



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

THIRD SECTION

CASE OF DEMİRAY v. TURKEY

(Application no. 27308/95)

JUDGMENT

STRASBOURG

21 November 2000

FINAL

04/04/2001

In the case of Demiray v. Turkey,

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

Mr J.-P. COSTA, *President*,

Mr W. FUHRMANN,

Mr L. LOUCAIDES,

Mr P. KÜRIS,

Sir Nicolas BRATZA,

Mrs H.S. GREVE, *judges*,

Mr F. GÖLCÜKLÜ, *ad hoc judge*,

and also Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 7 March, 17 October and 24 October 2000,

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

PROCEDURE

1. The case originated in an application (no. 27308/95) against the Republic of Turkey lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Turkish national, Mrs Asiye Demiray (“the applicant”), on 18 April 1995.

2. The applicant, who had been granted legal aid, was represented by Mr M.S. Tanrıkulu, of the Diyarbakır Bar. The Turkish Government (“the Government”) were represented by Mr A. Kılıç, Permanent Representative of Turkey to the Council of Europe.

3. The applicant alleged that her husband had been killed by security forces while in detention and that no investigation had been carried out by the judicial authorities.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

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

6. By a decision of 21 September 1999, the Chamber declared the application admissible [*Note by the Registry*. The Court's decision is obtainable from the Registry.].

7. The applicant and the Government each filed written observations on the merits of the case (Rule 59 § 1). The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 2 *in fine*), both parties were invited to submit written comments on the observations of the other party, which they did. The applicant also lodged her claims under Article 41 of the Convention, to which the Government have not replied.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant is a Turkish national. She was born in 1969 and lives in Diyarbakır. She lodged the application on her own behalf and on behalf of her late husband, Ahmet Demiray, who, she alleged, was killed by State security forces while in their custody.

A. Events concerning the death of the applicant's husband

1. Facts as presented by the applicant

9. Ahmet Demiray, the applicant's husband, was arrested in Diyarbakır on 21 July 1994.

10. On 28 July 1994 the father of Ahmet Demiray and father-in-law of the applicant lodged a criminal complaint with the public prosecutor at the Diyarbakır National Security Court against the village guards, H.E., T.E., Ö.E., and others whose identity he did not know, alleging that they had abducted his son on 22 July 1994. In his complaint he stated that his son's life was in danger and that the persons named were responsible.

On the same day the public prosecutor informed Ahmet Demiray's father that his son had been placed in custody at the Diyarbakır central gendarmerie station.

11. On 15 August 1994 the Lice public prosecutor informed the mayor of Lice that Ahmet Demiray's body had been found on 14 August 1994 near the village of Dibek (Lice). He stated that forensic medical examiners had carried out an examination and an autopsy of the body. The public prosecutor also said that since the deceased's relatives had not been in the

vicinity, but in the neighbouring village of Hazro, the body had been buried in their absence by Lice District Council.

12. The applicant alleged that it was some time before she learnt of her husband's death.

2. Facts as presented by the Government

13. On 21 July 1994 Ahmet Demiray was arrested by officers from the Diyarbakır Security Directorate because of suspicious behaviour. During questioning he stated that he was a member of the PKK (Workers' Party of Kurdistan) and offered to show the security forces one of the organisation's arms caches.

On the same day he was transferred to the Diyarbakır provincial gendarmerie command for questioning.

Lastly, and in connection with his statements concerning the location of the arms cache in question, he was handed over to a team from the Lice district gendarmerie on 8 August 1994 to take them to the site in question.

14. On 13 August 1994 Ahmet Demiray made a statement to the Lice gendarmerie.

15. A visit was organised by the gendarmerie to the alleged site of the arms cache in question. On 14 August 1994 Ahmet Demiray, accompanied by three gendarmes, arrived at the scene at approximately 4.30 a.m. As he was approaching the arms cache, the gendarmes heard an explosion. Ahmet Demiray was killed by the explosion of a booby-trapped grenade planted by the PKK. There were no other victims.

16. In an order of 29 May 1996 the Lice public prosecutor's office found that Ahmet Demiray had been killed following the explosion of a booby-trapped grenade planted by the PKK. It declared that it had no jurisdiction *ratione materiae* to examine the complaint lodged by Ahmet Demiray's father and decided to forward the investigation file concerning the village guards to the local administrative council of Kocaköy for examination under the Law on the Prosecution of Civil Servants.

Those proceedings are still pending.

17. On 27 September 1994 the public prosecutor at the Diyarbakır National Security Court gave an order discontinuing the criminal proceedings against the applicant's husband on the ground that he had since died.

3. Material submitted by the parties

18. During the proceedings before the Commission and before the Court the parties submitted a number of materials. Among other things, the Court requested the Government to provide it with a full copy of the investigation file on the incident during which Ahmet Demiray had died, but the request remained unanswered. Neither did the Government submit any document

relating to any investigation commenced in order to identify and arrest Ahmet Demiray's presumed killers, who are allegedly members of the PKK.

The documents of interest to the present case are the following.

(a) Transcript of statement taken from Ahmet Demiray at the Lice gendarmerie station

19. This document was provided by the Government, but the applicant disputed the authenticity of Ahmet Demiray's signature. She provided documents from 1993 showing her husband's signature and asserted that the difference was obvious. The relevant part of the transcript reads as follows:

“Question: Are you a member of a party, association or trade union carrying on legal or illegal activities?

Reply: I am not a member of any party, trade union or association, but I am a sympathiser of the PKK terrorist organisation. I have given the PKK financial assistance. I have worked within the PKK as a courier and guide and have supplied it with logistical support. I have collected sums of money in the villages and handed them over to the PKK.

Question: What were your activities within the PKK?

Reply: ... We went to lay anti-personnel mines in the vicinity of this third bridge. ... I can show you the arms cache whenever you wish, near the fountain. ... I have had enough, I no longer want to engage in this type of activity and regret having taken part in these terrorist activities. Now I am thinking of my family and I want to cooperate with the State. I can show you the organisation's arms cache (weapons and mines).”

(b) Sketch map of the scene

20. The Government provided a sketch map of the scene, which was drawn by the gendarmerie. According to the sketch map, at the time of the explosion Ahmet Demiray was 1 m away from the arms cache, whereas two of the gendarmes accompanying him were 30 m away and the third 50 m away, forming an isosceles triangle with the arms cache at the centre.

(c) Autopsy report of 14 August 1994 (extract)

21. This report was drawn up by a general practitioner, Dr Sami Karaka. The relevant part of it reads as follows:

“Following a call from the gendarmerie command to inform us that an individual had died while showing gendarmes a site when mines booby-trapped by the PKK organisation were detonated, we [the public prosecutor, the clerk of the court and the doctor] went the same day at 7.40 a.m. to the garden of the district commissioner's commandos unit where the corpse had been taken. We were unable to visit the scene of the incident because it was unsafe to do so. Since neither a forensic medical examiner nor a pathologist was present, we explained to Dr Sami Karaka what he had to do and he took the oath. ...

We identified the deceased by means of the photo on his identity card. ...

In the head area, the lower jaw had been entirely destroyed and the anterior part of the thorax and the organs of that area of the body had been completely destroyed. The two-thirds part of the left forearm had been amputated, probably due to an explosion at very close range. No trace of injuries inflicted by a firearm or a bladed weapon was found on the rest of the body. Since respiratory and circulatory deficiency due to injury from an explosion two or three hours earlier had been established as the cause of death, a classic autopsy was not deemed necessary.”

(d) Order by the Lice public prosecutor's office declaring that it had no jurisdiction

22. This decision was given on 29 May 1996 by the Lice public prosecutor's office for the attention of the Kocaköy District Commissioner's Office. It reads as follows:

“Public prosecution

Intervener: Hüsnü Demiray [applicant's father-in-law]

Suspects: [the three village guards]

Crime: abduction and murder

Date of crime: 27 July 1994

Although the intervener alleged that his son had been abducted and killed by the suspects, it has been noted that the deceased, who belonged to the PKK organisation, had been arrested on 21 July 1994 by the teams from the Diyarbakır Security Directorate. After it had been established that he operated in the rural area, he was transferred on 23 July 1994 to the provincial gendarmerie command and taken to the village of Yolçati by members of the Lice district gendarmerie command. As he was showing them the site of one of the PKK's arms caches, he was killed when a grenade booby-trapped by the PKK exploded. Those facts were communicated in the documents of the provincial gendarmerie command, dated 7 December 1995, and in the document of the Lice district gendarmerie command dated 15 August 1995. The facts were established from the above-mentioned documents and the contents of the file. Our public prosecutor's office declares that it has no jurisdiction *ratione materiae* given that the accused are village guards and that an investigation into acts committed by them is governed by the provisions of Article 4, paragraph (i) of Legislative Decree no. 285 on the exercise of emergency powers. The public prosecutor's office has decided to forward the investigation file to the Kocaköy District Commissioner's Office which will examine it and do the necessary in accordance with the Law on the Prosecution of Civil Servants.”

(e) Statement by the applicant of 18 October 1999

23. The applicant made the following statement regarding the circumstances in which she was informed of her husband's death:

“In so far as I remember, the Lice public prosecutor sent my husband's death certificate to Hazro where my father-in-law lives and our census records are kept. In that connection the Hazro public prosecutor summoned my father-in-law to collect my husband's death certificate. After collecting it, my father-in-law came to Diyarbakır.

Together, we went to Lice where we first met the mayor in order to enquire as to the steps to be taken for the burial. He informed us that the disintegrated corpse had been retrieved at the site and buried as ordered. We asked him what had been done with my husband's identity card, clothes and other personal effects. He replied that he had given them to the public prosecutor's office and advised us to contact them.

On the same day we went to the Lice public prosecutor's office, but the public prosecutor was not there. We spoke to his deputy and asked him to open the grave so that we could see whether it was indeed my husband or not. He told us that he was not in a position to open the grave; neither did he show us the photographs of my husband. We wanted him to give us the clothes, but an official from the Lice public prosecutor's office told us that they had sent them to Hazro with the death certificate. After Lice we went to the Hazro public prosecutor's office. We told them that we understood that the clothes had been sent there. They told us, however, that they had not retrieved them. We were unable to continue with our enquiries.

I did not learn of my husband's death until my father-in-law arrived in Diyarbakır after he had been summoned by the Hazro public prosecutor on receipt of the death certificate from Lice. If I am not mistaken, I was therefore not informed until a week later.

However, those who had arrested my husband knew our address well because it is written on the transcript of the statements bearing a signature which I believe to be forged since it is not that of my husband. At the material time we were renting a flat, where I am still living now. As my address was known I could easily have been informed of my husband's death and requested to attend the autopsy. The fact that I was not summoned shows that certain things have been concealed and that my husband was indeed murdered. ...”

B. Events occurring after the application was lodged

24. In her letters of 28 June and 17 July 1996 to the Commission the applicant maintained that since notice of the application had been given to the Government the security forces had been putting pressure on her and her husband's family to withdraw her application. She stated that Ahmet Demiray's father and brother had been placed in police custody. In her letter of 6 July 1996, the applicant stated that her husband's brother, Mr Erdal Demiray, had been placed in police custody again on 4 July 1996 for the same reasons.

The applicant produced a statement by her brother-in-law dated 22 October 1999. He said that he had been arrested by the security forces and that during his time in police custody he had been asked why the applicant had lodged an application against the State.

25. The documents provided to the Court (arrest report and decision of the Diyarbakır National Security Court) show that Mr Erdal Demiray was arrested on 4 July 1996 and released on 9 July 1996. On 30 July 1996 he was accused of having committed offences against the integrity of the State.

In a decision of 22 September 1997, he was acquitted by the Diyarbakır National Security Court.

II. RELEVANT DOMESTIC LAW AND PRACTICE

26. The relevant elements of domestic law in this case can be summarised as follows.

27. Under the Criminal Code all forms of homicide (Articles 448 to 455) and attempted homicide (Articles 61 and 62) constitute criminal offences. The authorities' obligations in respect of conducting a preliminary investigation into acts or omissions capable of constituting such offences that have been reported to them are governed by Articles 151 to 153 of the Code of Criminal Procedure. Any offence may be reported to the authorities or members of the security forces as well as to public prosecutors' offices. The complaint may be made in writing or orally. If it is made orally, the authority must make a record of it (Article 151).

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

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

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

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

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

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

31. The Government maintained that the proceedings instituted by the applicant's father-in-law against the three village guards, H.E., T.E., and Ö.E., who he claimed were responsible for the alleged abduction of Ahmet Demiray, were pending before the local administrative council of Kocaköy. They also asserted that an investigation was being carried out to identify and arrest the members of the PKK who were presumed to have murdered Ahmet Demiray. Domestic remedies had not therefore been exhausted.

32. The applicant observed that her father-in-law had expressed his concern as to his son's fate in the complaint he had lodged before being informed that his son had been placed in custody. She submitted that, having been informed that her husband had died while in custody, the public prosecutor should have carried out an investigation *ex officio* into the exact circumstances of his death and instituted proceedings against the gendarmes who had accompanied him to the site of the arms cache.

33. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges applicants to use first the remedies that are normally available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged. The existence of the remedies must be sufficiently certain, in practice as well as in theory, failing which they will lack the requisite accessibility and effectiveness (see the *Yaşa v. Turkey* judgment of 2 September 1998, *Reports of Judgments and Decisions* 1998-VI, p. 2431, § 71).

34. The application of the exhaustion of domestic remedies rule must make due allowance, however, for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting Parties agreed to set up. Accordingly, the Court has recognised that Article 35 must be applied with some degree of flexibility and without excessive formalism. It has further recognised that the rule of exhaustion is neither absolute nor capable of being applied automatically; in reviewing whether it has been observed, it is essential to have regard to the circumstances of the individual case. This means, in particular, that the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned, but also of the context in which they operate, as well as the personal circumstances of the applicant. It must then examine whether, in all the circumstances of the case, the applicant did everything that could reasonably be expected of him to exhaust domestic remedies (see the *Akdivar and Others v. Turkey* judgment of 16 September 1996, *Reports* 1996-IV, p. 1211, § 69; the *Aksoy*

v. Turkey judgment of 18 December 1996, *Reports* 1996-VI, p. 2276, §§ 53-54; and the Yaşa judgment cited above, p. 2432, § 77).

35. With regard to the present case, the Court observed, in its decision on admissibility, that in the light of the circumstances of the case the Government's preliminary objection raised issues which were closely linked to those raised by the applicant under Article 2 of the Convention. Accordingly, it decides to join the preliminary objection to the merits (see paragraphs 48-54 below).

II. ALLEGED VIOLATIONS OF ARTICLE 2 OF THE CONVENTION

36. The applicant maintained that her husband had been killed by security forces while in their custody and that no effective investigation had been carried out by the judicial authorities. She complained of a violation of Article 2 of the Convention, which provides:

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

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

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

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

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

37. The Government disputed those allegations. They maintained that the applicant's husband had been killed while showing the gendarmes an arms cache when a booby-trapped grenade planted by the PKK exploded. They thus disputed the State's responsibility under this provision of the Convention.

A. The circumstances of the death of the applicant's husband

38. The applicant pointed out, firstly, that none of the members of the security forces had been injured by the explosion in which her husband had been killed, whereas a booby-trapped grenade was liable to project a number of fragments. She submitted that her husband had been used as a human shield when indicating the site of the arms cache in question and that he had therefore died in circumstances engaging the authorities' responsibility.

39. The Government denied the State's responsibility under Article 2 of the Convention and submitted that members of the PKK were solely responsible for Ahmet Demiray's death.

40. The Court reiterates that Article 2, which safeguards the right to life and sets out the circumstances when deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention, to which no derogation is permitted. Together with Article 3, it also enshrines one of the basic values of the democratic societies making up the Council of Europe. The circumstances in which deprivation of life may be justified must therefore be strictly construed. The object and purpose of the Convention as an instrument for the protection of individual human beings also requires that Article 2 be interpreted and applied so as to make its safeguards practical and effective (see *Salman v. Turkey* [GC], no. 21986/93, § 97, ECHR 2000-VII).

41. The text of Article 2, read as a whole, demonstrates that it covers not only intentional killing, but also the situations where it is permitted to use force which may result, as an unintended outcome, in the deprivation of life. Article 2 may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual for whom they are responsible (see, *mutatis mutandis*, the *Osman v. the United Kingdom* judgment of 28 October 1998, *Reports* 1998-VIII, p. 3159, § 115).

42. In the light of the importance of the protection afforded by Article 2, the Court must subject deprivations of life to the most careful scrutiny, taking into consideration not only the actions of State agents, but also all the surrounding circumstances. Persons in custody are in a vulnerable position and the authorities are under a duty to protect them. Consequently, where an individual is taken into police custody in good health and is found to be injured on release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused. The obligation on the authorities to account for the treatment of an individual in custody is particularly stringent where that individual dies (see *Salman* cited above, § 99).

43. In assessing evidence, the general principle applied in cases has been to apply the standard of proof "beyond reasonable doubt". However, such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar un rebutted presumptions of fact. Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation.

44. In the instant case the circumstances surrounding Ahmet Demiray's death are in dispute. Even if the applicant appears to accept, in her observations on the merits of the case, the Government's version according to which her husband was killed following an explosion of a booby-trapped grenade, she submits that the circumstances surrounding the death suggest that Ahmet Demiray was deliberately used as a human shield, which is formally disputed by the Government.

45. The Court notes, having regard to the scanty evidence on the case file, that it is impossible to establish reliably the exact circumstances of Ahmet Demiray's death. It needs to be determined, however, whether the relevant authorities did all that could be reasonably expected of them to avoid a real and immediate risk to life of which they had or ought to have had knowledge.

46. In that connection the Court notes that the authorities were certainly in a position to evaluate the risks inherent in visiting the alleged site of the arms cache in question, if only because of the sensitivity of the situation in south-east Turkey. According to the sketch map provided by the Government, Ahmet Demiray was 1 m away from the arms cache at the time of the explosion, whereas two of the gendarmes accompanying him were 30 m. away and the third one 50 m away, forming an isosceles triangle with the arms cache at the centre (see paragraph 20 above). In the absence of an explanation by the Government of the reasons for proceeding in that way, which inevitably gives rise to serious doubts, and of any indication of other measures taken to protect Ahmet Demiray, the Court can only conclude that the relevant authorities failed to take measures which, judged reasonably, might have been expected to safeguard against the risk incurred by the applicant's husband.

47. The Court therefore considers that the State's responsibility for the death is engaged. Accordingly, there has been a violation of Article 2 of the Convention in that regard.

B. The alleged inadequacy of the investigation

48. The Court reiterates that the obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see *Tanrıkulu v. Turkey* [GC], no. 23763/94, § 101, ECHR 1999-IV).

49. In the present case the Government maintained that two sets of proceedings concerning the circumstances surrounding Ahmet Demiray's

death were still pending so that domestic remedies had not been exhausted (see paragraph 31 above).

50. The Court feels it important to point out from the outset that the obligation to carry out an investigation in circumstances such as those of the present case is not confined to cases where it has been established that the killing was caused by an agent of the State. In the instant case the mere fact that the authorities were informed of the death gave rise *ipso facto* to such an obligation under Article 2 (see *Tanrıkulu* cited above, § 103).

Similarly, the fact that it was the applicant's father who lodged a complaint, and not the applicant, is irrelevant. The complaint had the same effect as one that could have been lodged by the applicant, namely that a criminal investigation was opened (see *Oğur v. Turkey* [GC], no. 21594/93, § 67, ECHR 1999-III).

51. With regard to the investigative measures taken following the complaint, the Court notes firstly that the Lice public prosecutor's office does not appear to have arranged a visit to the site of the incident in order to carry out any investigations or, at the very least, to confirm the accuracy of the sketch map drawn by the gendarmes. Furthermore, none of the gendarmes present at the scene of Ahmet Demiray's death appears to have been questioned. Lastly, the autopsy was performed by a general practitioner and contains little forensic evidence. The authority's conclusion that a classic autopsy by a forensic medical examiner was not necessary is, in the Court's view, inadequate given that a death occurred in the circumstances described in the present case.

The Lice public prosecutor's office appears to have confined itself to giving a decision on 29 May 1996 that it had no jurisdiction *ratione materiae*. In that decision it established that Ahmet Demiray had been killed by a booby-trapped grenade planted by the PKK. The Lice public prosecutor's office based that conclusion solely on two documents which had been sent to it by the provincial gendarmerie command and one drawn up by the Lice district gendarmerie command and "all the information in the case file" (see paragraph 22 above).

The Court considers, in the light of its observations on the lack of investigative measures, that such a conclusion can be regarded as hasty given the scant amount of information available at the time to the Lice public prosecutor's office.

52. The subsequent investigation to be carried out by the administrative bodies hardly remedied the shortcomings referred to above. The Government assert that this investigation is still pending, but have not provided any concrete information on the progress of the investigation despite the fact that four years have elapsed since the case file was transferred to the Kocaköy District Commissioner's Office.

The Court feels it important to point out, as it has already done in earlier cases, that serious doubts arise as to the ability of the administrative

authorities concerned to carry out an independent investigation, as required by Article 2 of the Convention, having regard to their nature and composition (see *Oğur* cited above, § 91).

Lastly, the investigation referred to by the Government, which they maintained was commenced in order to identify and arrest those suspected of having murdered the applicant's husband, is apparently also pending. It should be noted in this connection that the Government have not produced any evidence concerning such an investigation (see paragraph 18 above).

53. In the light of the foregoing, the Court considers that the authorities failed to carry out an effective investigation into the circumstances of Ahmet Demiray's death. It finds that the authorities concerned disregarded their essential responsibilities in this respect. The Court is prepared to take into account, as indicated in previous judgments concerning Turkey (see, for example, the *Yaşa* and *Tanrıkulu* judgments cited above, p. 2440, § 104, and § 110, respectively), the fact that loss of life is a tragic and frequent occurrence in the context of the security situation in south-east Turkey, which may have hampered the search for conclusive evidence. Nonetheless, such circumstances cannot have the effect of relieving the authorities of the obligation imposed by Article 2 to carry out an effective investigation.

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

54. Accordingly, the Court dismisses the Government's preliminary objection and holds that there has been a violation of Article 2 of the Convention in that regard.

III. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

55. The applicant complained that her husband had been unlawfully placed in custody. She submitted that the arrest report referred to a mere "suspicion" regarding her husband's conduct. She stressed that her husband's family were not informed of his arrest until one week later, and then only following the complaint lodged against the three village guards. The applicant complained, lastly, that her husband was kept in custody for an excessive period of time without being brought before a judge.

56. The Government submitted that there had been nothing unlawful about keeping the applicant's husband in custody because the public prosecutor had been informed of the successive periods of custody by the police and the gendarmerie.

57. The Court notes that these complaints do not raise any issue distinct from those which have already been examined under Article 2. Having regard to its conclusions as to compliance with that Article (see paragraphs 47 and 54 above), it does not consider it necessary to examine the said complaints separately.

IV. ALLEGED VIOLATION OF FORMER ARTICLE 25 § 1 OF THE CONVENTION

58. The applicant complained of having been hindered in the exercise of her right of petition. The Court considers that this allegation should be examined under former Article 25 § 1 of the Convention (now Article 34), which provided:

“The Commission may receive petitions addressed to the Secretary General of the Council of Europe from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in [the] Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognises the competence of the Commission to receive such petitions. Those of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right.”

59. The applicant maintained that since notice of her application had been given to the Government the security forces had been putting pressure on her and her late husband's family to withdraw the application. She stated that Ahmet Demiray's father and brother had been placed in custody. In her letter of 6 July 1996 the applicant stated that on 4 July 1996 her brother-in-law had been placed in custody again for the same reasons. She submitted that these were systematic measures of intimidation.

60. The Government rejected the applicant's allegation in that regard and added that if she had had concrete evidence to support she said, an investigation would have been commenced.

61. The Court reiterates that it is of the utmost importance for the effective operation of the system of individual petition instituted under former Article 25 of the Convention that applicants or potential applicants should be able to communicate freely with the Convention institutions without being subjected to any form of pressure from the authorities to withdraw or modify their complaints. In this context, “pressure” includes not only direct coercion and flagrant acts of intimidation, but also other improper indirect acts or contacts designed to dissuade or discourage applicants from pursuing a Convention remedy.

Furthermore, whether or not contacts between the authorities and an applicant are tantamount to unacceptable practices from the standpoint of former Article 25 § 1 must be determined in the light of the particular circumstances of the case. In this respect, regard must be had to the vulnerability of the complainant and his or her susceptibility to influence exerted by the authorities. In previous cases the Court has had regard to the vulnerable position of applicant villagers and the reality that in south-east Turkey complaints against the authorities might well give rise to a legitimate fear of reprisals, and it has found that the questioning of applicants about their applications to the Commission amounts to a form of illicit and unacceptable pressure, which hinders the exercise of the right of

individual petition in breach of former Article 25 of the Convention (see *Tanrıkulu* cited above, § 130).

62. In the instant case there is no evidence to support the applicant's allegation that the Turkish authorities have been exerting pressure on her late husband's family. The Court observes, *inter alia*, that the arrest report regarding the applicant's brother-in-law does not show that he was questioned about the lodging of the present application with the Commission.

63. In the circumstances the Court considers, in the light of the evidence in its possession, that the facts are not sufficiently established to allow it to conclude that the respondent State authorities intimidated or harassed the applicant or members of her husband's family in circumstances designed to force her to withdraw or modify her application, or to hinder her in any other way in the exercise of her right of individual petition.

Consequently, there has not been a breach of former Article 25 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

64. Article 41 of the Convention provides:

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

A. Damage

65. The applicant claimed 74,238,230,577 Turkish liras (TRL) for pecuniary damage sustained by herself and her four minor children. She stressed that she has had no income since the death of her husband, who had been the family's breadwinner. Taking into account the average life expectancy in Turkey and the amount considered adequate to provide a family in that country with a livelihood, the calculation according to actuarial tables resulted in the sum referred to above.

She also claimed 50,000 United States dollars (USD) in respect of non-pecuniary damage for herself and USD 20,000 for each of her four children, totalling USD 130,000.

66. The Government made no submissions as to the amounts claimed.

67. With regard to the applicant's claims for pecuniary damage, the Court's case-law establishes that there must be a clear causal connection between the damage alleged by the applicant and the violation of the Convention and that this may, if appropriate, include compensation in respect of loss of earnings (see, among other authorities, the *Barberà*,

Messegueé and Jabardo v. Spain judgment of 13 June 1994 (*Article 50*), Series A no. 285-C, pp. 57-58, §§ 16-20, and *Salman* cited above, § 137). The Court has held (see paragraph 47 above) that the authorities were responsible under Article 2 of the Convention for Ahmet Demiray's death. In the circumstances there is a direct causal link between the violation of Article 2 and the loss of potential financial support which the victim had been providing for his widow and children. The Court notes, nonetheless, in that connection that, according to the applicant herself, her husband was unemployed at the time of his death. In the absence of other evidence as to his income at the time of his death, the amounts claimed under that head by Mrs Demiray are therefore speculative. The Court recognises, however, that if Ahmet Demiray was still alive he would have had the possibility of contributing to his family's livelihood.

The Court can therefore rule only on an equitable basis, as it is empowered to do under Article 41 of the Convention, taking into account also the non-pecuniary damage inevitably sustained by the applicant and her four minor children.

In the light of the foregoing considerations, the Court awards the applicant damages of USD 40,000, to be converted into Turkish liras at the rate applicable at the date of payment.

B. Costs and expenses

68. The applicant claimed USD 12,000 for legal fees, corresponding to 120 hours' work by her lawyer.

She also claimed reimbursement of photocopying, translation and other expenses which she assessed, giving a detailed breakdown, at TRL 308,000,000.

69. The Government did not express a view.

70. The Court notes firstly that the applicant has not submitted any bill of costs. She has, nevertheless, inevitably incurred costs for the work done by her lawyer. Ruling on an equitable basis, and taking into account also the other expenses set out and duly broken down, the Court awards USD 2,000 under this head, from which should be deducted 3,700 French francs already paid by the Council of Europe by way of legal aid.

C. Default interest

71. The Court considers it appropriate to provide for payment of default interest at the annual rate of 6% since the sums have been awarded in United States dollars.

FOR THESE REASONS, THE COURT

1. *Dismisses* unanimously the Government's preliminary objection;
2. *Holds* by four votes to three that there has been a violation of Article 2 of the Convention in relation to Ahmet Demiray's death;
3. *Holds* unanimously that there has been a violation of Article 2 of the Convention on account of the failure of the authorities of the respondent State to conduct an effective investigation into the circumstances of the death of the applicant's husband;
4. *Holds* unanimously that it is not necessary to determine whether there has been a breach of Article 5 of the Convention;
5. *Holds* unanimously that there has not been a breach of former Article 25 § 1 of the Convention;
6. *Holds*
 - (a) by four votes to three that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according Article 44 § 2 of the Convention, the sum of USD 40,000 (forty thousand United States dollars), for pecuniary and non-pecuniary damage;
 - (b) unanimously that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the sum of USD 2,000 (two thousand United States dollars) less FRF 3,700 (three thousand seven hundred French francs), for costs and expenses;
 - (c) unanimously that simple interest at an annual rate of 6% shall be payable on those sums, to be converted into Turkish liras at the rate applicable at the date of payment, from the expiry of the above-mentioned three months until settlement;
7. *Dismisses* unanimously the remainder of the claim for just satisfaction.

Done in French, and notified in writing on 21 November 2000, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President

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

J.-P.C.
S.D.

PARTLY DISSENTING OPINION
OF JUDGES COSTA AND KÜRIS

(Translation)

The point on which we do not agree with the majority is the one concerning a violation of Article 2 of the Convention. Like the majority, we found a violation on account of the lack of an effective investigation by the Turkish authorities into the circumstances of the death of the applicant's husband. However, we have been unable to find that it was established that Mr Ahmet Demiray was killed in violation of Article 2.

In the present case the version of the facts given by the applicant, set out in paragraphs 9 to 12 and 23 of the judgment, is extremely condensed. She cannot of course be blamed for that: the Turkish authorities, and particularly the public prosecutor, did not give Mrs Demiray much information about her husband's death, of which she apparently learnt only some time later (see paragraphs 12 and 23 of the judgment).

The Government's version of the facts (see paragraphs 13-17 and 19-22) is more detailed, which does not in itself mean that it is more convincing. However, it is clear from the case file as a whole that it is impossible to establish reliably the exact circumstances of the death, as is moreover acknowledged in paragraph 45 of the judgment. The majority's reasoning is therefore based principally on the lack of measures taken to limit the risks to which Ahmet Demiray was exposed: he apparently agreed to show the Lice gendarmes the site of an arms cache belonging to the PKK, of which he was a member; he was allegedly killed while walking towards the cache when a grenade booby-trapped by that organisation exploded; lastly, the fact that the three gendarmes accompanying him were placed at a distance of 30 to 50 m from the cache, whereas he himself was hit by the grenade at 1 m from it, shows that the authorities' responsibility for the death of the victim was engaged.

We are not convinced by that line of reasoning. In the state of quasi-civil war which existed in the region in August 1994, the security forces could not, in our opinion, be required to abide by the same rules as the person they had arrested and who might have lured them into a trap. Nor can it, without engaging in mere speculation, be considered – as is suggested in the judgment – that the gendarmes used Ahmet Demiray as a human shield.

In that respect this case is different from *Salman v. Turkey* ([GC], no. 21986/93, ECHR 2000-VII) in which we both subscribed to the majority view. In *Salman* the Court held (ibid., § 99) that where an individual is taken into custody in good health and is found to be injured on release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused (see also, with reference to Article 3, *Selmouni*

v. France [GC], no. 25803/94, ECHR 1999-V). That reversal of the burden of proof seems to us to be entirely justified for otherwise it would be very difficult for the victims or their heirs to prove their case. The position is different in this case, however: the State did provide a plausible explanation. The Court therefore takes it further (we feel) by requiring a prisoner to be protected from any risk of bodily harm or death, even if it is he who offered to reveal an arms cache in the context of an armed conflict.

In reality, it was patently and sufficiently clear that there had been a breach of Article 2 with regard to the lack of an effective investigation. We have not found it necessary, or even possible in the light of the case file, to find a “direct” violation of that provision; in any event, the majority's reasoning is not a straightforward application of the principle established in *Salman*.

PARTLY DISSENTING OPINION
OF JUDGE GÖLCÜKLÜ

(Translation)

Much to my regret, I cannot join the majority regarding points 2 (violation of Article 2) and 6 (a) (application of Article 41 for damage sustained) of the operative provisions of the judgment. Here are my reasons.

1. The majority reached the conclusion that Article 2 had been violated because the State did not take the measures necessary to protect the life of the applicant's husband, Ahmet Demiray. In other words, the respondent State failed to comply with a *positive obligation* incumbent on it in this respect. According to the applicant, her husband died following the explosion of a booby-trapped grenade while he was showing the gendarmes the site of an arms cache belonging to PKK terrorists; he was therefore, she alleged, used as a human shield, which engaged the responsibility of the authorities.

The Court has more than once defined the *contents* of that obligation in its previous judgments. According to well-established case-law on the subject, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities, bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources. Accordingly, *not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising* (see, *mutatis mutandis*, the Osman v. the United Kingdom judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII, pp. 3159-60, §§ 115-16). It was in application of those principles that the Court concluded, in the Osman case, that there had not been a violation of Article 2.

In conclusion, according to the well-established case-law of the Court, that positive obligation is not absolute but merely one to use best endeavours.

2. The Court has always stressed that, regarding allegations of a violation of Article 2 of the Convention, the State's responsibility must be proved beyond all reasonable doubt in the knowledge that the attainment of the required evidentiary standard may follow from the coexistence of sufficiently strong, clear and concordant inferences or un rebutted presumptions (see the Yaşa v. Turkey judgment of 2 September 1998, *Reports* 1998-VI, p. 2437, § 96).

Furthermore, the Court must examine the issues raised before it in the light of the material provided by those appearing before it and, if necessary, of material obtained *proprio motu* (see the Yaşa judgment cited above, p. 2437, § 94).

In the present case none of the evidence in the Court's possession enables it to establish beyond all reasonable doubt that Ahmet Demiray died in circumstances which engaged the responsibility of the security forces. While it is true that the sketch map of the site drawn by the gendarmerie – which is, moreover, imprecise – suggests that the applicant's husband was closer to the arms cache in question than the gendarmes, that fact cannot establish reliably, in the absence of other sufficiently certain evidence, that the security forces used her husband as a human shield.

The majority appear to give more weight and importance than they should to the fact that the person in question was 1 m away from the arms cache in question, whereas two of the gendarmes accompanying him were 30 m away and the third 50 m away (see paragraph 46 of the judgment). It should be borne in mind that it was a military operation and that it was prepared and executed in strict conformity with the military requirements involved in this type of operation. If the three gendarmes had been near the applicant's husband, the result would have been the same, except that instead of one person being pulverised, four would have been.

In conclusion, and all things considered, there is no other evidence to support the applicant's allegation that the security forces were responsible for her husband's death.

Accordingly, there has not been a violation of Article 2 in that respect.

Strange coincidence, but at the very time at which this case was concluded an international convention had just been signed against the use of anti-personnel mines. It is Mr Demiray's terrorist accomplices who placed these mines and the Turkish government which foots the bill.

3. Since I have not found a violation of Article 2 on the ground of lack of measures taken to protect life, neither do I share the majority's opinion as regards the award, on an equitable basis, of such an exorbitant sum for the alleged pecuniary and non-pecuniary damage without verifying that it really was sustained. I consider that where an applicant claims pecuniary damage the loss must be quantified, broken down and supported with documentary evidence. The majority itself, while accepting and affirming that there was no evidence of the income of the applicant's husband (see paragraph 67 of the judgment) or the loss sustained, uphold the claim on an equitable basis. That is mere speculation which sits uneasily with the concept of damages for pecuniary loss.