure of authorities to carry out effective investigation into killing

I. GOVERNMENT'S PRELIMINARY OBJECTION (applicant's lack of standing and validity of application)

Government failed to raise this objection at the admissibility stage of the proceedings before the Commission – estoppel.

Conclusion: objection dismissed (eight votes to one).

II. ARTICLE 2 OF THE CONVENTION

A. Alleged unlawful killing of applicant's brother

Reiteration of case-law on Commission's role in establishment of facts.

In instant case, deeply conflicting accounts of circumstances in which victim was killed – Commission's fact-finding seriously hindered on account of failure of applicant and alleged key eyewitness to testify before delegates – while sharing Commission's concerns about certain features of Government's case, Court considers nevertheless there are no exceptional circumstances which lead it to depart from Commission's finding of no violation – insufficient factual and evidentiary basis to conclude, beyond reasonable doubt, that deceased intentionally killed in circumstances alleged by applicant.

Conclusion: no violation (unanimously).

B. Alleged inadequacy of investigation

Reiteration of case-law on procedural obligation inherent in Article 2 requiring Contracting States to conduct some form of effective investigation when individuals killed by agents of State.

In instant case, circumstances surrounding killing disputed – could not be considered a clear-cut case of lawful killing which could be disposed of by means of minimum formalities – investigation (forensic examination, autopsy, further enquiries) seriously deficient – investigating authorities proceeded throughout on assumption that deceased was a terrorist killed in an armed clash with security forces – not prepared to test that assumption – neither prevalence of armed clashes in region nor high incidence of fatalities can displace obligation under Article 2 to ensure effective investigation into deaths arising out of clashes with security forces – authorities failed to comply with obligation in this case.

Conclusion: violation (eight votes to one).

C. Alleged lack of protection in domestic law for the right to life

Conclusion: not necessary to consider complaint (unanimously).

III. ARTICLES 6 § 1 AND 13 OF THE CONVENTION

A. Article 6 § 1 of the Convention

Applicant did not at any stage pursue a compensation claim before a civil or administrative court – not possible therefore for Court to determine whether domestic court would have adjudicated on claim notwithstanding applicant's contention that legal proceedings would offer no prospect of success in view of inadequacy of official investigation into killing – complaint under Article 6 § 1 in reality linked to Article 13 complaint that seriously deficient investigation resulted in denial of effective remedy.

Conclusion: not necessary to consider complaint (unanimously).

B. Article 13 of the Convention

Reiteration of Court's case-law on nature of an effective remedy in cases of alleged serious violations of Convention rights.

In instant case, authorities confronted with an allegation of unlawful killing by security forces – relatives of deceased had arguable grounds for making allegation in view of doubts about exact circumstances of killing – authorities obliged in circumstances to conduct, for benefit of relatives, thorough and effective investigation – no such investigation conducted having regard to Article 2 conclusion – accordingly applicant and next-of-kin also denied on that account an effective remedy and thereby access to other remedies, including compensation proceedings.

Conclusion: violation (eight votes to one).

IV. ARTICLES 2, 6 AND 13 OF THE CONVENTION IN CONJUNCTION WITH ARTICLE 14

Complaints not substantiated.

Conclusion: no violation (unanimously).

V. ARTICLE 50 OF THE CONVENTION

A. Non-pecuniary damage

Claim in respect of applicant disallowed – sum awarded to deceased's widow and children.

Conclusion: respondent State to pay a specified sum to deceased's widow and children only (eight votes to one).

B. Costs and expenses

Applicant's claim allowed in part.

Conclusion: respondent State to pay a specified sum (unanimously).

COURT'S CASE-LAW REFERRED TO

27.4.1988, Boyle and Rice v. the United Kingdom; 27.9.1995, McCann and Others v. the United Kingdom; 18.12.1996, Aksoy v. Turkey; 25.9.1997, Aydın v. Turkey; 28.11.1997, Menteş v. Turkey

In the case of Kaya v. Turkey[2],

The European Court of Human Rights, sitting, in accordance with Article 43 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A[3], as a Chamber composed of the following judges:

Mr R. BERNHARDT, *President*,
Mr THÓR VILHJÁLMSSON,
Mr F. GÖLCÜKLÜ,
Mr C. RUSSO,
Mr J.M. MORENILLA,
Mr K. JUNGWIERT,
Mr P. KŪRIS,
Mr E. LEVITS,
Mr J. CASADEVALL,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 27 October 1997 and 2 February 1998,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 5 December 1996, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in an application (no. 22729/93 (/sites/eng/pages/search.aspx#{"appno":["22729/93"]})) against the Republic of Turkey lodged with the Commission under Article 25 on 23 September 1993 by Mr Mehmet Kaya, a Turkish national, on his own behalf and on behalf of his deceased brother, Mr Abdülmenaf Kaya, and the latter's surviving widow and seven children.

The Commission's request referred to Articles 44 and 48 and to the declaration of 22 January 1990 whereby Turkey recognised the compulsory jurisdiction of the Court (Article 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 2, 3, 6, 13 and 14 of the Convention.

2. In view of the applicant's lack of response to the enquiry as to whether he wished to take part in the proceedings and to designate representatives for this purpose (Rule 33 § 3 (d) of Rules of Court A), the President of the Chamber, acting through the Registrar, took steps to clarify the applicant's intentions by writing to him directly at his address in Diyarbakır Prison on 3 June 1997. In response to that letter, which was delivered with the assistance of the Agent of the Turkish Government ("the Government"), the applicant stated in a letter of reply dated 25 June 1997 and communicated through the intermediary of the Government that he wished to take part in the proceedings. He authorised his daughter, Miss Leyla Kaya, to act as his intermediary for this purpose. The latter, acting on behalf of the applicant, designated the lawyers who would represent him (Rule 30).

By letter dated 18 March 1997, the President of the Chamber refused the applicant's request under Rule 27 for leave to provide for interpretation in a non-official language at the oral hearing having regard to the fact that two of the applicant's lawyers used one of the official languages of the Court.

3. The Chamber to be constituted included *ex officio* Mr F. Gölcüklü, the elected judge of Turkish nationality (Article 43 of the Convention), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 § 4 (b)). On 20 January 1997, in the presence of the Registrar, the President of the Court, Mr R. Ryssdal, drew by lot the names of the other seven members, namely, Mr Thór Vilhjálmsson, Mr C. Russo, Mr J.M. Morenilla, Mr K. Jungwiert, Mr P. Kūris, Mr E. Levits and Mr J. Casadevall (Article 43 *in fine* of the Convention and Rule 21 § 5).

4. As President of the Chamber (Rule 21 § 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the Government, the applicant's lawyers and the Delegate of the Commission on the organisation of the proceedings (Rules 37 § 1 and 38). Pursuant to the order made in consequence on 11 March 1997, the Registrar received the Government's memorial on 25 June 1997 and the applicant's memorial on 8 September 1997, the applicant having been granted an extended deadline for the submission of his memorial by the President on 29 July 1997 in view of the steps being taken to clarify the applicant's intention with respect to the proceedings (see paragraph 2 above).

On 9 October 1997 the Commission supplied a number of documents from its case file, including the verbatim record of the hearing of witnesses before the delegates in Diyarbakır and the original application lodged with the Commission by the applicant. These documents had been requested by the Registrar on the instructions of the President.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 21 October 1997. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*
Mr A.S. AKAY, *Acting Agent*,
Mr ABDÜLKADIR KAYA, *Counsel*,
Mr K. ALATAŞ,
Mr F. POLAT, *Advisers*;

(b) *for the Commission*
Mr H. DANELIUS, *Delegate*;

(c) *for the applicant*
Mr K. BOYLE, Barrister-at-Law, University of Essex,
Ms A. REIDY, Barrister-at-Law, University of Essex, *Counsel*.

The Court heard addresses by Mr Danelius, Ms Reidy, Mr Boyle and Mr Akay.

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

The applicant

6. The applicant, Mr Mehmet Kaya, is a Turkish citizen born in 1949. At the time of the events in question (see paragraph 8 below) he was a farmer living in Dolunay village in the district of Lice which is situated in the province of Diyarbakır in south-eastern Turkey. He is currently detained in Diyarbakır E-type Prison (see paragraph 2 above). His brother, Mr Abdülmenaf Kaya, who also lived and farmed in Dolunay before his

death, was killed on 25 March 1993 in the vicinity of the village in circumstances which are disputed and which have given rise to the proceedings before the Convention institutions.

7. The original application to the Commission was lodged by the applicant on his own behalf and on behalf of his deceased brother and the widow and seven children of the deceased.

The facts in dispute

8. The applicant has alleged that his brother was deliberately killed by the security forces on 25 March 1993. The Government on the contrary have contended that Mr Abdülmenaf Kaya was killed in a gun battle between members of the security forces and a group of terrorists who had engaged the security forces on the day in question. They claim that the applicant's brother was among the assailants. The facts as presented by the parties are set out in Section A below.

The applicant and the Government have defended their opposing accounts of the circumstances surrounding the death of Abdülmenaf Kaya on the basis of documentary material, which appears in Section B. The measures taken by the domestic authorities after 25 March 1993 to investigate the killing of Abdülmenaf Kaya are described in Section C.

The Commission appointed delegates to take oral evidence from key witnesses at a hearing held in Diyarbakır on 9 November 1995. Having regard to the testimony of those witnesses who appeared before the two delegates and to its examination of relevant material, the Commission assessed the evidence and established its conclusions in respect of both the killing of Abdülmenaf Kaya and the adequacy of the domestic investigation into his death. These conclusions and the reasons supporting them are summarised at Section D.

A. The events of 25 March 1993

1. Facts as presented by the applicant

9. The applicant has based his account of the events surrounding the killing of his brother on 25 March 1993 on the evidence of villagers from Çiftlibahçe village whom he alleges witnessed the incident and on the testimony of Mr Hikmet Aksoy, a villager from Dolunay whom he maintains was in the company of his brother on the day the latter was killed. The applicant was not himself an eyewitness to the events.

10. The applicant alleges that on the morning of 25 March 1993 his brother was going to the fields situated 300–400 metres from the village of Çiftlibahçe and four kilometres from his own village of Dolunay together with Hikmet Aksoy. A military operation was being conducted at the time. Hikmet Aksoy turned off the road at one point to tend to his beehives but was detained by soldiers. Seeing this, Abdülmenaf Kaya began to run away as he was frightened that he would also be taken into custody. The soldiers saw him running and opened fire. Abdülmenaf Kaya ran towards Çiftlibahçe village and hid in some bushes. The soldiers gave chase and found him. According to villagers from Çiftlibahçe who witnessed the incident the soldiers killed him, riddling his body with bullets. The soldiers then planted a weapon near his body and took photographs of the scene. The villagers requested that the body be handed over to them. At first the security forces refused but when the villagers insisted that the deceased was not a terrorist but the uncle of one of the inhabitants of a neighbouring village they relented. The villagers were verbally abused and threatened by the security forces.

Hikmet Aksoy was taken into custody and held at Lice gendarmerie headquarters for six days.

2. Facts as presented by the Government

11. The Government's account of the circumstances which led to the death of the applicant's brother is based on the statements made to the Commission's delegates at the hearing in Diyarbakır on 9 November 1995 (see paragraph 8 above) by members of the security forces involved in the alleged clash with terrorists on 25 March 1993, namely: Alper Sır, a first lieutenant who had been in charge of the four teams of soldiers involved in the anti-terrorist operation on the day in question; Mr Ahmet Gümüs and Mr Paşa Bülbül, both senior sergeants commanding units involved in the operation; and Sergeant Altan Berk who had been in one of the units.

12. The Government maintain that the security forces arrived in the vicinity of Dolunay on 25 March 1993 having received information that terrorists had been seen in the area. While they were conducting a field search in line formation they came under fire somewhere between Dolunay village and Çiftlibahçe

village. The gunfire was directed at them from a rocky area, a creek and from the hills around. The security forces, numbering about sixty, took cover and returned fire using mainly G3 and A4 guns with an effective range of between 300 and 1,000 metres as well as longer range MG3 and K23 machine guns. The firing distance between the security forces and their assailants varied between 300 and 500 metres. The terrorists retreated after about thirty minutes and in the lull a search of the scene of the attack was carried out during which the security forces recovered a dead body alongside of which lay an automatic assault gun (later confirmed as Chinese-made in the ballistics report – see paragraph 32 below) bearing the serial number 59339 together with ammunition including three cartridge clips, three rounds of which were spent and three unused. During the field search considerable traces of blood were found along the route used by the terrorists to make their escape.

13. The team commander, First Lieutenant Alper Sır, secured the area and contacted the office of the public prosecutor of Lice about the incident. Two and a half hours later the public prosecutor, Mr Ekrem Yıldız, and the District Government doctor, Dr Arzu Doğru, arrived at the scene by helicopter accompanied by assistants. An on-the-spot autopsy was performed on the body by Dr Doğru and an autopsy report (see paragraphs 26–30 below) was prepared there and then. The public prosecutor drew up a burial certificate.

14. The body, which was not identified at that stage (see paragraph 15 below), was handed over to First Lieutenant Alper Sır who signed the necessary forms. First Lieutenant Alper Sır's team subsequently advanced to the nearest village, Çiftlibahçe, where the body of the deceased was handed over to the mayor and two other villagers for burial. They signed for the body.

An incident report was drawn up in a handwritten form on 25 March. It was signed by six members of the security forces, amongst whom Alper Sır, Paşa Bülbül, Ahmet Gümüs and Altan Berk (see paragraph 11 above). The report confirms the above-mentioned account of the events (see paragraphs 12 and 13 above).

15. The identity of the deceased was in fact only discovered some months after the incident. According to a handwritten report signed by three gendarmes and dated 5 May 1993, the investigation which was carried out after the incident revealed that the body was that of Abdülmenaf Kaya, a resident of Dolunay village, who was killed in a clash with security forces conducting an operation in the outskirts of Dolunay.

B. Materials adduced in support of these accounts

1. Statements made by the applicant

16. The applicant maintains that he personally confirmed the account of the events as set out above (see paragraph 10) in a statement which he made to Mr Abdullah Koç of the Diyarbakır branch of the Human Rights Association on 31 March 1993, just six days after the fatal shooting and in a supplementary statement which he made to Mr Sedat Aslantaş also of the Diyarbakır branch of the Human Rights Association on 20 September 1993.

(a) Statement dated 31 March 1993 taken by Abdullah Koç of the Diyarbakır branch of the Human Rights Association

17. In his statement the applicant declared that at around 08.00 hours on the morning of 25 March 1993 Abdülmenaf Kaya and Hikmet Aksoy were going to the fields 300–400 metres from Çiftlibahçe village and four kilometres from Dolunay village. At that time a military operation was

starting in Boyunlu, Dolunay, Çiftlibahçe and Ormankaya villages. Soldiers participating in the operation took Hikmet Aksoy into custody. Seeing this, Abdülmenaf Kaya started to run whereupon the soldiers opened fire. Abdülmenaf Kaya ran the remaining 300–400 metres to Çiftlibahçe and hid there in the bushes. The soldiers found him and, according to eyewitnesses, fired over 100 bullets into his body, planted a firearm on him and took photographs. They did not want to give the body to the villagers, but the villagers insisted that the deceased was from a neighbouring village and that he was not a terrorist. The soldiers finally gave the body to the villagers.

Later, the commander of the military unit threatened the inhabitants of Çiftlibahçe and Dolunay with the destruction of their villages. Most of the people who came to offer their condolences on the death of Abdülmenaf Kaya suffered abuse of various kinds.

The applicant concluded in his statement that Hikmet Aksoy had been taken into custody and his whereabouts were unknown.

(b) Supplementary statement dated 20 September 1993 taken by Sedat Aslantaş of the Diyarbakır branch of the Human Rights Association

18. In this statement, the applicant declared that Abdülmenaf Kaya was injured while running away and that the security forces followed him to the bushes and killed him there.

The applicant stated that the security forces alone took photographs of the body and when the applicant's family received the body they had to bury it immediately. An autopsy was conducted but the applicant was not given a copy of the autopsy report although he had requested one. The applicant also declared in the statement that the witnesses who saw the body of Abdülmenaf Kaya had left the village, being frightened of the security forces and the intimidation to which they would be subjected if they spoke out publicly. He could not remember any of the names of the villagers who witnessed the killing. The applicant concluded his statement by mentioning that Hikmet Aksoy had been detained at Lice gendarmerie headquarters for six days for questioning and then released.

2. Statements made by Hikmet Aksoy

19. The applicant maintains that his account of the events is confirmed by statements made by Hikmet Aksoy to the authorities in circumstances which would have made it impossible for the latter to know of the content of his own statements (see paragraphs 17 and 18 above) to the Diyarbakır Human Rights Association.

(a) Statement dated 17 June 1994 taken by Özcan Küçüköz, Lice public prosecutor

20. This statement was taken following a letter dated 17 May 1994 from the public prosecutor at the Diyarbakır National Security Court (see paragraph 33 below). When Aksoy made the statement, he was detained in Lice Prison for possession of hashish.

21. Like Hikmet Aksoy, Abdülmenaf Kaya was from the village of Dolunay. On 25 March 1993 Hikmet Aksoy left his house to go and tend his beehives which were situated on a piece of land along a road between Dolunay and Çiftlibahçe. When he was leaving Dolunay village, he met Abdülmenaf Kaya who asked if he could accompany him.

When he reached his beehives, he heard some people running and saw about ten soldiers approaching him. The soldiers tied up his hands and asked who he was and why he was wandering about. Two or three minutes later the soldiers noticed Abdülmenaf Kaya running away. The soldiers shouted after him to stop, but he either did not hear them or chose to ignore them as he increased his pace. The lieutenant ordered the soldiers to shoot at Abdülmenaf Kaya's feet. At that time Abdülmenaf Kaya was approximately fifty to sixty metres away.

When the soldiers started shooting at his feet, Abdülmenaf Kaya began to run towards Çiftlibahçe. The soldiers chased him, taking Aksoy along with them. Abdülmenaf Kaya disappeared beyond a slope and when the soldiers reached the slope he was nowhere to be seen. They then came to the ten or so houses which are situated at a short distance from Çiftlibahçe where they encountered some other soldiers who said that they had seen Abdülmenaf Kaya. Aksoy and the soldiers waited in the street for about half an hour. He then heard shots being fired; he estimates that three cartridges were fired. About ten minutes later a helicopter landed but it was too far away from Aksoy for him to be able to see what was happening.

The helicopter left again after ten minutes. Later a lieutenant approached Aksoy and told him "we have killed Menaf".

Aksoy was taken to Lice and kept in custody for fifteen days.

(b) Statement dated 22 November 1995 taken by two police officers of the anti-terrorist branch

22. Aksoy is said to have made this statement whilst in detention following his arrest on 14 November 1995. According to the applicant the statement cannot be taken to be reliable and must be considered to have been obtained under pressure, as confirmed by Aksoy's subsequent retraction (see paragraphs 24 and 25 below).

23. Aksoy states how from 1990 he provided food to groups of Workers' Party of Kurdistan ("PKK") members who came to his village of Dolunay. From 1991 he was also involved with ensuring the attendance of villagers at funerals of terrorists.

In March 1992 six PKK members came to the village and told him to go and get Abdülmenaf Kaya. After Abdülmenaf Kaya had appeared, he and one of the PKK members talked to each other in a separate place. Two months later three PKK members arrived with a group of ten people. Abdülmenaf Kaya was told to organise the attendance of villagers at a funeral. Two months later the military staged an operation during which Abdülmenaf Kaya died. According to the Government, this last part of his statement is an inaccurate translation of Aksoy's words. They maintain that Aksoy in fact related that Abdülmenaf Kaya died during an armed clash.

(c) Statement dated 23 November 1995 to a public prosecutor

24. In this statement Aksoy retracted the statement of 22 November 1995 (see paragraphs 22 and 23 above), saying that he was forced to sign a statement which the police had written.

25. In the statement he denies the accusations that have been made against him, namely that he acted as a courier for the PKK. No mention is made of Abdülmenaf Kaya in the statement.

3. The autopsy report of 25 March 1993

26. This report was drawn up by Dr Arzu Doğru who had been flown to the scene of the fatal shooting to perform the field autopsy. It was prepared on-the-spot (see paragraph 13 above).

27. The report states that following a telephone call from the district gendarmerie headquarters on 25 March 1993 to the effect that the body of a person belonging to the PKK terrorist organisation had been captured during a clash, the public prosecutor Ekrem Yıldız and the District Government doctor Arzu Doğru set out by military helicopter, accompanied by a gendarme staff sergeant who was to act as clerk. On arrival at the scene the body was found to be lying on its back in the bushes on the bank of a creek. It was moved to a flat piece of ground. Beside the body there was a Kalashnikov rifle with serial number 8125298 and one round of ammunition containing three full and six empty cartridges. The body is described as being that of a 35–40 year-old man with grey hair and dressed in blue and grey trousers with a cummerbund round the waist, a sleeveless black vest and a striped winter shirt, wearing rubber shoes but no socks. Since there was no one at the scene of the incident who could identify the body, the security forces took photographs from several angles.

28. A large number of bullet entry and exit holes were found in the neck of the body, in the throat, above the heart, in the upper left area of the abdomen, around the navel and around the groin, in the left hip and in the femur of both legs. The bones of the legs were broken as a result of the blows received.

29. The report subsequently mentions that the medical examiner was brought over, that the body was handed over to him and that he made the following statement:

> "I established the above findings together with the public prosecutor, and I agree that the findings are as described above. As the result of these findings, the cause of death is clear. There is no need to carry out a classical autopsy. The conditions in the field combined with the fact that we do not have sufficient security or instruments are in any case an impediment to performing a full classical autopsy. From the above findings I have come to the conclusion that the deceased died from cardiovascular insufficiency as a result of the wounds caused by firearms. That is my definite opinion."

30. The report further states that the rifle and the ammunition were seized for safekeeping as *corpus delicti*. It concludes by stating that the forensic examination of the body and the autopsy procedure had been completed. The report is signed by, *inter alia*, First Lieutenant Alper Sır as the person receiving the body.

C. Proceedings before the domestic authorities

31. Following the events of 25 March 1993 and the identification of the body as that of Abdülmenaf Kaya (see paragraph 15 above), a decision of non-jurisdiction was issued on 20 July 1993 by Ekrem Yıldız, public prosecutor at Lice, and the file was transferred to the public prosecutor at the Diyarbakır National Security Court.

In his decision, the public prosecutor stated that "the preliminary documents have been examined" in respect of a crime committed by Abdülmenaf Kaya who, together with other PKK terrorists, took part on 25 March 1993 in an armed clash with the security forces The decision describes how the body of the deceased was recovered by the security forces after the clash together with an assault rifle and spent ammunition. The decision notes that the ballistics report on the weapon was not yet available. The public prosecutor concluded that, having regard to the aims of the terrorists and to the fact that the attack took place in an area subject to emergency rule, the investigation should be carried out by the prosecuting authorities of the National Security Court on account of the fact that he lacked jurisdiction in the matter.

The National Security Court in turn transmitted the file to the Lice District Administrative Council for investigation.

32. An expert report on the weapon and ammunition found beside Abdülmenaf Kaya's body was drawn up by the Diyarbakır police forensic laboratory on 23 June 1993. The report, which was not available at the time the public prosecutor issued his decision of non-jurisdiction (see paragraph 31 above), stated that the weapon was a Chinese-made Kalashnikov automatic rifle serial no. 8125298/59339 and that the three spent bullets examined had been fired from the rifle "which was found with the dead terrorist".

33. On 17 June 1994 a public prosecutor, apparently at the request of the Principal Public Prosecutor at the Diyarbakır National Security Court, took a statement in relation to the death of Abdülmenaf Kaya from Hikmet Aksoy while the latter was detained at Lice (see paragraphs 20 and 21 above).

34. During the proceedings before the Commission, the Government were requested to supply the photographs which were allegedly appended to the autopsy report (see paragraph 27 above). The authorities have so far been unable to retrieve the photographs.

D. The evaluation of the evidence and the Commission's findings in respect of the death of the applicant's brother and the adequacy of the official investigation

1. The witnesses

35. At the hearing held before two Commission delegates in Diyarbakır on 9 November 1995 oral evidence was taken from five witnesses: (i) Dr Arzu Doğru, who conducted the field autopsy on the deceased; (ii) First Lieutenant Alper Sır; (iii) Senior Sergeant Ahmet Gümüs; (iv) Senior Sergeant Paşa Bülbül; and (v) Sergeant Altan Berk.

36. The applicant did not attend the hearing. He notified the Commission on 1 November 1995 that he feared reprisals if he were to give evidence at the hearing. The nature of his fears was not specified. Nor

did Mr Hikmet Aksoy appear. In a letter dated 8 November 1995 Mr Aksoy, through the intermediary of the Diyarbakır Human Rights Association, informed the Commission that he and his family had been subjected to pressure by the police in order to prevent him from giving evidence at the hearing and he would not therefore be attending.

37. Moreover, although summoned to give evidence, neither the Lice public prosecutor, Mr Ekrem Yıldız, nor the public prosecutor attached to the Diyarbakır National Security Court attended the hearing. The former was unavailable on account of other commitments and the latter had taken the view that he would be unable to give any relevant information to the delegates on the pursuit of the investigation into Abdülmenaf Kaya's death since he had only become involved in the investigation after jurisdiction had been transferred to the Diyarbakır National Security Court.

2. The approach to the evaluation of the evidence

38. The Commission assessed the documentary and oral evidence before it on the basis of the evidentiary standard of proof beyond reasonable doubt, taking into account the fact that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. In this respect it noted that the failure of the applicant and of Mr Hikmet Aksoy as well as of the two public prosecutors to give evidence at the hearing in Diyarbakır had a considerable impact on the determination of whether the evidentiary standard had been attained. The Commission noted however that the applicant was not a direct witness to the events and his testimony would therefore have been of limited evidentiary value. On the other hand, the presence of Hikmet Aksoy would have been valuable since he claimed to be an eyewitness and his failure to attend meant that he could not be cross-examined with a view to assessing his credibility and the probative value of his evidence. Further, the absence of any detailed investigation at the domestic level into the circumstances surrounding the death of the applicant's brother (see paragraphs 31–34 above) meant that the Commission had to reach its conclusions on the basis of the oral and documentary evidence which it itself had collected in accordance with its powers under Article 28 § 1 (a) of the Convention.

3. The assessment of the evidence

39. The Commission's assessment of the evidence concerning the death of Abdülmenaf Kaya can be summarised as follows:

(i) The only clear and undisputed facts were that on 25 March 1993 the body of Abdülmenaf Kaya was found lying in the bushes on the bank of a creek near the village of Dolunay. The body was dressed in blue and grey trousers with a cummerbund round the waist, a sleeveless black vest and a striped winter shirt, wearing rubber shoes but not socks. A large number of bullet entry and exit holes were found in the neck of the body, in the throat, above the heart, in the upper left area of the abdomen, around the navel and the groin, in the left hip and in the femur of both legs. The bones of the legs were broken as a result of the impact of the bullets. The total number of bullet wounds is not recorded in the autopsy report but was estimated by Dr Arzu Doğru in his oral evidence to the delegates as seven or eight. It was also not in dispute that an autopsy, consisting only of an external examination, was carried out on the body by Dr Doğru at or near

the site of the killing and that subsequently the body was handed over on the instructions of First Lieutenant Alper Sır to three villagers from the nearby Çiftlibahçe village.

(ii) The accounts of the clash given by the soldiers whose evidence was heard (see paragraph 35 above), while deficient in detail, were broadly consistent and in line with the Government's version of the events (see paragraphs 11–15 above).

(iii) There were however a number of factors which gave reason to doubt the Government's account of the events: there was only one casualty despite the number of soldiers (50–60) and PKK terrorists (20–35) engaged in the gun battle which reportedly lasted between thirty and sixty minutes; the extent and severity of the bullet wounds to the deceased's body having regard to the range of the soldiers' weapons (400–600 metres) and the firing distance between the soldiers and their attackers (300–1,000 metres); the fact that there were bullet wounds to all parts of the body suggested that the deceased must have been fully exposed to gunfire whereas neither he nor any of the other terrorists had actually been seen during the clash; the deceased's clothing was not typical of PKK mountain apparel; the body was handed over to three unknown villagers even though he was considered to have been an active terrorist; and the absence of any forensic evidence linking the deceased to the weapon found beside his body.

4. The findings concerning the death of the applicant's brother

40. While the Commission took the view that the matters referred to above (see paragraph 39 (iii)) gave rise to concern and were difficult to reconcile with the undisputed facts, it could not be concluded on the basis of a general assessment of the written and oral evidence that it was proved beyond reasonable doubt that Abdülmenaf Kaya was deliberately killed by soldiers in the circumstances alleged by the applicant.

5. The findings concerning the domestic investigation into the death

41. The Commission's assessment of the inquiries and investigation into the death of Abdülmenaf Kaya was made in the absence of any detailed investigation by the authorities into the events of 25 March 1993 and without the delegates having had the benefit of the oral evidence of the key public prosecutors responsible at various stages for the investigation (see paragraph 37 above). The Commission considered the reasons given for their non-attendance at the delegates' hearing unconvincing.

The Commission found that the autopsy performed on the body was defective and incomplete. In the first place, no attempt had been made to record the number of bullets which struck the deceased or the distance from which the bullets had been fired and the autopsy report was imprecise as regards the location of the entry and exit wounds. Secondly, no tests for fingerprints or gunpowder traces on the deceased's clothes or body were made at the scene. While acknowledging that the autopsy and the forensic examination may have been carried out under difficult field conditions in view of the security situation, the Commission found it remarkable that the body was not flown to a place where further analyses could have been made of, for example, the bullets lodged in the body. The handing over of the body to the villagers precluded any further examination. Thirdly, it appeared to the Commission that the authorities took it for granted that the deceased was a PKK terrorist and they did not consider it necessary to examine seriously the possibility that he had been killed in circumstances engaging the responsibility of the security forces. In this respect, the Commission had regard to the mention made in the autopsy report that the deceased was a PKK terrorist, to the wording of the non-jurisdiction decision issued by the public prosecutor, Mr Ekrem Yıldız, (see paragraph 31 above) and to the apparent failure of the public prosecutor attached to the Diyarbakır National Security Court to put any questions to Hikmet Aksoy about the deceased's possible involvement with the PKK (see paragraphs 20 and 21 above).

II. RELEVANT DOMESTIC LAW AND PRACTICE

42. The Government submitted before the Commission and the Court that the following domestic law is relevant to the case.

A. Circumstances entitling the security forces to open fire

43. Pursuant to Article 23 of Decree no. 285 (instituting the state of emergency), security forces, special

forces on duty and members of the armed forces are, in the circumstances stipulated in the relevant Act, empowered to use their weapons when carrying out their duties. The security forces thus empowered may open fire and shoot at a person if a command to surrender is not accepted, is disobeyed or met with counter-fire or if they have to act in self-defence.

44. The plea of self-defence is enacted in Article 49 of the Turkish Criminal Code which, in so far as relevant, provides:

> "No punishment shall be imposed if the perpetrator acted ...
>
> 2. in immediate necessity to repel an unjust assault against his own or another's person or chastity."

B. Investigation and prosecution of the offence of homicide under the Code of Criminal Procedure

45. The Criminal Code contains provisions dealing with unintentional homicide (Articles 452, 459), intentional homicide (Article 448) and murder (Article 450). In respect of these offences, complaints may be lodged, pursuant to Articles 151 and 153 of the Code of Criminal Procedure, with the public prosecutor or the local administrative authorities. The public prosecutor and the police have a duty to investigate crimes reported to them (Article 153), the former deciding whether a prosecution should be initiated, pursuant to Article 148 of the Code of Criminal Procedure. A complainant may appeal against the decision of the public prosecutor not to institute criminal proceedings (Article 165).

46. The applicant has drawn attention to the provisions of Article 4 § 1 of Decree no. 285 which requires a public prosecutor to transfer authority for the investigation of allegations against the security forces to local administrative boards or councils. According to the applicant this provision is immune from judicial challenge, being contained in a decree having the force of law. An identical provision in section 15(3) of Law no. 3713 (the Prevention of Terrorism Act 1981) was in fact declared unconstitutional by the Supreme Court in a decision of 31 March 1992. The applicant contends that the administrative boards, which are composed of appointed civil servants with no legal training, lack independence and entrust investigations into alleged wrongdoing by members of the security forces to a senior member of the security forces. The investigator makes a recommendation as to whether or not a prosecution should be initiated and this recommendation is endorsed by the administrative board whose decisions are subject to review by the Supreme Administrative Court.

C. The relationship between criminal and civil liability under Turkish law

47. The Government have provided the Court with a description of the relationship between criminal and civil liability under Turkish law.

When a civil court decides on whether a person was at fault in respect of the commission of a particular act it is not bound by criminal-law considerations. The judge in a civil case is not bound by the rules of the criminal law on liability nor by the decision of a criminal court to acquit a person of the wrongdoing which forms the object of civil-law proceedings. It follows from Article 53 of the Turkish Code on Obligations that the judge in civil matters does not need to adopt the findings of a criminal court as regards either the absence of fault or the existence and degree of fault.

Article 53 provides:

> "The court is not bound by the provisions of the penal laws concerning criminal responsibility nor by an acquittal by a criminal court in deciding questions of fault or capacity to act."

48. Under Turkish law, considerations of crime and fault are not the same as in civil law. Criminal liability comprises the imposition of sanctions whereas civil law is only concerned with the payment of compensation to a plaintiff who can establish fault on the part of the defendant. Liabilities in criminal and civil-law proceedings are determined at different levels and in accordance with different criteria. Under the criminal law, intent on the part of the accused has to be established; in principle it does not consider negligence as a fault in terms of criminal liability. The position is different under civil law.

49. The criminal court may decide the criminal aspects of a case as well as its civil aspects if requested by the aggrieved party under the Law on Criminal Procedure. Thus, the criminal court may make an award of damages. In such a case the criminal court's decision on the payment of compensation is binding.

50. A civil court dealing with a claim for compensation against a defendant does not need to await a

preliminary ruling from a criminal court hearing the criminal-law aspects of the case. It is only where a criminal court has ruled that an accused has committed an act amounting to an offence that a civil court would be bound by that finding. However if the criminal court has acquitted an accused person on the ground that the evidence against him was not sufficient to sustain a conviction, the civil court would not be bound by that decision if the act of which he was accused formed the object of civil litigation. The issue of civil-law liability would be determined in accordance with civil rules and procedures. On this latter point a court of appeal ruled in 1971 that:

> "The fact that the criminal proceedings resulted in the acquittal of the suspect or the fact that the wrongful act had been committed by many people [and] it is not possible to determine who committed it shall not bind the civil court judge in a compensation case opened afterwards."

PROCEEDINGS BEFORE THE COMMISSION

51. In his application to the Commission (no. 22729/93 (/sites/eng/pages/search.aspx#{"appno":["22729/93"]})) introduced on 23 September 1993, the applicant complained that his brother, Abdülmenaf Kaya, was unlawfully killed by the security forces on 25 March 1993 and that the circumstances surrounding his killing had not been adequately investigated by the authorities. The applicant alleged violations of Articles 2, 3, 6, 13 and 14 of the Convention.

52. The Commission declared the application admissible on 20 February 1995. In its report of 24 October 1996 (Article 31), it expressed the opinion by twenty-seven votes to three that there had been a violation of Article 2 of the Convention on account of the inadequacy of the investigation conducted by the authorities into the death of the applicant's brother; unanimously, that there had been no violation of Article 3 of the Convention; by twenty-seven votes to three that there had been a violation of Article 6 of the Convention; by twenty-eight votes to two that no separate issue arose under Article 13 of the Convention; and, unanimously, that there had been no violation of Article 14 of the Convention. The full text of the Commission's opinion and of the five separate opinions contained in the report is reproduced as an annex to this judgment[4].

FINAL SUBMISSIONS TO THE COURT

53. In his memorial and at the hearing the applicant requested the Court to find that the facts of the case disclosed a breach by the respondent State of Articles 2, 6 and 13 of the Convention and of the same Articles in conjunction with Article 14 of the Convention. He did not maintain the complaint under Article 3 which had been submitted to the Commission. He also requested the Court to award him just satisfaction under Article 50.

54. The Government for their part requested the Court both in their memorial and at the hearing to declare the case inadmissible on account of the fact that Mr Kaya had failed to prove that he enjoyed the status of an applicant for the purposes of the proceedings before the Convention institutions. In the alternative, they requested the Court to reject the applicant's complaints as disclosing no breach of the Convention.

AS TO THE LAW

I. THE SCOPE OF THE CASE

55. The Court notes that the Commission, when referring the case to the Court, asked for a decision on whether the facts gave rise to, *inter alia*, a breach of Article 3 of the Convention (see paragraph 1 above). The applicant has not however maintained that complaint in the proceedings before the Court, either in his memorial or at the hearing (see paragraph 53 above). Neither the Government nor the Delegate of the Commission addressed the complaint at the hearing.

The Court does not propose to consider this allegation having regard to these circumstances.

II. THE GOVERNMENT'S PRELIMINARY OBJECTION

56. The Government challenged Mr Kaya's standing as an applicant in the proceedings before the Convention institutions. They contended that it was questionable whether he had ever in fact consciously lodged an application with the Commission since the proceedings were initiated on the strength of a statement he made to Mr Abdullah Koç of the Diyarbakır branch of the Human Rights Association (see paragraph 16 above). That statement was written by Mr Koç and bore an illegible scratched signature purporting to be that of Mr Kaya. The Commission processed the "application" on the incorrect assumption that there was a *bona fide* applicant in the case at issue.

The Government insisted that Mr Kaya had never at any stage participated in the proceedings. Significantly, he failed to turn up at the hearing held by the Commission's delegates in Diyarbakır on 9 November 1995 and could not confirm his attendance at a further hearing which the Commission had wished to hold in Strasbourg in March 1996.

For these reasons, the Government requested the Court to dismiss the case on account of the absence of an applicant.

57. The applicant's legal representatives repudiated the Government's challenge to his standing. Before the Court, they asserted that it had always been his intention to seek redress before the Convention institutions. He had actively participated in an early phase by making statements on two occasions to the Diyarbakır Human Rights Association (see paragraphs 16–18 above), by making unsuccessful attempts to secure a copy of the post-mortem report and by contacting villagers who had witnessed the killing of his brother. It was his fear of reprisals from the authorities which had prevented him from appearing at the delegates' hearing. Furthermore, he had confirmed his wish to continue with the proceedings before the Court in a signed written declaration addressed from his cell in Diyarbakır Prison (see paragraph 2 above).

58. The Delegate of the Commission did not address the Government's preliminary objection.

59. The Court notes that the Government's challenge to Mr Kaya's standing was not raised at the admissibility stage, or even at any subsequent stage, of the proceedings before the Commission. It is to be observed that the sole objection raised at the admissibility stage concerned his failure to

exhaust domestic remedies, an objection which has only been pursued before the Court as a defence to the applicant's Article 6 complaint and not with respect to the admissibility of the case as a whole (see paragraph 100 below).

60. The Government must therefore be considered to be estopped from disputing before the Court either the validity of Mr Kaya's application to the Commission or his standing as an applicant (see, *mutatis mutandis*, the Aydın v. Turkey judgment of 25 September 1997, *Reports of Judgments and Decisions* 1997-VI, pp. 1885 and 1886, §§ 58 and 60). The Government's preliminary objection is accordingly dismissed.

III. ALLEGED VIOLATIONS OF ARTICLE 2 OF THE CONVENTION

61. The applicant submitted that his brother had been deliberately killed on 25 March 1993 by members of the security forces without justification, in breach of Article 2 of the Convention. Furthermore, the authorities' failure to investigate the circumstances surrounding his brother's death also engaged their responsibility under the same Article. These two distinct violations of Article 2 were further compounded by the inadequacy of the protection afforded to the right to life in the domestic law of the respondent State.

Article 2 of the Convention 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."

62. The Government repudiated the factual basis of the applicant's allegations, maintaining that his brother had been lawfully killed by the security forces while taking part in a terrorist attack on their members and that the investigation conducted by the authorities was entirely adequate and appropriate in the clear circumstances of the case.

The Commission for its part found that Article 2 had been violated only to the extent that the authorities had failed to conduct an adequate investigation into the circumstances surrounding the killing of the applicant's brother.

A. As to the alleged unlawful killing of the applicant's brother

1. Arguments of those appearing before the Court

(a) The applicant

63. The applicant contended that there existed sufficiently strong, clear and concordant inferences and unrebutted presumptions of fact which inexorably led to the conclusion that his brother was intentionally killed by the security forces in circumstances where there was no threat to their lives (see paragraph 39 above). The onus was on the authorities to prove that the force used was justified in the circumstances and strictly proportionate in pursuance of one of the aims delineated in the second paragraph of Article 2. They failed to adduce any credible evidence to support either their claim that the deceased was a terrorist or that the security forces had been obliged to retaliate in self-defence in the face of an armed terrorist attack.

64. The applicant stressed in this respect that the Government had not advanced any evidence which proved that the deceased had used the weapon which was allegedly found by his body; nor had they given any explanation as to why, if he was a terrorist as claimed, he was dressed in civilian clothes at the time of his death. Furthermore, the assertion that the deceased was an unidentified terrorist who was shot dead during a gun battle did not sit comfortably with the facts that a public prosecutor and a doctor were specially flown to the scene to conduct a post-mortem on the corpse and that the remains were subsequently handed over to villagers for burial (see paragraphs 13 and 14 above).

65. Moreover, the Government had failed to present any independent evidence which corroborated their view that an armed confrontation had taken place on the day in question. Not one bullet was recovered from the scene which would have borne out the alleged duration and intensity of the gun battle; nor had there been any independent confirmation of the existence of the traces of blood which had supposedly been found on the route used by the terrorists to make their retreat.

66. Even if it were possible to concede that the applicant's brother had been killed in a gun battle with the security forces, the authorities could still not justify his death by an appeal to the provisions of paragraph 2 of Article 2 of the Convention. They had failed to establish that the force

used was strictly proportionate in order to rout the assailants and defend themselves, having regard to the number, severity and location of the bullet wounds in the deceased's body as well as to the absence of other casualties. These factors were consistent with a finding that his brother was targeted and intentionally killed.

67. His own statements as well as the statement made by Hikmet Aksoy to the public prosecutor on 17 June 1994 (see paragraphs 16–21 above) were entirely consistent with the undisputed facts as found by the Commission (see paragraph 39 above) and provided convincing accounts of how his brother had been intentionally killed by the security forces. Neither he nor Aksoy had deliberately avoided giving evidence at the delegates' hearing in Diyarbakır on 9 November 1995. They both feared reprisals from the authorities. In fact, Aksoy's fears were borne out by the fact that he was detained shortly after the date when he was due to testify at that hearing.

(b) The Government

68. The Government insisted that the applicant's allegations were unsubstantiated and based on statements whose authors had never been subjected to cross-examination at the delegates' hearing. In fact, the applicant was not an eyewitness to the alleged events and Hikmet Aksoy must be considered a discredited witness, being a convicted drugs offender with links to the PKK. Aksoy had, like the applicant, deliberately avoided attendance at the delegates' hearing. He could not plead fear of reprisals as an excuse given the fact that he had no qualms about making damning statements against the security forces to the public prosecutor while detained in prison (see paragraphs 20 and 21 above).

69. There were moreover inconsistencies in the applicant's two hearsay accounts of the events which undermined the credibility of the allegation. It was, for example, highly improbable that the applicant's brother would have been able to run 300–400 metres if he had been wounded as alleged by the applicant in his second statement (see paragraph 18 above). It also belied belief that a member of the security forces would have informed Aksoy that the applicant's brother had been killed if he had in fact been deliberately executed by the security forces as alleged (see paragraph 21 above).

70. On the other hand, all the members of the security forces who testified before the delegates were consistent and firm in their testimony. Their account of the occurrence of an armed attack on the day in question and the subsequent discovery of an unidentified, armed body in the bushes following the terrorists' retreat was confirmed by an unsolicited observation

made by a local mayor in the course of a hearing held by delegates in an unrelated case to the effect that Abdülmenaf Kaya had been killed in an armed clash with the security forces.

71. The Government also maintained that the concerns expressed by the Commission about the official version of the events (see paragraph 39 above) and which were relied on by the applicant in support of his contention were without foundation. The terrorists had indeed suffered other casualties, as was confirmed by the discovery of patches of blood on the path used to make their escape. In any event, the absence of casualties was not inconsistent with the occurrence of an armed and intense confrontation having regard to the experience of previous encounters. Furthermore, the number of bullet wounds in the deceased's body was entirely consistent with the range and fire power of the soldiers' automatic weapons. The applicant's brother only had to be exposed for a few seconds to be struck many times. Moreover, neither the deceased's age nor his apparel were conclusive of the fact that he was not a terrorist.

72. The Government concluded by requesting the Court to find that the applicant's brother had been killed while engaged in a clash with the security forces and that his death resulted from a legitimate act of self-defence.

(c) The Commission

73. Before the Court, the Delegate of the Commission stated that the Commission's attempts to clarify the events of 25 March 1993 were hampered on account of the failure of the applicant and especially of Hikmet Aksoy to testify before the delegates. The delegates had heard the evidence of four officers, all of whom were broadly consistent in their affirmations that the security forces had come under fire, had retaliated and that a body dressed in civilian clothes was subsequently found in bushes in a creek close to Dolunay village. The Commission had nevertheless identified a number of elements which suggested that the deceased may not in fact have been a terrorist involved in an armed attack (see paragraph 39 above). However, it found that the actual circumstances in which the applicant's brother died remained to some extent a matter of speculation and assumption, and it was impossible to conclude beyond reasonable doubt that he had been deliberately killed as alleged.

2. The Court's assessment

74. The Court notes at the outset that it is confronted with fundamentally divergent accounts of how the applicant's brother died. Both the applicant and the Government have pleaded that the undisputed facts as found by the Commission (see paragraph 39 above) militate in favour of their respective positions having regard to the arguments and materials which they have

adduced before the Court. It must however be observed that similar arguments and material were advanced before the Commission and duly considered by it in its attempts to shed light on the events of 25 March 1993. However, the Commission was unable to elucidate the precise sequence of events on that day.

75. It is important to emphasise in this respect that under the Court's settled case-law the establishment and verification of the facts are primarily a matter for the Commission (Articles 28 § 1 and 31 of the Convention). While the Court is not bound by the Commission's findings of fact and remains free to make its own appreciation in the light of all the material before it, it is only in exceptional circumstances that it will exercise its powers in this area (see, in the context of an Article 2 complaint, the McCann and Others v. the United Kingdom judgment of 27 September 1995, Series A no. 324, p. 50, § 169; as well as the Aksoy v. Turkey judgment of 18 December 1996*, Reports* 1996-VI, p. 2272, § 38; the above-mentioned Aydın judgment, pp. 1888–89, § 70; and the Menteş v. Turkey judgment of 28 November 1997, *Reports* 1997-VIII, pp. 2709–10, § 66).

76. The Court is not persuaded that there exist any exceptional circumstances which would compel it to reach a conclusion different from that of the Commission. In the instant case the Commission was unable to draw a complete picture of the factual circumstances surrounding the death of the applicant's brother. The Commission's fact-finding was considerably impaired on account of the failure of the applicant and in particular Hikmet Aksoy to testify before the delegates; nor were the delegates able to secure the presence at the hearing of the villagers who, according to both the applicant and Hikmet Aksoy, were eyewitnesses to the alleged killing of Abdülmenaf Kaya by the security forces. The inability of the delegates to test the probative value of their evidence and to observe how they withstood the cross-examination of the Government side must be considered to constitute a serious impediment to the attainment of the evidentiary requirement which the Commission correctly sought to apply (see paragraph 38 above), namely proof beyond reasonable doubt (see, for example, the above-mentioned Aydın judgment, p. 1889, § 72).

77. It is also to be noted that the applicant relies essentially on the doubts which certain features of the Government's account of the events raised in the minds of the members of the Commission. The Court for its part considers that those doubts are in fact legitimate and it cannot be maintained that they have been allayed by the explanations which the Government have advanced in their pleadings (see paragraph 70 above). Notwithstanding, it is not convinced that, taken together, these elements substantiate the applicant's allegation. While it is true that the attainment of the required evidentiary standard (see paragraph 76 above) may follow from the coexistence of sufficiently strong, clear and concordant inferences (see the above-mentioned Aydın judgment, p. 1889, § 72), it must be concluded that their probative force must be considered in the circumstances at issue to be offset by the total absence of any direct oral account of the applicant's version of the events before the delegates.

78. Having regard to the Commission's fact-finding and to its own careful examination of the evidence, the Court considers that there is an insufficient factual and evidentiary basis on which to conclude that the applicant's brother was, beyond reasonable doubt, intentionally killed by the security forces in the circumstances alleged by the applicant.

B. As to the alleged inadequacy of the investigation

1. Arguments of those appearing before the Court

(a) The applicant

79. The applicant asserted that no official investigation was in fact conducted into the death of his brother. The report of the autopsy performed at the scene failed to record critical data such as the nature, size and number of the bullet wounds in the deceased's body. The incomplete and superficial nature of the autopsy was also confirmed by the absence of any findings on the presence or absence of traces of gunpowder on the hands or clothes of the deceased or of any observations on the distance from which the fatal shots were fired. The photographs which were supposedly taken of the body have never been recovered and it would appear that no record was kept of where they were filed (see paragraph 34 above). The decision to hand the body over to the villagers (see paragraph 14 above) immediately after the field autopsy had been performed made it impossible to carry out any further medical or forensic

examinations of the body or the clothes worn by the deceased.

80. Further, the public prosecutor failed to carry out any material investigation at the scene of the killing. No attempt was made to check the weapon allegedly used by the deceased for fingerprints or to retain the bullets lodged in the body for further analysis. No statements were taken from the soldiers either at the scene or afterwards, even though none of the military witnesses who had signed the incident report (see paragraph 14 above) or had been questioned by the delegates was able to affirm that he had in fact seen the applicant's brother being killed during the alleged attack. The public prosecutor had in effect convinced himself from the very beginning that the deceased was a terrorist who had been killed in a clash. That conviction determined his attitude to the investigation thereafter since it effectively excluded the possibility of any alternative version of the cause of death.

81. It could only be concluded that the investigation was so superficial and inadequate as to constitute a failure to protect the right to life in breach of Article 2 of the Convention.

(b) The Government

82. The Government pleaded that the investigation could in the circumstances be legitimately reduced to a minimum. It was plainly the case that the applicant's brother had died in a clash with the security forces. He was armed at the time of his death, and was killed while trying to kill. In spite of the obvious dangers to which they were exposed the public prosecutor and Dr Doğru courageously conducted an on-the-spot autopsy and forensic examination. An autopsy report was drawn up, a burial certificate prepared and the body, as yet unidentified, handed over to the villagers. Official attempts were made afterwards to identify the body, and the public prosecutor transmitted the file to the National Security Court for further investigation. The latter court in turn transferred the file to the Lice Administrative Council.

83. The Government maintained that nothing more could have been expected of the authorities under Article 2 of the Convention in the clear circumstances of the case.

(c) The Commission

84. The Commission considered that the circumstances surrounding the killing of the applicant's brother were unclear and such as to require the authorities to carry out a thorough investigation, especially since there were a number of crucial points left unanswered which raised doubts as to whether the applicant's brother was in fact a terrorist who had been killed in an armed confrontation with the security forces (see paragraph 39 above). However, the investigation was seriously deficient as regards the conduct of the autopsy, the forensic examination of the body and of the scene of the killing and the measures taken subsequently by the public prosecutor, Mr Ekrem Yıldız. The latter in fact proceeded throughout on the assumption that the deceased was a terrorist without questioning the truth of the security forces' account; nor did the public prosecutor attached to the National Security Court consider it worthwhile to check whether there was any foundation to the allegations made by Hikmet Aksoy on 17 June 1994.

85. For these reasons, the Commission concluded that the investigation was so inadequate as to amount to a failure to protect the right to life in violation of Article 2 of the Convention.

2. The Court's assessment

86. The Court recalls at the outset that the general legal prohibition on arbitrary killing by agents of the State contained in Article 2 of the Convention would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under Article 2, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms 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 by, *inter alios*, agents of the State (see the above-mentioned McCann and Others judgment, p. 48, § 161).

87. The Court observes that the procedural protection of the right to life inherent in Article 2 of the Convention secures the accountability of agents of the State for their use of lethal force by subjecting their actions to some form of independent and public scrutiny capable of leading to a determination of whether the force used was or was not justified in a particular set of circumstances.

88. The Court recalls the Government's contention that the instant case is a clear-cut case of lawful killing by the security forces and for that reason the authorities were dispensed from having to comply with

anything other than minimum formalities. It cannot accept that submission, having regard to the fact that the official account of the events was impaired through the absence of corroborating evidence. In addition, it also considers that the minimum formalities relied on by the Government were in themselves seriously deficient even for the purposes of an alleged open and shut case of justified killing by members of the security forces.

89. The Court is struck in particular by the fact that the public prosecutor would appear to have assumed without question that the deceased was a terrorist who had died in a clash with the security forces. No statements were taken from any of the soldiers at the scene and no attempt was made to confirm whether there were spent cartridges over the area consistent with an intense gun battle having been waged by both sides as alleged. As an independent investigating official he should have been alert to the need to collect evidence at the scene, to make his own independent reconstruction of the events and to satisfy himself that the deceased, despite being dressed as a typical farmer, was in fact a terrorist as alleged. There are no indications that he was prepared in any way to scrutinise the soldiers' account of the incident.

His readiness to accept at face value the information given by the military may also explain why no tests were carried out on the deceased's hands or clothing for gunpowder traces or why the weapon was not dusted for fingerprints. In any event, these shortcomings must be considered particularly serious in view of the fact that the corpse was later handed over to villagers, thereby rendering it impossible to conduct any further analyses, including of the bullets lodged in the body. The only exhibits which were taken from the scene for further examination were the weapon and ammunition allegedly used by the deceased. However, whatever the merits of this initiative as an investigative measure at the time, it is to be noted that the public prosecutor issued his decision of non-jurisdiction without awaiting the findings of the ballistics experts (see paragraph 31 above).

The autopsy report provided the sole record of the nature, severity and location of the bullet wounds sustained by the deceased. The Court shares the concern of the Commission about the incompleteness of this report in certain crucial respects, in particular the absence of any observations on the actual number of bullets which struck the deceased and of any estimation of the distance from which the bullets were fired. It cannot be maintained that the perfunctory autopsy performed or the findings recorded in the report could lay the basis for any effective follow-up investigation or indeed satisfy even the minimum requirements of an investigation into a clear-cut case of lawful killing since they left too many critical questions unanswered.

The Court acknowledges that the on-the-spot post-mortem and forensic examination were conducted in an area prone to terrorist violence, which may have made it extremely difficult to comply with standard practices. Dr Doğru admitted such in his report (see paragraph 29 above). It is therefore surprising that neither the doctor nor the public prosecutor requested that the body be flown to a safer location to allow more detailed analyses to be made of the body, the clothing and the bullet wounds.

90. No concrete measures were taken thereafter by the public prosecutor to investigate the death of the applicant's brother, for example by verifying whether the deceased was in fact an active member of the PKK or by questioning villagers living in the vicinity of Dolunay to ascertain whether they heard the sound of a gun battle on the day in question or by summoning members of the security forces involved to his office to take statements. The public prosecutor's firm conviction that the deceased was a terrorist killed in an armed clash with the security forces was never in fact tested against any other evidence and the terms of his non-jurisdiction decision effectively excluded any possibility that the security forces might somehow have been culpable, including with respect to the proportionality of the force used in the circumstances of the alleged armed attack. It is also to be noted that the public prosecutor attached to the National Security Court did not seek to verify the statement made by Hikmet Aksoy on 17 June 1994, for example by checking the custody records at the Lice gendarmerie headquarters to ascertain whether he had been detained there on or around 25 March 1993 as alleged (see paragraph 20 above).

91. The Court notes that loss of life is a tragic and frequent occurrence in view of the security situation in south-east Turkey (see the above-mentioned Aydın judgment, p. 1873, § 14). However, neither the prevalence

of violent armed clashes nor the high incidence of fatalities can displace the obligation under Article 2 to ensure that an effective, independent investigation is conducted into deaths arising out of clashes involving the security forces, more so in cases such as the present where the circumstances are in many respects unclear.

92. Having regard to the above considerations the Court, like the Commission, concludes that the authorities failed to carry out an effective investigation into the circumstances surrounding the death of the applicant's brother. There has accordingly been a violation of Article 2 of the Convention in that respect.

C. As to the alleged lack of protection in domestic law of the right to life

93. The applicant maintained that the effect of Article 4 § 1 of Decree no. 285 (see paragraph 46 above) was to entrust the investigation and prosecution of members of the security forces to administrative boards or councils whose decisions are influenced by the attitude taken by the security forces with respect to allegations levelled against them. Thus, the death of his brother was not subjected to any proper investigation; on the contrary, he was deemed to have been lawfully killed on the basis of the untested evidence of the security forces. Given the absence of an independent prosecution system for investigating allegations of unlawful killing by the security forces, it could not be maintained that the right to life was afforded adequate protection in the domestic law of the respondent State.

94. Neither the Government nor the Delegate of the Commission addressed this complaint.

95. The Court considers that it is not necessary to examine this complaint having regard to its earlier finding that the authorities were in breach of Article 2 of the Convention on account of their failure to carry out an effective investigation into the killing of the applicant's brother.

IV. ALLEGED VIOLATIONS OF ARTICLES 6 § 1 AND 13 OF THE CONVENTION

96. The applicant complained that the inadequacy of the official investigation into his brother's death deprived him and the deceased's next-of-kin from having access to a tribunal to sue for compensation, in breach of the right guaranteed by Article 6 § 1 of the Convention. That provision provides to the extent relevant:

> "In the determination of his civil rights and obligations …, everyone is entitled to a … hearing … by an independent and impartial tribunal…"

97. He further complained that there was no effective mechanism which could be invoked by the relatives of the deceased in order to grant them the justice of having a determination of the circumstances surrounding the killing and the truth brought to light. This failing gave rise to a violation of Article 13 of the Convention, which reads:

> "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."

1. Arguments of those appearing before the Court

(a) The applicant

98. According to the applicant, it would have been impossible to have approached a domestic court, whether civil or administrative, with a claim for damages which had any hope of success on account of the investigating authority's unwavering belief that his brother was a terrorist who lost his life in an armed confrontation with the security forces. The public prosecutor's entry in the post-mortem report to that effect coupled with the terms of his non-jurisdiction decision that his brother stood accused of involvement in a terrorist attack on the security forces (see paragraph 31 above) effectively precluded the relatives of the deceased from asserting in compensation proceedings that the latter had been unlawfully killed in circumstances which engaged the liability of the authorities.

99. The applicant further alleged that, irrespective of a right to bring a claim for pecuniary compensation, the relatives of the deceased needed to have access to an effective remedy or system of remedies which would establish independently and for their benefit the truth of what happened on the day in question. The relatives of the deceased had no effective remedy in the circumstances and were in effect victims of the absence of a system of effective remedies in the respondent State with respect to allegations of unlawful killing by the security forces. He highlighted in this respect the serious deficiencies of the official investigation, including the attitude adopted by the public prosecutor with respect to the circumstances surrounding the killing of his brother and the fact that the file was now within the jurisdiction of an administrative council pursuant to Article 4 § 1 of Decree no. 285, the functioning of which he had criticised in his earlier submissions under Article 2 of the Convention (see paragraph 93 above).

(b) The Government

100. The Government replied that the applicant could have sued the Ministry of Defence before an administrative court or brought civil proceedings against the members of the security forces who, he alleged, had

killed his brother. As to a civil claim, he could have sought to adduce evidence to show that his brother had been deliberately killed, for example by identifying the lieutenant who had allegedly issued the order to open fire on his brother (see paragraph 21 above) or the lieutenant who reportedly told Hikmet Aksoy that his brother had been killed by the security forces (see paragraph 21 above). Under Turkish law, a civil court was not precluded from adjudicating on a claim on account of the absence of a criminal investigation; nor was it bound by a decision of a criminal court acquitting an accused of criminal responsibility for acts which subsequently form the basis of a civil action (see paragraphs 47–50 above).

101. However, despite the availability of effective remedies, the applicant at no stage even attempted to bring proceedings to seek compensation or to approach an official authority to complain about his brother's death. He must be considered to have failed to exhaust domestic remedies. Accordingly there was no breach of Article 6 § 1 of the Convention in the circumstances**.**

(c) The Commission

102. The Commission found a violation of Article 6 § 1 of the Convention on account of the deficiencies of the investigation conducted by the authorities into the events of 25 March 1993. These deficiencies deprived the applicant of any effective access to a tribunal for a determination of his civil right to damages. Having regard to this conclusion, the Commission did not consider it necessary to examine also whether there had been a violation of Article 13 in the circumstances of the case.

103. At the hearing the Delegate stated that the Commission did not have at the time of its consideration of the case the benefit of the Court's Aksoy v. Turkey judgment and the approach which had been adopted with respect to that applicant's complaints under Articles 6 and 13 of the Convention.

2. The Court's assessment

(a) Article 6 § 1 of the Convention

104. The Court notes that it has not been disputed that Article 6 § 1 of the Convention applies to a civil claim for compensation by the near relatives of a person who has been killed by agents of the State. The Government maintain that the applicant should have exercised his right to institute proceedings before either the civil or administrative courts, which could have made a determination on the merits of the compensation claim irrespective of the outcome of a domestic criminal investigation or any

finding of guilt by a criminal court. That hypothesis has not however been tested since the applicant has not at any stage pursued a claim for compensation before the domestic courts.

105. In these circumstances the Court considers that it is not possible for it to determine whether the domestic courts would have been able to adjudicate on the applicant's claim had he, for example, brought a tort action against individual members of the security forces. On the other hand, it is to be observed that the applicant's grievance under Article 6 § 1 of the Convention is inextricably bound up with his more general complaint concerning the manner in which the investigating authorities treated the death of his brother and the repercussions which this had on access to effective remedies which would help redress the grievances which he and the deceased's family harboured as a result of the killing. It is accordingly appropriate to examine the applicant's Article 6 complaint in relation to the more general obligation on Contracting States under Article 13 of the Convention to provide an effective remedy in respect of violations of the Convention including Article 2 thereof, which, it is to be noted, cannot be remedied exclusively through an award of compensation to the relatives of the victim (see, *mutatis mutandis*, the above-mentioned Aksoy judgment, pp. 2285–86, §§ 93–94; and the above-mentioned Aydın judgment, pp. 1894–96, §§ 100–03).

(b) Article 13 of the Convention

106. The Court recalls 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 the relevant Convention complaint 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 the omissions of the authorities of the respondent State (see the above-mentioned Aksoy judgment, p. 2286, § 95; the above-mentioned Aydın judgment, pp. 1895–96, § 103; and the above-mentioned Menteş judgment, pp. 2715–16, § 89).

107. In the instant case the applicant is complaining that he and the next-of-kin have been denied an "effective" remedy which would have brought to light the true circumstances surrounding the killing of Abdülmenaf Kaya. In the view of the Court the nature of the right which the authorities are alleged to have violated in the instant case, one of the most fundamental in the scheme of the Convention, must have implications for the nature of the remedies which must be guaranteed for the benefit of the relatives of the victim. In particular, where those relatives have an arguable claim that the victim has been unlawfully killed by agents of the State, the notion of an effective remedy for the purposes of Article 13 entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure (see, *mutatis mutandis*, the above-mentioned Aksoy and Aydın judgments at p. 2287, § 98, and pp. 1895–96, § 103, respectively). Seen in these terms the requirements of Article 13 are broader than a Contracting State's procedural obligation under Article 2 to conduct an effective investigation (see paragraphs 86 and 87 above).

In the case at issue, the relatives had arguable grounds for claiming that Abdülmenaf Kaya was unlawfully killed by the security forces. The applicant had made two statements to that effect based on the accounts supplied to him by villagers who had allegedly witnessed the killing. Furthermore, the statement provided by Hikmet Aksoy was in general consistent with the applicant's allegations. There were, moreover, a number of features of the security forces' version of the events which required independent clarification. It is true that the Court has concluded that it has not been established beyond reasonable doubt that the deceased was indeed unlawfully killed. Nevertheless, the fact that the applicant's allegations were not ultimately substantiated does not prevent his claim from being an arguable one for the purposes of Article 13 of the Convention (see, *mutatis mutandis*, the Boyle and Rice v. the United Kingdom judgment of 27 April 1988, Series A no. 131, p. 23, § 52). Accordingly, the Court's conclusion on the merits does not dispense with the requirement to conduct an effective investigation into the substance of the allegation.

108. The Court recalls its earlier findings on the serious deficiencies of the autopsy and forensic examination conducted at the scene as well as on the failure of the investigating authorities to consider

seriously any alternative options which may have explained the death (see paragraphs 89-92 above). Having regard to the absence of any effective investigation into the circumstances of the killing, it must be concluded that the applicant and the next-of-kin were on that account also denied an effective remedy against the authorities in respect of the death of Abdülmenaf Kaya, in violation of Article 13 of the Convention, and thereby access to any other available remedies at their disposal, including a claim for compensation.

There has accordingly been a breach of Article 13 of the Convention.

V. ALLEGED VIOLATION OF ARTICLES 2, 6 AND 13 OF THE CONVENTION IN CONJUNCTION WITH ARTICLE 14

109. The applicant further claimed that his rights and the rights of his deceased brother under Articles 2, 6 and 13 of the Convention were violated in conjunction with Article 14 on grounds of ethnic origin. Article 14 provides:

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

110. The applicant submitted that the life of his deceased brother as well as the lives of the Kurdish civilian population in general in south-east Turkey were protected to a lesser extent than the lives of persons of non-Kurdish origin. He argued that the Kurdish population was most adversely affected by military operations conducted in the region and that the security forces failed to take adequate measures to minimise risk to civilian lives. Furthermore, the attitude of the security forces was to treat the Kurdish civilian population as in some way involved with the PKK. No distinction was made between terrorists and ordinary civilians. Thus, although his deceased brother was dressed as a typical villager, he was automatically presumed by the security forces and by the prosecutor to be a PKK terrorist.

111. The Government did not address this allegation other than to deny the factual basis of the applicant's allegations under Article 2 and to assert the availability of remedies at the domestic level to redress his grievances.

112. The Commission concluded that the evidence submitted to it did not substantiate the applicant's complaint under Article 14 in so far as this related to the breaches which it had found to be established.

113. The Court agrees with the conclusion reached by the Commission. The applicant has not produced any evidence which could ground a violation under this head of complaint.

VI. ALLEGED ADMINISTRATIVE PRACTICE OF VIOLATING THE CONVENTION

114. The applicant asserted that there existed an officially tolerated practice in the respondent State of violations of Articles 2 and 13 of the Convention, which increased the gravity of the breaches of which he and his brother were victims. He maintained that there was an administrative practice of conducting inadequate investigations into killings committed by

members of the security forces in south-east Turkey and a pattern of failure to prosecute those responsible.

115. The applicant further maintained that the authorities have adopted a policy of denial of breaches of the Convention, thereby frustrating the rights of victims to effective remedies. As a consequence of this policy, allegations of unlawful killings are either not investigated at all or are processed in a biased and inadequate manner.

116. Neither the Government nor the Commission addressed the substance of these allegations.

117. The Court is of the view that the evidence assembled by the Commission is insufficient to allow it to reach a conclusion on the existence of any administrative practice of the violation of any of the Articles relied on by the applicant.

VII. APPLICATION OF ARTICLE 50 OF THE CONVENTION

118. The applicant claimed just satisfaction under Article 50 of the Convention, which provides:

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Non-pecuniary damage

119. The applicant submitted that the intentional and unjustified killing of his brother was a violation of one of the most fundamental provisions of the Convention. Furthermore, his death at the hands of the security forces left his surviving widow and seven children without any means of support or income. He claimed the sum of 30,000 pounds sterling (GBP) by way of compensation.

He further requested the Court to award the sum of GBP 10,000 to compensate for the failure of the authorities to investigate the killing of his brother as well as for their steadfast assumption that he was a terrorist killed in a clash with the security forces. He also claimed an additional amount of GBP 20,000 in compensation for the violation of Articles 6 and 13, which sum reflected his contention that there existed in the respondent State an administrative practice of violation of Article 13 (see paragraphs 114 and 115 above).

120. The Government contested the applicant's entitlement to any award of just satisfaction. His allegations were unsubstantiated and he had not even attempted to seek redress for his grievances in the domestic courts.

121. The Delegate of the Commission did not comment on the applicant's claims.

122. The Court notes that it has not been established that the applicant's brother was unlawfully killed as alleged. However, having regard to its finding of a violation of Articles 2 and 13 of the Convention, the Court considers that the deceased's surviving widow and children are entitled to some form of just satisfaction by way of compensation for the authorities' failure to conduct an effective investigation into his killing. It notes in this regard that the application was brought by the applicant not only on his and his deceased brother's behalf but also on behalf of the latter's widow and children (see paragraph 1 above). The Court awards the sum of GBP 10,000 in this latter respect. On the other hand it is not convinced of the extent of the applicant's own loss in the circumstances and for this reason makes no award in his favour.

B. Costs and expenses

123. The applicant claimed GBP 19,840.60 by way of legal costs and expenses incurred in the preparation and defence of his case before the Convention institutions. In his revised and supplementary schedules of costs and expenses he itemised his claim as follows: professional fees and costs incurred by (1) his United Kingdom-based representatives (GBP 15,420.60) and (2) his Turkish representatives (GBP 1,000); work conducted by Mr Abdullah Koç and Mr Sedat Aslantaş of the Diyarbakır Human Rights Association (GBP 250); administrative support costs (GBP 1,950); interpretation and translation costs (GBP 480); participation costs of a translator at the delegates' hearing (GBP 185); photocopying, postage

and telecommunications costs (GBP 255); and other administrative costs incurred in Turkey (GBP 300).

124. The applicant was not in receipt of legal aid from the Council of Europe. He asserted that all of the itemised costs and expenses were actually and necessarily incurred and were reasonable as to quantum having regard, *inter alia*, to the complexity of the issues raised by his case. He requested that the amount awarded by the Court be paid directly to his United Kingdom-based legal representatives in sterling into a named bank account, and that the rate of default interest be set at 8% per annum.

125. The Government requested the Court to dismiss the claim since the amounts sought had not been properly verified and were unnecessary and excessive having regard to the level of costs and expenses which would be billed for domestic proceedings by lawyers in Turkey.

126. The Delegate of the Commission did not comment on the amounts claimed by the applicant.

127. The Court, deciding on an equitable basis and having regard to the details of the claims submitted by the applicant, awards the applicant's United Kingdom and Turkish-based lawyers the sum of GBP 17,000 together with any value-added tax that may be chargeable.

C. Default interest

128. 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 8% per annum.

FOR THESE REASONS, THE COURT

1. *Dismisses* by eight votes to one the Government's preliminary objection concerning the applicant's lack of standing;

2. *Holds* unanimously that it has not been established that the applicant's brother was unlawfully killed in breach of Article 2 of the Convention;

3. *Holds* by eight votes to one that there has been a violation of Article 2 of the Convention on account of the failure of the authorities of the respondent State to conduct an effective investigation into the circumstances surrounding the death of the applicant's brother;

4. *Holds* unanimously that it is not necessary to consider the applicant's complaint under Article 2 of the Convention regarding the alleged lack of protection in domestic law of the right to life;

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

6. *Holds* unanimously that it is not necessary to consider the applicant's complaint under Article 6 § 1 of the Convention;

7. *Holds* unanimously that there has been no violation of Articles 2, 6 and 13 of the Convention in conjunction with Article 14 of the Convention;

8. *Holds* by eight votes to one
   (a) that the respondent State is to pay the surviving widow and children of Abdülmenaf Kaya, within three months, in respect of compensation for non-pecuniary damage, 10,000 (ten thousand) pounds sterling to be converted into Turkish liras at the rate applicable on the date of settlement;
   (b) that simple interest at an annual rate of 8% shall be payable from the expiry of the above-mentioned three months until settlement;

9. *Holds* unanimously
   (a) that the respondent State is to pay the applicant, within three months, in respect of costs and expenses, 17,000 (seventeen thousand) pounds sterling together with any value-added tax that may be chargeable;
   (b) that simple interest at an annual rate of 8% shall be payable from the expiry of the above-mentioned three months until settlement;

10. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 19 February 1998.

Signed: Rudolf BERNHARDT
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 § 2 of the Convention and Rule 53 § 2 of Rules of Court A, the dissenting opinion of Mr Gölcüklü is annexed to this judgment.

Initialled: R. B.
Initialled: H. P.

DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

(*Translation*)

1. To my great regret, I cannot agree with the opinion of the majority in this case, for the following reasons.

2. In this case it has not been proved that Mr Kaya has the status of applicant for the purposes of Article 25 of the Convention because not only did he not apply to any national authority after the death of his brother, but in addition he has not supplied any information about the course of events or the persons involved or witnesses of what took place. Six days after his brother's death he apparently went to the Diyarbakır Human Rights Association and made a statement. The way this statement is worded seems to indicate that it was drafted by another person. It is in indirect speech.

In the present case accepting that there really is a genuine applicant means accepting a mere allegation.

3. At no time, for example, in the entire proceedings, from the time when the application was lodged with the Commission, arriving in Strasbourg from Diyarbakır via London, until the end of the public hearings before the European Court of Human Rights, was the applicant seen or heard either by the national authorities or by the Commission or its delegates who travelled to Turkey to investigate the facts of the case.

He did not participate in or contribute in any way to consideration of the case, whether before the Commission or before the Court. Nor did the alleged eyewitness (Hikmet Aksoy) of the events which form the subject of the present case, who disappeared from the scene completely immediately after the beginning of the proceedings (see the Commission's report, paragraphs 86, 87, 148 and 149).

4. In spite of these glaring facts, the Commission declared the application admissible and considered the merits of the case before reaching the conclusion that "Having regard to the standard of proof to be applied … and on the basis of a general assessment of the written and oral evidence, the Commission cannot find it proved beyond reasonable doubt that the applicant's brother was deliberately killed by soldiers in circumstances such as those alleged by the applicant" (Commission's report, paragraph 161).

5. In my opinion, instead of considering the case, as it did, the Commission should have struck it out of its list in view of the way matters stood.

6. When the Commission finally realised the true facts and the real nature of applications like this one against Turkey, it rightly decided (after dealing with the application of Kaya v. Turkey) in connection with a similar application (application no. 22057/93 (/sites/eng/pages/search.aspx#{"appno":["22057/93"]}), Siyamet Kapan v. Turkey, decision of 13 January 1997, Decisions and Reports 88-A, p. 17) as follows:

"*Article 25 § 1 of the Convention*

(a) The system provided for by this provision is based on the right of individual petition, and the Commission may not examine cases of its own motion or by way of *actio popularis*.

(b) Applicants bear the responsibility of cooperating in the procedures flowing from the introduction of their applications, and since the Commission relies on their ability and willingness to maintain and support applications purportedly introduced on their behalf it cannot continue the examination of an application where this is not forthcoming."

"*Article 30 § 1 (c) of the Convention*

Doubts as to authenticity of application and validity of its introduction by the applicant's representatives. Applicant's duty to cooperate, notwithstanding allegations of intimidation. In view of the applicant's failure to appear before the Commission or its delegates, and the inability of his representatives to provide a handwritten and signed statement of his intentions, they have not sufficiently shown their competence to act on his behalf. Lack of general interest. Striking out of the list of cases."

7. Moreover, I must emphasise that in the file there is no evidence, except the account drawn up by the Diyarbakır Human Rights Association, that a real applicant exists.

8. In spite of all these uncontested facts, the Court has accepted that Mr Kaya has standing as an applicant for the purposes of Article 25 of the Convention, on the grounds that the Commission considered that the case had been properly referred to it and that the respondent Government were estopped from disputing Mr Kaya's standing because they had not raised this preliminary objection before the Commission (see the present judgment, paragraphs 55 et seq.).

9. It is true that the Government did not raise this issue before the Commission, but that was because they could not have done so as they waited in vain until the last moment of the proceedings in the hope that the alleged applicant would come forward to argue his case.

10. However, the European Court of Human Rights, instead of striking the case out of its list in application of Article 45 of the Convention, has taken the view that the case was properly referred to it, despite the fact that it knows more about the true situation and is aware of the Commission's later decision to strike a case out when it was in doubt about the authenticity of an application.

11. Although the above considerations dispense me from going into the merits of the Kaya case, I wish to make it clear, in the alternative, that I also disagree with the conclusion reached by the majority of the Court regarding violation of Article 2 through a breach of the obligation to protect the right to life and violation of Article 13.

12. As regards Article 2, I merely note that in another case (Gündem v. Turkey) the Commission decided that there had been no violation of Articles 3, 5 and 8 of the Convention or of Article 1 of Protocol No. 1 on the ground that the applicant had not appeared before it at any stage of the proceedings (Commission's report, paragraphs 145, 148, 150, 151 and 152) and accordingly that the facts complained of had not been established beyond all reasonable doubt (Commission's report, paragraphs 152, 163, 180 and 182). I fully agree with that opinion. It is inconceivable (and totally illogical) in my opinion that it can reasonably be concluded that there has been a breach of any of the Convention's provisions when the facts in issue have not been proved beyond a reasonable doubt (especially in connection with Article 6 and/or Article 13). I must add, further, that the respondent Government did what they could to establish the facts of the case as they had actually happened. Is it necessary to reiterate that the positive obligation entered into by States under the Convention is only an obligation as to measures to be taken and not as to results to be achieved?

13. As regards Article 6 and/or Article 13, I will merely cite some of the Commission's decisions.

In the case of Aytekin v. Turkey (application no. 22880/93 (/sites/eng/pages/search.aspx#{"appno":["22880/93"]}), decision of 18 September 1997), the Commission rightly expressed the opinion that there had been a violation of Article 2 of the Convention on the ground that the State concerned had failed to discharge its positive obligation to protect the right to life and that no separate issue arose under Article 13 (twenty-nine votes to one). The Commission reached the same conclusion in the case of Ergi v. Turkey (application no. 23818/94 (/sites/eng/pages/search.aspx#{"appno":["23818/94"]}), decision of 20 May 1997) (twenty-two votes to nine). Likewise, in the Yasa v. Turkey case (application no. 22495/93 (/sites/eng/pages/search.aspx#{"appno":["22495/93"]}), decision of 8 April 1997) the Commission reached the same conclusion, with regard to both Article 13 (thirty votes to two) and Article 6 § 1 (thirty-one votes to one). It should be noted that the above-mentioned decisions were adopted much later than the one in the

present case (see also the dissenting opinion of Mr Bratza and Mr Reffi) and in the case of Gündem v. Turkey, now pending before the Court.

Considering that the lack of a satisfactory and efficient inquiry into the death lies behind the applicant's complaints concerning Articles 6 and 13 of the Convention, I take the view that no separate issue arises under those Articles.

14. Lastly, I wonder how it is possible to conclude that domestic remedies have been exhausted when the applicant not only failed to contact any competent national authority but also disappeared from the scene immediately after the declarations he is alleged to have made only to the officials of the Diyarbakır Human Rights Association.

15. Is not the fact that the so-called applicant's British representatives have asked for their fees to be paid directly into their accounts in the United Kingdom in pounds sterling yet another indication that in this case there is no real applicant?

16. I strongly disagree with the award of compensation for non-pecuniary damage to the deceased's widow and children; neither they nor the applicant have done anything to argue their case and relieve their alleged distress. Is it not symptomatic that the Commission has not made any comment on this question?

17. As regards the non-exhaustion of domestic remedies, in addition to the conduct of the alleged applicant in this case, I refer to my dissenting opinion in the cases of Akdivar and Others v. Turkey and Menteş and Others v. Turkey, both of which are referred to in the judgment, on the real and adequate existence of the remedies in question.

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

[2]*Notes by the Registrar*

1. The case is numbered 158/1996/777/978. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

[3]2. Rules of Court A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol. They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

[4]1. *Note by the Registrar*. For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* 1998), but a copy of the Commission's report is obtainable from the registry.