



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

THIRD SECTION

CASE OF AKTAŞ v. TURKEY

(Application no. 24351/94)

*This version has been rectified under Rule 81 of the Rules of Court on
23 October 2003*

JUDGMENT

STRASBOURG

24 April 2003

This judgment is final but it may be subject to editorial revision.

In the case of Aktaş v. Turkey,

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

Mr I. CABRAL BARRETO, *President*,

Mr L. CAFLISCH,

Mr P. KÜRIS,

Mr B. ZUPANČIČ,

Mrs M. TSATSA-NIKOLOVSKA,

Mr K. TRAJA, *judges*,

Mr F. GÖLCÜKLÜ, *ad hoc judge*,

and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 3 April 2003,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case was referred to the Court as established under former Article 19 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by the European Commission of Human Rights (“the Commission”) on 30 October 1999, within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention.

2. The case originated in an application (no. 24351/94) against the Republic of Turkey lodged with the Commission under former Article 25 of the Convention by a Turkish national, Mr Eshat Aktaş (“the applicant”), on 8 June 1994. The applicant alleged, in particular, that his brother Mr Yakup Aktaş had died as a result of torture at the hands of agents of the respondent Government.

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

4. The Commission declared the application admissible on 4 September 1995. In its report of 25 October 1999 (former Article 31 of the Convention) [*Note by the Registry*. Copies of the report are obtainable from the Registry], it expressed the unanimous opinion that there had been violations of Articles 2, 3 and 13 of the Convention but no violation of Article 14 of the Convention.

5. The applicant, who was granted legal aid, was initially represented before the Court by Mr Kevin Boyle and Ms Françoise Hampson, lawyers practising in the United Kingdom. On 10 March 2000 they stood down in

favour of Mr William Bowring, also a lawyer practising in the United Kingdom. On 13 March 2000 the applicant appointed as his representatives Mr Philip Leach, a lawyer with the Kurdish Human Rights Project (“KHRP”), a non-governmental organisation based in London, and Mr Osman Baydemir, Ms Reyhan Yalçındağ and Mr Cihan Aydın, lawyers practising in Turkey. By a letter dated 30 July 2002 the applicant withdrew the authority which he had given to Mr Baydemir, Ms Yalçındağ and Mr Aydın. On 2 September 2002 Mr Leach stood down. He was replaced by Ms Anke Stock, Mr Mark Muller and Mr Tim Otty of the KHRP.

6. The Turkish Government (“the Government”) were represented mainly by their Agent, Mr Bahadır Kaleli.

7. On 6 and 8 December 1999 a panel of the Grand Chamber decided that the case should be dealt with by a Chamber constituted within one of the Sections of the Court. Subsequently the application was allocated to the First 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 of the Rules of Court.

8. Mr R. Türmen, the judge elected in respect of Turkey, withdrew from sitting in the case (Rule 28). The Government accordingly appointed Mr . Gölcüklü to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

9. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

10. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Third Section. Within this Section also, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Introduction

11. The applicant was born in 1973 and lives in Derik, Turkey.

12. The case concerns the circumstances of the death of the applicant's brother, Mr Yakup Aktaş. According to his death certificate, Mr Yakup Aktaş, who was born in 1964, died in Mardin, Turkey, on 25 November

1990. He left a widow and also a daughter who had been born earlier that year.

13. The applicant alleges that the death of Yakup Aktaş resulted from torture following his arrest. The Government deny this.

14. The facts of the case being in dispute, the Commission appointed Delegates who took evidence in Ankara on 19 and 20 November 1997. They heard the applicant and the following witnesses: the applicant's brother Mr Mahmut Aktaş, the Public Prosecutor Şevki Artar, Professor Dr Özdemir Kolusayın, Dr Hüseyin Sarı and Dr Güneş Pay.

15. On 18 November 1997, while evidence was being taken in a different case, the Acting Agent of the Government submitted that, for their security, ten members of the gendarmerie who had been summoned to appear before the Delegates in the present case should give evidence in the absence of the applicant and his relatives and be shielded from the view of the applicant's representatives by a screen. On 19 November 1997 the Government extended that request to include a further witness: the member of the gendarmerie who had investigated Yakup Aktaş's death on behalf of the Mardin Provincial Administrative Council. Having deliberated, the Delegates decided not to comply with the request for a screen. However, they suggested to the Acting Agent that the eleven witnesses give their evidence on a day when neither the applicant nor his relatives would be present in the Palace of Justice. The Acting Agent informed the Delegates that the eleven witnesses would not give evidence in those circumstances, whereupon the Delegates invited the Government to submit their request to the Commission in writing, giving full reasons for it in respect of each witness.

16. Further documentary material was submitted by the parties during the hearing. On 20 November 1997 the Acting Agent showed four photographs of a body said to be that of Yakup Aktaş. They were not marked with any kind of identifying information, either on the front or on the back. At the conclusion of the hearing the Delegates requested the Government to submit further information, a number of documents and two sets of copies of the photographs with the negatives. That request was subsequently confirmed by a letter dated 26 November 1997. On the same day the parties were also requested to inform the Commission of the names of any witnesses they might still wish to be heard.

17. On 8 December 1997 the Government were reminded of an outstanding request for the name of the doctor who pronounced Yakup Aktaş dead.

18. By a letter dated 23 December 1997 the Government submitted a doctor's note relating to one of the witnesses who had not appeared before the Delegates and a number of other documents. One of these was a copy of a letter dated 10 December 1997 from the Chief Public Prosecutor at Mardin to the Ministry of Justice (General Directorate of International Law and External Relations) to the effect that the requested negatives of the four

photographs were not in the file at the Mardin Assize Court or in the possession of the Mardin Provincial Gendarmerie Headquarters.

19. By a letter dated 5 February 1998 the Government informed the Commission that it had not proved possible to trace the name of the doctor who had pronounced Yakup Aktaş dead.

20. On 12 February 1998 the Government were reminded that not all the information and documents mentioned in the Commission's letter of 26 November 1997 had been submitted. In reply, the Government stated in their letter of 20 March 1998 that all requested documents had been provided to the Commission. On 27 March 1998 the Commission provided the Government with a list of the information and documents which had yet to be submitted.

21. On 12 March 1998 the parties were informed that the Commission was expected to examine the state of the proceedings on the application at its session beginning on 14 April 1998 and that, unless a reply to the question concerning witnesses contained in the Commission's letter of 26 November 1997 was received beforehand, it would be assumed that they did not wish any further witnesses to be heard.

22. By a letter dated 15 April 1998 the Government requested that five witnesses, all officers in the gendarmerie, be heard. They stressed, however, that all necessary security measures should be taken. On 20 April 1998 the Government were requested to inform the Commission why such special arrangements were necessary and in what way the present case fell to be distinguished from other cases in which evidence from members of the security forces had been heard. They were further requested to specify the security measures they sought.

23. By a letter dated 20 April 1998 the Government submitted the two sets of copies of the photographs that had been requested by the Commission in its letter of 26 November 1997.

24. By a letter dated 5 May 1998 the Government asked the Commission to hear the five witnesses they had proposed in the absence of both the applicant and his representatives so that they would not be recognised.

25. On 23 May 1998 the Commission examined that request. It decided not to accede to it in so far as it related to the hearing of the witnesses in the absence of the applicant's representatives. The parties were informed of the Commission's decision on 27 May 1998, the Government being requested to confirm that the five witnesses could be heard under normal conditions.

26. By a letter dated 27 May 1998 the Government submitted information that had been requested by the Commission in its letter of 26 November 1997.

27. On 4 June 1998 the Government were again reminded that not all the information and documents mentioned in the Commission's letter of 26 November 1997 had been submitted.

28. By a letter dated 5 June 1998 the Government submitted observations concerning the hearing of the five witnesses. They again requested that the witnesses be heard in the absence of the applicant and his representatives, failing which they would not give evidence.

29. By a letter dated 23 June 1998 the Government submitted information requested by the Commission in its letter of 26 November 1997. They added that some documents referred to in the Commission's reminder letter of 4 June 1998 had already been submitted.

30. On 4 July 1998 the Commission examined the Government's observations of 5 June 1998 pertaining to the hearing of the five witnesses. It decided that it would not reverse its decision of 23 May 1998. The parties were informed of the Commission's decision on 6 July 1998 and were also invited to submit their written submissions on the merits. At the same time the Commission specified a document the Government had not yet provided.

31. By a letter dated 9 July 1998 the Government submitted a number of observations on the merits of the case.

32. By a letter dated 4 September 1998 the Government submitted the document specified in the Commission's letter of 6 July 1998.

B. The applicant's submissions on the facts

33. The applicant's brother Yakup Aktaş was arrested on 18 November 1990 by the Derik district gendarmerie. Prior to his arrest he had been in good health apart from a minor venereal infection for which he had received treatment. After his arrest Yakup Aktaş was taken to Dr Adnan Parkan for an examination. Dr Parkan issued a certificate stating that Yakup Aktaş showed no signs of having been beaten or subjected to force or violence.

34. The next morning (19 November 1990) Mahmut Aktaş, another of the applicant's brothers, visited Yakup Aktaş and saw that he was in good health. Later that morning Yakup Aktaş was transferred to the Mardin interrogation centre, where he was held until his death. He died shortly after 7.30 p.m. on 25 November 1990. A post-mortem examination and a full autopsy were performed at 10 p.m. that same evening. As neither yielded a positive finding as to the exact cause of death, the reports of the two examinations and specimens taken from Yakup Aktaş's body were sent to the Institute of Forensic Medicine of the Ministry of Justice. The forensic examination concluded that it was not possible to determine the cause of death from the information available.

35. The body was returned to the applicant and other members of his family prior to the burial. They observed the injuries which were also described in the reports of the post-mortem examination, the autopsy and the forensic examination. The injuries described were consistent with death by deliberate

asphyxiation, and thus with the evidence of the consultant pathologist engaged by the applicant.

36. On 26 November 1990, the day after Yakup Aktaş's death, the applicant lodged a complaint with the public prosecutor at Derik concerning his brother's death. However, the investigation did not begin until 30 November 1990, no search for evidence took place at all and the witnesses were not interviewed until March 1991.

C. The Government's submissions on the facts

37. The questioning of Yakup Aktaş by the two gendarme officers who were subsequently prosecuted had come to an end on 23 November 1990, that is two days before Yakup Aktaş's death. Yakup Aktaş had shown no signs of illness or pain in the period between 18 and 23 November 1990, either during questioning or between sessions. Had he done so, the regiment's doctor would have been available. Yakup Aktaş's pale complexion and his need to drink large quantities of water suggested a connection with his medical history of two urinary infections.

38. Despite the fact that 25 November 1990 was a Sunday, all measures and precautions required by Yakup Aktaş's sudden illness had been taken in order for him to receive immediate medical attention. Thus, the persons in charge had been alerted to the situation at once and Yakup Aktaş was transferred to hospital without delay. Likewise, an investigation had been commenced immediately and the applicant had subsequently been able to intervene in the criminal proceedings against the gendarme officers. A large number of statements from witnesses had been obtained. The accused officers were acquitted because of a lack of sufficient factual and medical evidence.

D. Proceedings before the domestic authorities

39. On 25 November 1990 a post-mortem examination and full autopsy were performed on the body of Yakup Aktaş at the Mardin State Hospital. His body was identified by Captain Mehmet Göçmen, commander of the Mardin provincial central gendarmerie. The report on those examinations (see paragraphs 153-160 below) stated, *inter alia*, that since the exact cause of death had not been established, tissue samples of internal organs had been taken and dispatched to the Institute of Forensic Medicine.

40. At 8.10 p.m. on 25 November 1990 an inspection of the interrogation centre of the Mardin provincial gendarmerie was carried out by four members of the gendarmerie (see paragraph 61).

41. On 27 November 1990 a public prosecutor at Derik ruled that he had no jurisdiction *ratione loci* to deal with the applicant's complaint that his brother Yakup Aktaş had died as a result of torture at the hands of

intelligence officers at the interrogation centre of the Mardin provincial gendarmerie. The case file was transmitted to the Mardin Public Prosecutor's Office.

42. The Mardin Public Prosecutor Şevki Artar decided on 29 November 1990 that he had no jurisdiction *ratione materiae* and referred the investigation to the Mardin Provincial Administrative Council. Major Dursun Şeker was appointed to conduct the investigation.

43. On 20 February 1991 the Institute of Forensic Medicine issued a report, from which it appeared that the exact cause of death could not be established (see paragraphs 161-164 below).

44. Between 13 and 20 March 1991 a number of persons, including the applicant, made statements to Major Dursun Şeker. On 21 March 1991 Major Dursun Şeker issued a report (see paragraphs 125-129). The recommendation contained therein, that gendarme officers Major Aytekin Özen and Master Sergeant Ercan Günay should not face prosecution, was adopted by the Mardin Provincial Administrative Council in its decision of 6 June 1991. The Council of State overturned that decision on 24 June 1992 on the automatic appeal to which the decision was subject and ordered that Major Aytekin Özen and Master Sergeant Ercan Günay be charged with the offence of unintentional homicide (Article 452 of the Criminal Code) and should stand trial at the Mardin Assize Court. In its decision the Council of State held that it appeared from the report of the post-mortem examination and autopsy that Major Özen and Master Sergeant Günay had caused Yakup Aktaş's death by beating him during interrogation.

45. On 23 September 1992 the Mardin Assize Court decided that it was not competent to try the case and transferred it to the Ankara Assize Court. In its decision of 26 October 1992 the latter court also declined jurisdiction and transferred the file to the Court of Cassation in order to have the jurisdiction issue settled. On 29 December 1992 the Court of Cassation quashed the decision of the Mardin Assize Court of 23 September 1992, finding that it did have jurisdiction.

46. The proceedings against Major Aytekin Özen and Master Sergeant Ercan Günay on a charge of having caused Yakup Aktaş's death by beating during interrogation commenced at the Mardin Assize Court on 3 March 1993. The applicant was given permission to take part in the proceedings as an intervening party. On 3 March 1993 the Assize Court found that the decision of the Council of State of 24 June 1992, committing the two defendants for trial, did not contain the minimum information required by law concerning the identities of the accused. For this reason it transmitted the file to the Council of State. On 19 March 1993 the Council of State held that its decision of 24 June 1992 contained sufficient information to enable the identities of the defendants to be determined. It returned the file to the Mardin Assize Court.

47. Hearings took place before the Mardin Assize Court on 12 May, 7 July, 21 September, and 23 November 1993, and 2 February, 30 March, and 11 May 1994. On the latter date the defendants Major Aytekin Özen and Master Sergeant Ercan Günay were acquitted.

48. The applicant lodged an appeal on points of law with the Court of Cassation. It was rejected on 6 February 1995.

E. Evidence contained in the Court's case file

49. The documentary evidence obtained by the Commission and the transcript of the hearing before the Commission's Delegates have been transmitted to the Court and are in the case file.

1. Documentary evidence

50. The parties submitted various documents to the Commission. These related to the investigation and court proceedings and included statements from the applicant and witnesses concerning their version of the events in issue in this case. The Government also submitted copies of four colour photographs said to have been taken of the body at the Mardin State Hospital.

51. The Commission, when drawing up its report under former Article 31 of the Convention, had particular regard to the following documents:

(a) Applicant's statement dated 4 December 1992 to the Diyarbakır branch of the Human Rights Association (hereinafter referred to as "HRA")

52. At about 4 p.m. on 18 November 1990 the applicant's brother Yakup Aktaş had been apprehended in Derik. While still there, he had been taken to the local health clinic where he had been issued with a medical report stating that he was not suffering from any medical complaint whatsoever. The following morning Yakup had been taken to the interrogation centre at the Mardin provincial gendarmerie headquarters. A week later, on 25 November 1990, the applicant's uncle Süleyman had been informed that Yakup had died. Süleyman Aktaş had taken delivery of Yakup's body at the morgue of Mardin State Hospital on 26 November 1990.

53. As the relatives of Yakup were waiting in a convoy of vehicles the security forces had escorted the hearse to the cemetery at Derik and ensured an immediate burial. During that time, strict security measures had been imposed on the district; entry into or exit from the district was prohibited and helicopters patrolled overhead. A delegation of the Human Rights Association (HRA) had been refused entry to the district.

54. The person who had washed Yakup's body had observed bruises and scratches to both wrists and arms and the back. The back of the head had been entirely crushed and blood was still flowing from it. There was also an

injury to the forehead. The authorities had claimed that Yakup had died as a result of a heart attack but the injuries observed on Yakup's body constituted proof of the fact that he had died as a result of torture.

(b) Statement by the applicant dated 26 November 1990 to the Derik Public Prosecutor

55. The applicant stated that he wished to file a complaint concerning the death of his brother, Yakup Aktaş, whose body had been delivered to the family that day (26 November 1990). Yakup had been taken to Mardin eight days previously for interrogation and had died under interrogation. In the applicant's opinion, the death was not due to natural causes but had been brought about by torture. A healthy person would not have died for no apparent reason. He demanded the prosecution and conviction of the persons responsible for Yakup's death.

56. The applicant requested that a second autopsy be performed, stating that the original autopsy might have been carried out in such a way as to conceal the real cause of death.

(c) Record of mutual identification and confrontation of suspects, undated

57. This record describes how Yakup Aktaş was confronted with a fellow suspect, one Ali Alay. Ali Alay said that Yakup Aktaş was the person who had given him banknotes. Yakup Aktaş confirmed that he had given Ali Alay approximately ten million Turkish liras (TRL) in banknotes wrapped in a newspaper.

58. During a confrontation between another fellow suspect, Osman Önen, and Ali Alay, the latter stated that he had given the money received from Yakup Aktaş to Osman Önen. Osman Önen confirmed having received money from Ali Alay.

59. The record is signed by Captain Mehmet Göçmen as the person who conducted the identification procedure. It further contains the thumbprints of Ali Alay and Osman Önen. A handwritten note underneath the name of Yakup Aktaş states that it had been assumed that Yakup Aktaş would sign the record at a later stage but that his death had prevented him from doing so.

(d) Incident report dated 25 November 1990

60. This report is signed by Lance Corporals Ali Yavaş and Mustafa Tüylek and by Master Sergeants Yusuf Karakoç, Mehmet Yılmaz, Mustafa Ten, Süleyman Altuner, Üzeyir Nazlım and Ramazan Baygeldi. It states that at around 7.30 p.m. on 25 November 1990 sounds were heard in cell no. 18. The door of the cell was opened and the occupant was found unconscious, having convulsions and thrashing from side to side. An attempt was made to contact Senior Major Haşim Üstünel, the head of the intelligence unit, but when he proved unavailable Colonel Enver Uysal, commander of the

Mardin provincial gendarmerie, was informed. On Colonel Uysal's instructions the detainee, who was established to be Yakup Aktaş, was taken to hospital by car. On examination at the hospital it was determined that Yakup Aktaş had died in transit.

(e) Record of inspection of the interrogation centre on 25 November 1990

61. This record is signed by Senior Colonel Pekcan Cengiz (deputy commander of the 22nd Border Brigade), Senior Major Haşim Üstünel, Sergeant Major Ali Yavaş and Master Sergeant Yusuf Karakoç. It states that on the verbal instructions of the Mardin provincial security command the signatories of the record arrived at the interrogation centre of the Mardin provincial gendarmerie at approximately 8.10 p.m. on 25 November 1990. After an inspection and search of the premises it was established that the interrogation centre was equipped with modern equipment and that there were no tools or instruments that could be used to torture, torment or use force against persons interrogated there. It was further established that the interrogations were carried out using modern techniques and in accordance with the instructions. An examination of the detention area showed that the cells, which had been designed for one detainee, could easily accommodate three, that the necessary medical checks were made and that the needs of the detainees were met. The authors of the record concluded that any inhuman treatment of detainees there was out of the question.

(f) Letter from the Mardin Public Prosecutor, Şevki Artar, to the Institute of Forensic Medicine dated 26 November 1990

62. The Public Prosecutor, Şevki Artar, informed the Institute of Forensic Medicine that on 25 November 1990 an autopsy had been performed on the body of Yakup Aktaş, who had died that same day at the Mardin State Hospital after having been taken suddenly ill at the Mardin provincial gendarmerie headquarters, where he was detained. Given that it had not proved possible to determine the exact cause of death it had been decided that tissue samples from the body should be sent to the Institute of Forensic Medicine and that the Institute's opinion be sought as to the exact cause of death.

(g) Decision issued by the Mardin Public Prosecutor, Şevki Artar, on 29 November 1990 that he had no jurisdiction

63. This decision mentions "gendarme officers serving at the intelligence and interrogation department of the Mardin provincial gendarmerie" as being accused of the offence of torture, and the date of the offence is given as 25 November 1990. It relates how Yakup Aktaş was taken into custody by officers serving at the aforementioned department on 19 November 1990 following rumours to the effect that he had connections with the PKK, an illegal organisation. After Yakup Aktaş's death at Mardin

State Hospital, where he had been taken after being taken suddenly ill on 25 November 1990, an inconclusive autopsy had been performed and tissue samples had been sent to the Institute of Forensic Medicine.

64. The decision further refers to the statement made by the applicant before the Derik Public Prosecutor on 26 November 1990 in which the applicant alleged that his brother Yakup had died as a result of being tortured during interrogation.

65. Since the incident involved the conduct of civil servants, it was decided in accordance with Article 4 § 1 of Decree no. 285 to refer the case file to the Mardin Provincial Administrative Council.

(h) Statements taken by Major Dursun Şeker in the proceedings before the Mardin Provincial Administrative Council

i. Applicant's statement dated 14 March 1991

66. In this statement the applicant is referred to as the “complainant”. The statement which he had made to the Derik Public Prosecutor on 26 November 1990 was read out to him. The applicant stated that his brother Yakup Aktaş had been apprehended in Derik on 18 November 1990 and had been transferred to the Mardin gendarmerie interrogation centre on 19 November 1990. At that time the applicant had been at university in Diyarbakır. He had been informed three days later that his brother had been taken into custody, whereupon he had returned to Derik to run Yakup's grocery shop. On the morning of 26 November 1990 Yakup's body had been brought to Derik and it was then that he had learned of his brother's death.

67. He remembered that Yakup had once had an illness (a pustule on the penis) for which he had received medical treatment, but he could not recall exactly when this had been. Other than this he was not aware of Yakup having suffered any medical complaints.

68. Yakup had died at the interrogation centre and it was very probable that he had been tortured. However, the applicant did not know for certain whether torture was the cause of death. That fell to be decided by the doctors performing the autopsy and the Institute of Forensic Medicine. If Yakup had died as a result of torture, he wanted the culprits punished. However, if death had occurred by natural causes it had been God's will.

69. Finally, it is recorded that the statement was read out to the applicant, who confirmed its accuracy by signing it.

ii. Statement of Mahmut Aktaş dated 14 March 1991

70. In this interview Mahmut Aktaş was asked whether he had any complaints in relation to his brother Yakup Aktaş, who had fallen ill on 25 November 1990 at the Mardin interrogation centre and had died in hospital. He was also asked whether Yakup had been suffering from an illness previously.

71. He replied that he did not know whether Yakup had had an illness prior to his arrest. Even if Yakup had been ill and had received medical treatment he had not been aware of the fact. They shared the same house and he did not recall Yakup having any medication at home. On the day of Yakup's arrest, 18 November 1990, two police officers had come to Mahmut's bakery and said that Yakup had to attend the police station to pay a fine. Mahmut had sent an employee to his home to alert Yakup. The police superintendent had taken Yakup to the gendarmerie where Yakup had undergone a medical examination. Yakup had been kept at the gendarmerie overnight. He had visited Yakup the following morning and found him in good health and not suffering from anything. Yakup had been transferred to Mardin the same day.

72. Whilst in Mardin on 26 November 1990 he had been informed that Yakup had died at the hospital after being taken ill at the interrogation centre and that his body had been taken to Derik. If Yakup's death was the result of torture he wanted to see the culprits punished. However, if death had occurred by natural causes then it had been God's will and there was nothing for him to say.

73. It was recorded in the statement that it had been read out to him following which he confirmed its accuracy by signing it.

iii. Statement of Ms Dediye Aktaş dated 14 March 1991

74. Ms Dediye Aktaş, Yakup Aktaş's mother, was asked the same questions as Mahmut Aktaş (see paragraph 70 above). She stated that her son Yakup had been called to the gendarmerie on 18 November 1990 upon which he had been apprehended and sent to the Mardin gendarmerie. One week later she had been informed of his death. Her son had not been suffering from any illness when he was arrested. He had not to her knowledge been ill or treated for any illness previously. As she was illiterate, she was not familiar with the content of the medical reports on her son's death, nor did she know what cause of death had been given. She knew that her son had been beaten to death and wished to lodge a complaint against all those responsible. She confirmed the accuracy of her statement with a thumbprint after it had been read out to her.

iv. Statement of Alaattin Aydın dated 14 March 1991

75. Alaattin Aydın, a police constable serving with the Derik district police force, stated that on 18 November 1990 the Derik district gendarmerie had requested Yakup Aktaş's arrest. Together with a colleague he had asked Yakup Aktaş's brother Mahmut to tell Yakup to go to the police station to pay a fine for a minor offence. He had met Yakup Aktaş while he was on the way to the police station. He had not noticed anything unusual about him. Yakup Aktaş had been taken to the district gendarmerie headquarters and handed over to Senior Sergeant İlhan Keskin.

v. Statement of Senior Sergeant İlhan Keskin dated 14 March 1991

76. İlhan Keskin, a Senior Sergeant in the gendarmerie in charge of administrative affairs at the Derik district gendarmerie headquarters, stated that on 18 November 1990 Major Aytekin Özen of the interrogation centre had telephoned him and given him instructions to arrest Yakup Aktaş. He had contacted the Derik police superintendent and had brought the matter to his attention. In the afternoon two police officers had brought Yakup Aktaş to the gendarmerie headquarters. He had had Yakup Aktaş examined by Dr Adnan Parkan at the district health centre in accordance with usual practice. He had then received the report of the medical examination. Yakup Aktaş's name had been entered in the custody record and he had spent the night in the cells at the district gendarmerie headquarters.

77. The following morning (19 November 1990), the witness had blindfolded Yakup Aktaş and taken him to the Mardin interrogation centre where, some time before noon, he had delivered him into the hands of Master Sergeant Mustafa Ten. In his opinion, Yakup Aktaş had appeared listless, nervous and anxious. Also, Yakup Aktaş had been somewhat overweight. It was an established fact that Yakup Aktaş had provided assistance and supplied guns to the PKK.

vi. Statement of Dr Adnan Parkan, undated

78. Dr Adnan Parkan stated that Yakup Aktaş had been brought to him for a medical check-up on 18 November 1990 after his arrest by the district gendarmerie. The signature on the medical report bearing that date was his. He had drawn up the report after asking Yakup Aktaş whether he had been beaten to which Yakup Aktaş had replied that this was not the case. He had not asked Yakup Aktaş to undress and thus had not conducted an external physical examination since the purpose of the check-up had been to ascertain whether or not Yakup Aktaş had been beaten.

79. He did not remember whether or not he had previously examined Yakup Aktaş but, since the data contained in the register of the health clinic were correct, it must have been the case that Yakup Aktaş had come to see him on two occasions. Yakup Aktaş's illness had been diagnosed as urethritis. He did not think that that disease was the cause of death since otherwise it would have been stated in the autopsy report. He knew Yakup Aktaş because he ran a grocery shop in the district. Yakup Aktaş had been a little overweight. He described Yakup Aktaş as a respectful, polite person.

vii. Statement of Colonel Enver Uysal dated 18 March 1991

80. Colonel Uysal, commander of Mardin provincial gendarmerie, stated that although the interrogation centre was situated on the premises of the Mardin provincial gendarmerie and although the interrogation unit appeared to form part of the intelligence unit, the position was in fact completely

different in practice. The interrogation centre functioned as the interrogation centre for the Mardin provincial security command. Persons to be taken into custody would be apprehended by the Mardin provincial central gendarmerie on the orders of the security command.

81. He would receive a list with the names of the persons who had been taken into custody but it was the personnel serving at the interrogation unit who decided which suspects were to be interrogated by which officers. As provincial gendarmerie commander he would frequently attend interrogations. Such inspections were general in nature. He had never witnessed any ill-treatment being meted out at the interrogation sessions he had attended.

82. Early in the evening of 25 November 1990 Sergeant Major Ali Yavaş had telephoned him to say that a detainee named Yakup Aktaş had fallen ill and that they wanted to take him to hospital. He had ordered that Yakup Aktaş be taken to hospital immediately. Approximately half an hour later Ali Yavaş had informed him that Yakup Aktaş had been hospitalised but had died before the doctor could intervene. Thereupon, the public prosecutor's office had been informed of the incident and the necessary investigations had commenced. He was not aware of the cause of death but did not think that Yakup Aktaş had died as a result of torture. The interrogation building was in complete conformity with sanitary requirements and persons being held for interrogation were never ill-treated.

83. He had subsequently been told by the head of the interrogation unit that Yakup Aktaş had been interrogated by Master Sergeant Ercan Günay and Major Aytekin Özmen. He had never seen Yakup Aktaş.

viii. Statement of Captain Mehmet Göçmen dated 15 March 1991

84. In this statement Captain Göçmen is introduced as a gendarme captain, commander of Mardin provincial central gendarmerie. He was asked whether it was correct that Yakup Aktaş had been taken with two co-accused for mutual identification under his, Göçmen's, supervision. He stated that the interrogation of suspects was carried out by interrogation personnel serving under the command of the intelligence unit of the provincial gendarmerie. Related correspondence bore his signature because he was the officer in charge of judicial matters. Prior to the confrontation for identification purposes of Yakup Aktaş with his two co-accused he had been asked to go to the interrogation centre. The information included in the mutual identification record had been furnished by the persons identified. The signature at the bottom of that record was his and its content was true.

ix. Statement of Senior Major Haşim Üstünel dated 18 March 1991

85. Senior Major Üstünel, head of the intelligence unit at the Mardin provincial gendarmerie, explained that the interrogation centre was one of the five sections attached to his intelligence unit. However, the interrogation centre functioned under the command and direction of the provincial security command. Persons to be interrogated were detained by the provincial central gendarmerie, which was responsible for bringing them before the courts. Therefore, the interrogation centre did not operate under his orders.

86. Interrogations were carried out by interrogation personnel stationed at the interrogation centre. On 25 November 1990 there had been a total of fourteen members of staff at the interrogation centre, consisting of four lance corporals, nine master sergeants and intelligence officer Major Aytekin Özen who had been posted at the interrogation centre since August 1990 in order to direct the interrogation activities and render them more effective.

87. He had been informed of Yakup Aktaş's death by Sergeant Major Yavaş, who had telephoned him at home with the news. Yakup Aktaş had fallen ill and been taken to hospital but had died before the doctor could intervene. Upon hearing this news the witness had gone to the provincial gendarmerie headquarters. Meanwhile, he had given instructions for the public prosecutor to be informed. The provincial gendarmerie commander had also been present at the headquarters. When the public prosecutor arrived they went to the hospital. He had seen the body for the first time at the autopsy but there had been nothing that had attracted his attention. He did not think that Yakup Aktaş had been tortured because during the one and a half years he had been in his post he had never seen or heard of anyone being mistreated, let alone tortured, at the interrogation centre.

x. Statement of Sergeant Major Ali Yavaş, date illegible

88. Ali Yavaş stated that he was a gendarme with the rank of lance corporal serving at the intelligence unit of the Mardin provincial gendarmerie and head of the interrogation centre.

89. He stated that he had been on leave on the day Yakup Aktaş was taken into custody (19 November 1990). Upon his return on 23 November 1993 he had visited all the persons detained at the interrogation centre, including Yakup Aktaş in cell no. 18. Yakup Aktaş had been listless, nervous and frightened. No interrogations had taken place on Saturday 24 or Sunday 25 November. The interrogations of Yakup Aktaş had been carried out by Major Aytekin Özen, who was in charge of the coordination of the interrogation centre, and Sergeant Ercan Günay. On 23 November Major Aytekin Özen had gone on leave and Master Sergeant Ercan Günay had gone to Adana on an assignment. Therefore, Yakup Aktaş had not been interrogated on 23, 24 or 25 November.

90. On 25 November, while he was in the canteen, he had been informed by Master Sergeant Yusuf Karakoç, the duty officer at the interrogation centre, that Yakup Aktaş had fallen ill. He had ordered a vehicle and had informed Colonel Enver Uysal of the matter. He had then gone to the interrogation centre and seen Yakup Aktaş being taken out of his cell in a blanket. He had helped Yakup Aktaş onto the back seat of the car. He had observed that Yakup Aktaş was breathing and had checked for and found a pulse. He had taken Yakup Aktaş to the accident and emergency department at the State Hospital, where after an examination, the doctor pronounced him dead.

91. It had been established before Yakup Aktaş was taken to the interrogation centre that he had helped and sheltered members of the PKK. Yakup Aktaş had given TRL 30,000,000 and five Kalashnikov rifles and ammunition to the PKK.

xi. Statement of Master Sergeant Yusuf Karakoç dated 13 March 1991

92. Yusuf Karakoç, a Master Sergeant in the gendarmerie serving at the intelligence unit of the Mardin provincial gendarmerie, stated that Major Aytekin Özen had ordered Yakup Aktaş to be brought to the interrogation centre after it had been established from statements made by members of the PKK and documents that had been seized that Yakup Aktaş had provided assistance, shelter and supplies to that organisation. On 19 November 1990 Yakup Aktaş had arrived at the interrogation centre and a medical certificate and permission from the public prosecutor to take Yakup Aktaş into custody had been obtained. He had been the duty officer that day. During his shift he had arranged for the doors of the cells to be opened at around 6 p.m., midnight, 3 a.m. and 7 a.m. to check on the detainees. On each occasion Yakup Aktaş, who was in cell no. 18, had told him that he had no problems. He did not observe anything unusual in Yakup Aktaş's behaviour.

93. He was also the duty officer on 25 November 1990. Both before and after noon he had checked on Yakup Aktaş and had not noticed anything unusual about him. As the evening meal was about to be served, the private distributing the meals had come to see him and told him that he had heard strange voices coming from cell no. 18, that Yakup Aktaş had been banging on the door and that when the private had looked into the cell Yakup Aktaş had told him that he was ill. Upon receiving this information the witness said that he had immediately gone downstairs to the detention area. The private standing guard had opened the door to cell no. 18. When the witness called out to Yakup Aktaş there had been no response. Yakup Aktaş had been seated and had fainted. The witness had immediately taken him out of the cell to make sure that he got some fresh air. A private had supported Yakup Aktaş on one arm but he had been unable to stand up in his condition and had therefore been laid on a blanket. The witness had given instructions

for the relevant superiors to be informed and for a car to be made ready. Meanwhile, Sergeant Major Ali Yavaş had arrived.

94. With the blanket serving as a stretcher, Yakup Aktaş had been taken to the car and driven to the hospital. He was still breathing when he was taken outside. Later, the witness had been informed that Yakup Aktaş had died at the hospital.

95. Yakup Aktaş had been interrogated by Major Aytekin Özen and Master Sergeant Ercan Günay. The witness did not have any information concerning the methods that had been used. While he was certain that Yakup Aktaş had not been tortured, he did not know the cause of his death.

xii. Statement of Master Sergeant Üzeyir Nazlım dated 14 March 1991

96. Üzeyir Nazlım stated that he was a Master Sergeant in the gendarmerie serving at the intelligence unit of the Mardin provincial gendarmerie. He had checked on Yakup Aktaş in cell no. 18 while on guard duty on 21 and 24 November 1990. Yakup Aktaş had been listless, nervous and anxious. Master Sergeant Yusuf Karakoç had taken over the guard duty from him on 25 November 1990. On that day he had heard that Yakup Aktaş had become ill and had died in hospital.

97. Yakup Aktaş had been interrogated by Major Aytekin Özen and Master Sergeant Ercan Günay. He did not know how many times Yakup Aktaş had been interrogated or what methods had been used. He had neither seen nor heard Yakup Aktaş being subjected to torture during interrogation.

xiii. Statement of Master Sergeant Ramazan Baygeldi dated 13 March 1991

98. Ramazan Baygeldi, a Master Sergeant in the gendarmerie serving at the intelligence unit of the Mardin provincial gendarmerie, said that he had seen Yakup Aktaş on 19 November 1990 on his arrival at the interrogation centre. As far as he could see, Yakup Aktaş did not appear to be suffering from any kind of illness, although he was somewhat overweight. He had been detained in cell no. 18 and interrogated by Major Aytekin Özen and Master Sergeant Ercan Günay.

99. The witness had been on guard duty on 20 and 24 November 1990. As part of his duties he had personally asked the detainees about their health five times during the day and the night. The inactivity displayed by Yakup Aktaş had attracted his attention. Nevertheless, when he had asked him if he was ill, Yakup Aktaş had replied that he had no problem. If a detainee complained of aches and pains medical supplies were available at the interrogation centre. Moreover, such detainees were examined by the doctor on duty at the headquarters.

100. He had not heard anything about Yakup Aktaş having been tortured or beaten while in detention and had not seen any such treatment.

xiv. Statement of Master Sergeant Mustafa Ten dated 14 March 1991

101. While on guard duty at the detention area of the interrogation centre on 22 November 1990 this Master Sergeant in the gendarmerie had checked on Yakup Aktaş in cell no. 18 a number of times. He had not observed anything unusual. Yakup Aktaş had been interrogated by Major Aytekin Özen and Master Sergeant Ercan Günay. The witness had neither seen nor heard Yakup Aktaş being subjected to torture. In the evening of 25 November 1990 he had heard that Yakup Aktaş had become unwell and had died at the hospital to which he had been taken.

xv. Statement of Master Sergeant Mehmet Yılmaz dated 13 March 1991

102. Mehmet Yılmaz, a master sergeant in the gendarmerie serving in the intelligence unit of the Mardin provincial gendarmerie, stated that he had seen Yakup Aktaş while on guard duty on 22 November 1990. On that day he had ordered the doors of the cells to be opened three times in the morning and twice in the evening and had asked the detainees if they had any problems. He had spoken to Yakup Aktaş who had been in cell no. 18. He had not observed anything unusual in his behaviour and Yakup Aktaş had not complained to him about being ill. As he had been resting in the canteen on 25 November 1990 he had heard the news that Yakup Aktaş had fallen ill and had died at the hospital. He had no information about any torture.

xvi. Statement of Master Sergeant Süleyman Altuner dated 14 March 1991

103. This master sergeant in the gendarmerie stated that he could not remember whether or not he had seen Yakup Aktaş, who had fallen ill in his cell on 25 November 1990 and had subsequently died in hospital. Yakup Aktaş had been interrogated by Major Aytekin Özen and Master Sergeant Ercan Günay. The witness had not heard anything about Yakup Aktaş having been tortured during interrogation, nor had he seen anything of the sort.

xvii. Statement of Lance Corporal Mustafa Tüylek dated 14 March 1991

104. Mustafa Tüylek, a lance corporal in the gendarmerie, stated that although he had been at the interrogation centre when Yakup Aktaş had been detained there, he had not been on guard duty at the time and so could not remember having seen Yakup Aktaş, who had been taken ill and had died in hospital.

xviii. Statement of Corporal Hüseyin Hamamcioğlu dated 13 March 1991

105. The witness, a corporal in the gendarmerie, stated that he remembered having been on guard duty at the detention area of the interrogation centre on 20 November 1990. During his turn of duty he had

let Yakup Aktaş and other detainees out of their cells at meal times and when they needed to go to the lavatory. He had not observed any signs that Yakup Aktaş might be ill.

106. He had again been on guard duty on 25 November 1990. He had gone to the room where the detainees were served their meals, which was near cell no. 18. He had heard somebody knocking on a cell door. In reply to his question, "Which number?", he had received the answer, "Number 18". He had unfastened the bolt on the door and asked what the matter was. In a very low voice Yakup Aktaş had replied that he was ill and in a bad state. Although Yakup Aktaş was standing up the witness realised that he was seriously ill and had immediately gone to inform Master Sergeant Yusuf Karakoç, the duty officer. Master Sergeant Karakoç had informed their superiors of the situation. Yakup Aktaş had been helped into a vehicle that had been summoned and was taken to the hospital. The witness had later heard that Yakup Aktaş had died either in the hospital or on the way there.

107. During the hours he had been on guard duty in the detention area he had not heard any unusual voices in cell no. 18. He had not observed anything unusual about Yakup Aktaş on the occasions he was removed from and returned to his cell, blindfolded.

xix. Statement of Private Hüseyin Bekir Günel dated 13 March 1991

108. The witness, a private in the gendarmerie serving at the intelligence unit of the Mardin provincial gendarmerie, stated that as part of his guard duty at the detention area he would let detainees out of their cell when they needed to go to the lavatory or when they went for their meals. He would also give the detainees water if they asked for it. While carrying out those duties he had not observed anything unusual about Yakup Aktaş's behaviour and the latter had not mentioned any sickness to him. Yakup Aktaş had not been taken out of his cell to be interrogated while he was on duty. He had not witnessed Yakup Aktaş being beaten.

xx. Statement of Private Ercüment Erbil dated 13 March 1991

109. Ercüment Erbil, a private in the gendarmerie, stated that he had been on guard duty for some of the time that Yakup Aktaş had been detained. While on duty, he would open the doors of the cells when detainees were served meals or water, when they needed to go to the lavatory or when they were sent to the interrogation centre. He had taken Yakup Aktaş from his cell to the interrogation room two or three times. On the occasions he had accompanied Yakup Aktaş from the interrogation room back to his cell Yakup Aktaş had been in the same condition as when he had been taken from his cell. The witness had not seen Yakup Aktaş being tortured by Major Aytekin Özen or Master Sergeant Ercan Günay. Neither had he observed any traces of torture on Yakup Aktaş's body. If

Yakup Aktaş had been tortured in the interrogation room, he would, at very least, have heard their voices. Yakup Aktaş had not been taken to the interrogation room on the last days before his death.

xxi. Statement of Private Mehmet Bora dated 13 March 1991

110. The witness was a private in the gendarmerie. He stated that he had seen Yakup Aktaş when on guard duty in the period from 19 to 25 November 1990. He had taken Yakup Aktaş out of his cell several times to take him to the lavatory, to the area where meals were served and to the interrogation room. He had not observed anything unusual about Yakup Aktaş. There had been no difference in Yakup Aktaş's appearance between the moment his cell door was opened and he was blindfolded and taken to the interrogation room and the moment he returned from the interrogation room. He had not seen Yakup Aktaş being tortured or observed any signs of torture on Yakup Aktaş.

111. On 25 November 1990 he had been on guard duty between 6 p.m. and midnight. The private serving the meals had told him that the detainee in cell no. 18 had fallen ill and said that they should inform the duty officer, Master Sergeant Yusuf Karakoç. He had gone to cell no. 18, had opened the door and had seen Yakup Aktaş sitting on a blanket. Master Sergeant Karakoç had then arrived. A private had held Yakup Aktaş by one arm and he had been taken out of the interrogation room. He remembered very clearly that Yakup Aktaş had been fine the day before. He was unable to recall whether or not Yakup Aktaş had been taken to the interrogation centre on 25 November 1990. (The Commission understood this last sentence to mean that Private Bora was unable to recall whether or not Yakup Aktaş had been interrogated on 25 November 1990.)

xxii. Statement of Private İbrahim Olgun dated 14 March 1991

112. This witness, a private in the gendarmerie, stated that he was the driver of a Renault car belonging to the interrogation centre. On 25 November 1990 he had been informed by Sergeant Major Ali Yavaş that one of the detainees had fallen ill and needed to be taken to hospital. He had helped to carry the detainee from the interrogation centre on a blanket. The detainee had been taken to the hospital in a seated position on the back seat of the car. A few minutes later at the hospital they – it is not clear from the text of the statement who are meant by “they”; presumably hospital staff – had said that the detainee had died. He had not heard anything about the detainee having been tortured at the interrogation centre.

xxiii. Statement of Major Aytekin Özen dated 20 March 1991

113. In his statement, Major Aytekin Özen is introduced as an intelligence officer serving in the Gendarme Public Order Command. He explained that following clashes between the PKK and security forces in a

village in Mardin province on 1 August 1990 a large number of documents had been seized. It had been possible to determine from the documents, *inter alia*, which people in the region, particularly in the districts of Kızıltepe and Derik, had collaborated with the PKK. Subsequently, a large number of people, including Yakup Aktaş, had been taken into custody. The task of interrogating them had been divided up between the personnel of the interrogation centre of the Mardin provincial gendarmerie. Although the witness's posting was at the Gendarmerie Public Order Command, he had been assigned to the interrogation centre in order to alleviate pressure of work and had been given the task of interrogating a specific group.

114. Ali Alay, one of the persons who had been taken into custody, had made a statement incriminating Yakup Aktaş. Yakup Aktaş was said to have given financial support to the PKK. The witness had referred the matter to the commander of the Mardin provincial gendarmerie who had instructed him to contact the Derik district gendarmerie after also informing the head of the intelligence unit. In coordination with the Derik district police force the Derik district gendarmerie had then arranged for Yakup Aktaş's arrest and had brought him to the interrogation centre on 19 November 1990.

115. Meanwhile, the witness and his assistant, Master Sergeant Ercan Günay, had interrogated Ali Alay and a person named Osman Önen, who had surrendered to custody voluntarily.

116. He had first interrogated Yakup Aktaş one or two days after his arrest. Yakup Aktaş had denied the accusations made against him by Ali Alay. Ali Alay had then been brought into the interrogation room and had been asked to relate once more his account of Yakup Aktaş's involvement with terrorists. At that point he had observed that Yakup Aktaş had suddenly started to perspire and had turned slightly pale. Yakup Aktaş had asked for water and it had been provided immediately. Although Yakup Aktaş had initially continued to say that Ali Alay was slandering him, he was sweating profusely and eventually confessed his guilt. During this time he had requested seven or eight glasses of water. The witness had asked him whether there was a reason for him drinking so much. Yakup Aktaş had replied that he was a little unwell, that he needed to drink a lot of water and could not go to sleep without having drunk a full jug of water. Because he knew that Yakup Aktaş had had a medical check prior to being taken into custody, he had not made too much of this.

117. Despite his confession it was clear that Yakup Aktaş was nevertheless attempting to conceal the involvement of others. Therefore, the witness had given Yakup Aktaş one day to reflect and sent him back to his cell.

118. The following day, which must have been either 21 or 22 November, they had again interrogated Yakup Aktaş in the presence of Ali Alay. Yakup Aktaş had been overexcited and again wanted to drink

water. Finally, Yakup Aktaş had given the name of his accomplice. The witness had thanked Yakup Aktaş for his cooperation and told him that they would not cause him any more discomfort.

119. Meanwhile, he had had a statement prepared concerning Osman Önen, Ali Alay and Yakup Aktaş, whom they had brought face to face at the beginning. He was not sure, however, if the three suspects had signed it, as the interrogation centre had been crowded and matters of signatures were generally dealt with just before detainees were transferred. He nevertheless thought that Osman Önen and Ali Alay had signed the statement.

120. On 23 November 1990 he had gone on one week's leave. While at home in Ankara on 26 November 1990 he had received the news of Yakup Aktaş's death. He had been informed that he had fallen ill and had died on the way to hospital. Nevertheless, the witness said that his conscience was clear: Yakup Aktaş had not been subjected to the slightest physical force. He was certain that neither he nor Master Sergeant Ercan Günay had done anything to precipitate Yakup Aktaş's death. He also did not think it likely that Yakup Aktaş would have been subjected to any kind of torture after 23 November. There had been more than ten ranked members of staff at the interrogation centre and it was impossible that such a thing could have been kept out of sight.

xxiv. Statement of Master Sergeant Ercan Günay dated 13 March 1991

121. Ercan Günay, a Master Sergeant in the gendarmerie, stated that he had been serving at the Mardin provincial gendarmerie interrogation centre since 18 September 1990. Together with Major Aytekin Özen he had undertaken the task of interrogating Yakup Aktaş. He did not remember interrogating Yakup Aktaş on the day the latter arrived at the interrogation centre (19 November 1990). The next day Major Aytekin Özen and himself had questioned Yakup Aktaş for one or two hours about the amount of TRL 30,000,000 which Yakup Aktaş was known to have given to the PKK. During this interrogation Yakup Aktaş had appeared frightened and apprehensive; his face had turned white and he had been a little shaky. Yakup Aktaş had rejected all their claims. The following day Yakup Aktaş had been confronted with two co-accused after which he had confessed his guilt. No kind of torture whatsoever had been used on him. The witness did not know whether Yakup Aktaş had suffered from any illness in the past. During his interrogation Yakup Aktaş had asked for water several times. He had also been a little overweight.

122. On 23 November 1990 the witness had been sent to Adana on an assignment and Major Aytekin Özen had gone on leave the same day. Since according to the procedures and distribution of tasks within the interrogation centre detainees could only be questioned by the same officers, Yakup Aktaş had not been interrogated on 23, 24 or 25 November.

xxv. Statement of Osman Önen dated 18 March 1991

123. Osman Önen was one of Yakup Aktaş's co-accused. He was asked how long he had been kept in custody at the Mardin interrogation centre, whether he had been confronted with Yakup Aktaş and if so, whether the latter had borne any signs of torture. In reply Osman Önen stated that he could not remember the exact date but that he had been taken into custody at the interrogation centre towards the end of 1990. He had been detained for nineteen days. Over a period of ten days he had been interrogated twice a day. On one occasion the blindfold he had been wearing had been partially removed and he had recognised Ali Alay. He had then been blindfolded once again and for that reason had been unable to see whether there was another person in the room. He did not know whether Yakup Aktaş had been in the room at that time but he had not seen him. His circumstances in custody had been difficult. It was as a result of this that he had made a false statement accusing Ali Alay of giving money to a terrorist.

124. He had been kept in cell no. 19. There were cells adjacent to and opposite his. He did not know whether anyone had been detained in them. After his release he had heard that Yakup Aktaş had died under interrogation at the time when he, Önen, had also been in custody. He had not heard Yakup Aktaş's voice in the interrogation centre.

(i) Report by Major Dursun Şeker dated 21 March 1991

125. This report lists the applicant, his brother, Mahmut Aktaş, and their mother, Dediye Aktaş, as complainants. The allegation investigated was that of manslaughter during torture and the accused were Major Aytekin Özen and Master Sergeant Ercan Günay. The report then lists the identities of 25 witnesses who had made statements before Major Dursun Şeker, followed by a short summary of the incident and of the statements of the accused and the witnesses.

126. The summary of the incident describes how the applicant had alleged that his brother, Yakup Aktaş, had been tortured to death by interrogation personnel of the interrogation centre of the Mardin provincial gendarmerie, where Yakup had been taken on 19 November 1990. On 25 November 1990 Yakup Aktaş had fallen ill in his cell and had died after being admitted to hospital. The summaries of the statements of Major Aytekin Özen and Master Sergeant Ercan Günay mention that they had interrogated Yakup Aktaş once and that they had confronted him with his co-accused once.

127. The report then goes on to list as "Other Evidence" the documents that had been examined by Major Şeker, including statements incriminating Yakup Aktaş, duty rosters, the record of the inspection of the interrogation centre (see paragraph 61 above), the entries in the register of the Derik health clinic concerning Yakup Aktaş (see paragraph 151 below), the medical report issued by Dr Adnan Parkan (see paragraph 152 below), the

report of the post-mortem examination and autopsy (see paragraphs 153-160 below) and the report issued by the Institute of Forensic Medicine (see paragraphs 161-164 below).

128. In the subsequent “Analysis of The Evidence”, it is stated, *inter alia*, that Major Özen and Master Sergeant Günay interrogated Yakup Aktaş once for one or two hours and that they supervised the confrontations between Ali Alay and Yakup Aktaş and between Ali Alay and Osman Önen that had been arranged for the purposes of mutual identification. In a paragraph in which reference is made to the fact that Yakup Aktaş had been diagnosed with urethritis, Major Şeker observed that according to the statements made before him, Yakup Aktaş had been excessively thirsty and had drunk a remarkable quantity of water. This section of the report also contains the following paragraph:

“During his first interrogation ... Yakup Aktaş denied that he had given financial support to the [PKK] organisation and later, when he was confronted by the person to whom he had delivered money, he confessed to the crime. The witnesses state that from that moment on the aforementioned person (that is to say, Yakup Aktaş) had been noticeably subdued, depressed and nervous. It is very probable that Yakup Aktaş had reached such a mental state as a result of his thinking that the security forces knew that he had bought five Kalashnikov guns from the gun smuggler ... and he went into an extreme mental depression and death occurred in this mental atmosphere.”

129. The report concluded that Yakup Aktaş's death had not been caused by torture, force, violence or harsh treatment and for this reason Major Dursun Şeker proposed that no criminal prosecution be instigated against Major Özen and Master Sergeant Günay.

(j) Minutes of the proceedings before the Mardin Assize Court concerning the prosecution of Major Aytekin Özen and Master Sergeant Ercan Günay

i. Court sitting on 28 January 1993

130. A pre-trial review was held on this date. The court decided, *inter alia*, to issue a rogatory letter requesting the Ankara Assize Court to obtain Major Özen's defence submissions and to issue a summons requiring Master Sergeant Günay to appear as a defendant. It adjourned the proceedings until 3 March 1993.

ii. Court sitting on 7 July 1993

131. The applicant was present and the court granted him permission to intervene in the proceedings. He was asked to state his complaint and his evidence. He stated that the deceased, Yakup Aktaş, was his brother. Yakup Aktaş had been taken by the gendarmerie for interrogation. After one week the family had received notification that Yakup had died. Yakup had not been suffering from any health problem prior to his arrest. Given that he had died unexpectedly, the family had filed a complaint as they believed that he

had been tortured to death during the interrogation. He had not personally seen evidence that Yakup had been tortured and it would have been impossible for him to do so, since the family had been denied access to Yakup while he was under interrogation. Moreover, Yakup was already dead by the time the family arrived at the hospital. He had seen Yakup's body some twelve hours after Yakup's admission to hospital. He had observed abnormal bruising and signs of beating to the outer section of both arms, the forehead and the soles of the feet. Yet shortly after Yakup's arrest a medical report had been issued, in which the presence or absence of any such signs should have been noted.

132. The applicant further confirmed that the content of his statement of 26 November 1990 to the Derik public prosecutor was correct.

133. The report of the post-mortem examination and the autopsy of 26 November 1990 and the report of the Institute of Forensic Medicine of 20 February 1992 (which should presumably read 21 February 1991) were read out. The applicant stated that he had no comments on the autopsy report but was not satisfied by the report of the Institute of Forensic Medicine. However, he did not think that there was anything else that could be done.

134. The court decided to issue a rogatory letter to the Ankara Assize Court requesting Major Özen's defence submissions and to issue a summons requiring Master Sergeant Günay to appear. It further decided to issue rogatory letters to the Assize Courts of Buldan and Pazaryolu in respect of the public prosecutors Şevki Artar and Ekrem Şendoğan who were to be asked whether, according to the autopsy report, the body of Yakup Aktaş bore any traces of torture within the eight days preceding death. Finally, the court decided to issue witness summons to the other persons whose signatures appeared on the autopsy report, including Dr Güneş Pay and Dr Erol Aksaz, and the witnesses whose statements had been taken by Major Dursun Şeker. The court adjourned the proceedings until 21 September 1993.

iii. Court sitting on 21 September 1993

135. The applicant's brother, Mahmut Aktaş, who was also an intervener in the proceedings, stated that his brother Yakup had been in custody for one week when the news of his death was received. Apart from when Yakup was detained in Derik, he had not been able to see him in detention. Yakup had not been suffering from any illnesses whatsoever. He had washed Yakup's body; there had been a wound on the forehead and traces of beating on the right side of the back and on the arms. He believed that Yakup had died as a result of torture. The report of the post-mortem examination and autopsy and the report of the Institute of Forensic Medicine were read out. Mahmut Aktaş stated that he had nothing to say about the autopsy report but that the Institute of Forensic Medicine's report was not true.

136. Counsel for the defendants stated that, in view of the present posting of his client, Master Sergeant Ercan Günay, his defence submissions should be heard by the Ankara Assize Court. The court decided to issue a rogatory letter to that effect. It also decided, *inter alia*, to instruct the Sivrihisar Criminal Court of First Instance to take a statement from Dr Adnan Parkan. It adjourned the proceedings until 23 November 1993.

iv. Court sitting on 23 November 1993

137. The court noted that a number of statements had been received from other courts in Turkey as a result of the rogatory letters that had been issued. The interveners requested that they be granted more time to study those statements. They also said that the defendants had tortured their brother, Yakup Aktaş, for three days and that when he had gone into a coma one of the defendants had taken leave and the other had been transferred to another post. Since they believed that this had been done intentionally they demanded that the defendants be arrested.

138. The court examined three witnesses: a hospital orderly, a clerk and the driver who had taken the autopsy officials to the morgue. Although all three confirmed that their signatures appeared on the autopsy report of 26 November 1990, none could remember the incident in issue.

139. The court adjourned the proceedings until 2 February 1994.

v. Court sitting on 11 May 1994

140. The interveners, including the applicant, did not attend this hearing. The court examined five master sergeants, Yusuf Karakoç, Mustafa Ten, Süleyman Altuner, Murat Gömek and Ramazan Baygeldi. They all stated that a military doctor carried out examinations every day in the detention area of the interrogation centre. Some of them added that the interrogation centre conformed to the requisite standards and that the rooms where interrogations were conducted were not equipped with sound insulation. Therefore, if Yakup Aktaş had been tortured or subjected to violence during his interrogation then the sounds of his cries and screams would have been audible outside those rooms, but they had not heard anything of that nature. According to Master Sergeants Yusuf Karakoç and Ramazan Baygeldi, the defendant Major Özen had gone on leave four or five days before the day Yakup Aktaş had died. As far as Master Sergeant Mustafa Ten could remember, Major Özen had left three to four days before that day but he was unable to recall whether the defendant Master Sergeant Günay had been at his post or out on assignment on the day in question. Master Sergeant Baygeldi said that Master Sergeant Günay had gone on an assignment two or three days before the day Yakup Aktaş died. These five witnesses confirmed the content of the statements they had made before Major Şeker after they had been read out to them.

141. The court further noted that additional statements had been received from other courts in Turkey in reply to rogatory letters. The public prosecutor and counsel for the defendants stated that the principal witnesses had been heard and that those witnesses who had not yet been heard were gendarmes who had said in their preparatory statements – the Commission assumed that “preparatory statements” meant the statements taken by Major Dursun Şeker – that they had no knowledge of the incident. They submitted, therefore, that it would be sufficient for the preparatory statements to be read out. The court accepted that submission and decided not to summon those witnesses; the preparatory statements were read out.

142. In respect of the merits of the case the public prosecutor said that there was insufficient evidence to convict and submitted that the defendants should be acquitted. Counsel for the defendants agreed with the public prosecutor's position, adding that no prosecution need have been instigated and that the Council of State had probably only decided to refer the case to court because of the fact that there had been a death. The court then decided to acquit the defendants as the charges against them had not been proved.

(k) Statement taken from Major Aytekin Özen by the Ankara Assize Court on 23 February 1993 pursuant to a rogatory letter

143. The statement was requested by the Mardin Assize Court in its rogatory letter of 28 January 1993. The decision of the Council of State of 24 June 1992 (see paragraph 44 above) was read out to Major Aytekin Özen and he was asked to submit his defence and evidence concerning the charge against him.

144. Major Aytekin Özen denied having struck Yakup Aktaş during his interrogation. Nor had he seen anybody else do so. He had gone on leave to Ankara while Yakup Aktaş remained in custody. On the third day of his leave he had been informed of Yakup Aktaş's death, and had cut short his leave and returned to his post. At a later stage one of Yakup Aktaş's relatives must have filed a complaint against him and he had become the subject of an investigation. The Mardin Provincial Administrative Council had reached a unanimous decision to the effect that he should not be prosecuted. However, the Council of State had subsequently accepted that the report of the post-mortem examination and autopsy constituted evidence against him that Yakup Aktaş's death had been caused by beating. He expressed his amazement that he had been committed for trial given that he had no stage struck Yakup Aktaş. He could also categorically affirm that Yakup Aktaş had not been beaten by Master Sergeant Ercan Günay. Finally, he confirmed that the statements he had made previously were correct.

(l) Statement taken from Master Sergeant Ercan Günay by the Ankara Assize Court on 2 November 1993 pursuant to a rogatory letter

145. The statement was requested by the Mardin Assize Court in its rogatory letter of 21 September 1993. The decision of the Council of State of 24 June 1992 was read out to Master Sergeant Ercan Günay. He made a statement in the presence of his defence counsel.

146. Master Sergeant Ercan Günay stated that he had been an interrogating officer on the date of the incident. Together with his colleague, Major Aytekin Özen, he had interrogated Yakup Aktaş, who was suspected of having provided assistance to the PKK on various occasions. However, he had not beaten Yakup Aktaş. He had then been sent to Ankara on an assignment for two or three days. Upon his return to Mardin he had learned that Yakup Aktaş had fallen ill, had been taken to hospital and had died there. Accordingly, he denied the charge against him. His counsel added that it appeared from the report of the autopsy and the report issued by the Institute of Forensic Medicine that the exact cause of Yakup Aktaş's death could not be established. In spite of this the Council of State had decided that the defendants should stand trial. However, his client had not had anything to do with the offence with which he had been charged.

(m) Statement taken from Public Prosecutor Şevki Artar by the Buldan Assize Court on 16 September 1993 pursuant to a rogatory letter

147. The statement was requested by the Mardin Assize Court in its rogatory letter of 12 July 1993. Public Prosecutor Şevki Artar stated that the public prosecutor's office had been informed that a person detained at the investigation and interrogation unit of the Mardin provincial gendarmerie had fallen ill and died as he was being transported to hospital. Together with Public Prosecutor Ekrem Şendoğan he had gone to the Mardin State Hospital where he had attended the autopsy that had been performed by medical experts. He confirmed the content of the relevant report. As was mentioned in that report, during the external examination of the deceased, bruising, possibly resulting from trauma, had been observed on the right arm, on the inside of the right arm and near the right wrist. Other than the marks indicated in the report, they had not observed any other signs which could be attributed to torture.

(n) Judgment of the Mardin Assize Court dated 11 May 1994

148. The judgment stated that evidence had been taken from the following persons: Master Sergeants Yusuf Karakoç, Mustafa Ten, Süleyman Altuner, Murat Gömek, Ramazan Baygeldi and Üzeyir Nazlım; Lance Corporals Ali Yavaş, Ferruh Çileşoğlu, Mehmet Yılmaz and Mustafa Tüylek; Private Hüseyin Bekir Günel; Police Constable Alaattin Aydın; Captain Mehmet Göçmen; Colonel Enver Uysal; Private İbrahim Olgun; Senior Major Haşim Üstünel; and Corporal Hüseyin Hamamcıoğlu. All

these witnesses had testified that the deceased had been detained in order to be interrogated, that the military doctor looked after detainees on a daily basis and that detainees were referred to hospital if they were ill, and that they had never seen any detainees being ill-treated.

149. The Mardin Assize Court referred to the finding of the post-mortem examination that Yakup Aktaş presented cyanosis covering the head and various superficial ecchymotic areas on the head, both arms and the back. Reference was further made to the report of the Institute of Forensic Medicine which concluded that it was not possible to determine the exact cause of death.

150. The defendants were acquitted since it had not been possible to obtain wholly incontrovertible evidence that would allow the court conscientiously to decide that the defendants had caused death by torture.

(o) Medical and expert reports concerning Yakup Aktaş

i. Extracts from the register of the Derik Health Clinic

151. The name Yakup Aktaş and the comment “urethritis” are included in the entries for 22 March and 2 October 1990 as nos. 4,489 and 13,452 respectively.

ii. Medical report dated 18 November 1990 issued by Dr Adnan Parkan at the Derik Health Clinic

152. This report states that Yakup Aktaş had been brought to the health clinic and that on examination had not presented any signs of beating, or of being subjected to force or violence.

iii. Report of the post-mortem examination and autopsy dated 26 November 1990

153. This report states that following information received by telephone at 8.30 p.m. on 25 November 1990 to the effect that an individual had died whilst being taken to Mardin State Hospital after being taken suddenly ill at the investigation and interrogation unit at the Mardin provincial gendarmerie headquarters, the chief public prosecutor had, in view of the seriousness of the incident, instructed Public Prosecutors Şevki Artar and Ekrem Şendoğan to go to the hospital where they arrived at 10 p.m. An expert medical witness, Dr Güneş Pay, was present and, again owing to the seriousness of the matter, a second expert medical witness, Dr Erol Aksaz, was immediately appointed.

154. The body was identified as being that of Yakup Aktaş by Captain Mehmet Göçmen, commander of the Mardin provincial central gendarmerie. Captain Göçmen stated that Yakup Aktaş had been detained on suspicion of involvement with the PKK. Captain Göçmen had been

informed that Yakup Aktaş had suddenly fallen ill at approximately 7.30 p.m. and had been taken to the Mardin State Hospital, where he died.

155. Subsequently, the clothes were removed from the body and a photographer brought in from gendarmerie headquarters took a number of photographs from various angles.

156. On external examination of the body the head was observed to be covered with a mask-like mauve discoloration (cyanosis) starting from the upper section of the thorax, 15 cm below the jaw towards the thorax, and covering the complete surface of the neck including the ears and the back of the neck. The head was examined manually and the bone structure was observed to be intact. In the frontal section of the forehead, 3 cm above the middle of the left eye-brow, was a one- or two-day-old graze measuring 1 x 0,5 cm consistent with trauma. The examination of the neck revealed normal articulation with no breakage or pathological disorder.

157. On the outer section of the left arm humerus and parallel to the axis of the body an area of ecchymosis measuring 10 x 2 cm consistent with blunt trauma was observed. The left forearm and hand, including the fingers, were covered with extensive ecchymoses. On the outer section of the upper right arm humerus and parallel to the axis of the body was an area of ecchymosis measuring 4 x 1 cm consistent with trauma; 5 cm below this was another area of ecchymosis 4 x 2 cm in size. Under the right armpit and starting near the back was a clean cut, 8 cm in length and 3 cm in width, perpendicular to the axis of the body and trailing towards the middle of the armpit. There was a further ecchymotic area on the right forearm near the wrist. One half of the outer surface of the left foot was covered with a widespread ecchymotic area. The soles of the feet were covered with dirt and calluses. The manual examination of the back revealed an 8 cm long scar, seven to eight days old, in the shape of a half moon on the right shoulder blade. *Rigor mortis* had started to develop. With the exception of the findings stated above, there were no other pathological diagnoses or signs of injuries caused by sharp, pointed instruments, firearms or otherwise.

158. On the basis of these findings the doctors observed that the cyanosis covering the head could be consistent with a heart attack or with another incident occurring either before or after death. The findings of the external examination, none of which were by themselves capable of causing death, did not allow the exact cause of death to be established. For this reason it was decided to perform a full autopsy. The expert medical witnesses estimated that death had occurred three to four hours previously.

159. On the subsequent internal examination of the head, the thorax and the abdomen no abnormalities were observed. The urethra was found to be positioned normally and no pathological finding was made in this respect. In view of the failure to establish the exact cause of death, it was decided to send tissue samples from the body to the Institute of Forensic Medicine in

order for the exact cause of death to be determined. Sections from both lobes of the brain, the whole heart, sections from both lungs, sections from the liver and spleen, the whole of the stomach and its contents, a section of the intestine and its contents, sections from both kidneys and a blood sample were taken, placed in glass containers with a formaldehyde solution and sealed.

160. The time indicated at the bottom of the report is 2.50 a.m. It is signed, *inter alia*, by both public prosecutors and both doctors.

iv. Report dated 21 February 1991 issued by the Institute of Forensic Medicine

161. This report, signed by Professor Dr Özdemir Kolusayın and Dr Hüseyin Sarı, refers to the letter of the Mardin public prosecutor dated 29 November 1990 in which it is requested that the exact cause of death be established. There then follows a summary of the report of the post-mortem examination and autopsy (see paragraphs 153-160 above).

162. In the macroscopic examination of the internal organs, performed at the morgue specialist department of the Institute of Forensic Medicine, the heart was found to weigh 400 grams, no peculiarities were observed in the samples other than hyperaemia, and the lungs were found to be of a hard and solid consistency and of a multicoloured appearance.

163. The report issued by the specialist chemical analyses office dated 28 December 1990 stated that no alcohol, tranquillisers, stimulants or toxic materials had been found in the internal organs.

164. According to the histopathological report dated 12 February 1991 there had been post-mortem changes to the heart, liver, kidneys and brain; hyperaemia and acute swelling were observed in the lungs; the septal capillaries were full of red blood cells; the alveolar septa were torn in places and the alveolar cavities had expanded.

v. Report of Dr Christopher Mark Milroy dated 3 April 1995

165. This report was commissioned by the applicant and submitted on 2 May 1995. Dr Milroy was a registered medical practitioner, Senior Lecturer in Forensic Pathology at the University of Sheffield, United Kingdom, and Consultant Pathologist to the British Home Office.

166. On the basis of the report of the post-mortem examination and autopsy and the report of the Institute of Forensic Medicine Dr Milroy concluded that no natural disease had been found to contribute to or account for death. The body had shown injuries to the arms and foot which were in keeping with blows to those areas. The extensive bruising of the left forearm could have been due to the deceased having used his arms to try and ward off blows. The injuries in these areas were referred to as defence injuries which typically involved the forearm and hands. They might also involve the feet if the feet were used to shield blows. The cut to the right

arm suggested that it had been inflicted with a sharp implement such as a knife.

167. The injuries appeared to have been inflicted whilst the deceased was in custody. The scar described as being seven to eight days old could have been inflicted during custody. Given that dating of scars was not accurate this injury could have been more recent.

168. In the absence of any natural disease process to cause death and with the presence of obvious injuries which were not self-inflicted, the possibility that the deceased was a victim of an unnatural disease process had to be seriously considered. Poisoning as a cause of death could be excluded from the toxicological examination performed. However, there were a number of possible mechanisms to account for the appearances. The first of these was traumatic or crush asphyxia. In this type of death the chest was pinioned in such a way as to prevent breathing. Crucifixion caused death in a similar manner, as did so-called Palestinian hanging where the hands were tied behind the back and the body was suspended from the tied arms which would cause respiratory failure if the position was held for a sufficient length of time. The second possible mechanism was the placing of a plastic bag over the face or head, which was well recognised to lead to death. This would not leave any specific external signs. Finally, in a choke hold or carotid sleeper an arm was held across the neck. In choke holding it was held across the front of the neck, frequently damaging the structures in the neck, particularly the laryngeal cartilages. With carotid sleeper a similar hold was placed, but with the neck being held in the crook of the arm so that the carotid arteries were occluded. Application of either hold could prove fatal.

169. Dr Milroy did not accept that Yakup Aktaş had died as a result of a heart attack. In every death the heart would stop, but this was a mode of death and not a cause of death. Moreover, neither in the autopsy nor in the microscopic (histopathological) examination had any heart disease been found. In the absence of natural disease and with clear injuries present on the deceased, death as a result of torture must be a very strong possibility in this case.

170. In respect of the autopsy Dr Milroy remarked that it was not clear to what extent the physicians performing it had had training and experience in forensic pathology. The autopsy report did not appear to contain a detailed description of the internal appearance of the neck. This was a major omission in detailing a death in custody, especially in view of the description of cyanosis of the head and neck. Moreover, injuries in persons having died whilst in custody should be documented and photographed and unlawful methods of killing had to be considered. It was not clear that such a thorough investigation had been conducted in this case. The inability of the doctors performing the autopsy to conduct a microscopic examination, which was an integral part of any post-mortem examination, suggested that

they may have lacked the necessary experience to have conducted this examination.

(p) Photographs

171. The photographs show the naked body of a man laid down on what is, presumably, a mortuary slab. The colour reproduction in particular is of poor quality, tingeing everything with a green hue. The first photograph shows part of the chest as well as the left side of the face. A mark is visible on the forehead, between the left eyebrow and the hairline. Cyanosis in the shape of a mask cannot be observed but the left ear appears bluish.

172. In the second photograph, the body lies on its left side and the back of the body is portrayed. It is not possible to see the whole of the right shoulder blade. No half-moon shaped scar is visible. The third and fourth photographs show the body lying on its back. For the third photograph, the photographer would have stood near the feet of the body; the feet are not visible and of the head only the tip of the nose and the bearded chin can be observed. There appears to be a reddish area of discoloration on the left forearm. For the fourth photograph, the photographer would have stood to the right of the body near the knees. The right side of the face, part of the neck and chest, the right arm, a small part of the left forearm, and the rest of the body down to almost the top of the knees can be seen. No cyanosis is visible. On the outside of the right arm there appears to be a welt-like reddish mark stretching down from the middle of the shoulder to halfway to the elbow. The reddish area of discoloration on the left forearm can also be observed in this photograph.

2. Oral evidence

(a) Witnesses heard by the Commission

173. The evidence of the six witnesses heard by the Commission's Delegates may be summarised as follows:

i. The applicant

174. The applicant stated that he had been born in 1970 and was a lawyer by profession. Apart from Yakup, he had seven other brothers and sisters. He was the second youngest.

175. The last time he had seen his brother Yakup had been one week prior to the latter being taken into custody. Yakup had seemed to be in good health and had in fact never had an illness. He had not heard of an illness called urethritis.

176. He had been in Diyarbakır, where he was studying, when his elder brother had informed him of the fact that Yakup had been taken into

custody. He had immediately returned to Derik and had arrived home on the same day as Yakup had been apprehended.

177. Yakup had been a tradesman and a delegate of the True Path Party (*Doğru Yol Partisi*, “DYP”). He had never been arrested before.

178. The applicant had not seen Yakup in detention. During interrogation a detainee was not allowed any visitors for seven days. The family had gone to Mardin to try and see Yakup many times but had not been allowed to do so. He had gone to the public prosecutor's office in Mardin but this had not resulted in permission being granted to the family to see Yakup and neither had any information of the charges brought against Yakup been forthcoming. Members of the DYP had tried to intercede, but to no avail. At the Derik gendarmerie station the family had been told not to worry as Yakup would be released.

179. A week after Yakup's arrest, his uncle Süleyman had been contacted by the Derik gendarmerie station with the news that Yakup's body could be collected from Mardin. The family had brought the body home on 26 November 1990 and this was where he had seen the body. He had noticed that certain parts had been removed for the autopsy, including parts of the brain. Apart from the scars caused by that, he had seen the mark of an injury on Yakup's forehead. In his opinion this injury had been caused by a blow, as it did not have the appearance of a boil or of an injury that might have come about as a result of scratching, for example. There had also been marks on the hands, under the soles of the feet and on the elbows.

180. Later that day he had gone to the public prosecutor in Derik stating that Yakup's was no normal death. Although at that time he was not familiar with the content of the health report drawn up by Dr Parkan (see paragraph 152 above), he knew that every person taken into custody would first be taken to the health centre for an examination. He did not know what kind of tests this examination entailed. When Yakup's body had been released to his uncle Süleyman, officials had said that Yakup had died of a heart attack. The family had not believed this and he had therefore requested another autopsy. Asked why he had not told the prosecutor of the wounds he had seen on Yakup's body, he said that this must have been because he had been in shock but also because the prosecutor had not asked him about it. Nevertheless, he had clearly stated that Yakup's death had been brought about by torture. He had read and signed the record of his statement to the prosecutor.

181. Yakup's body had remained at the house for one night and the burial had taken place the next day. He conceded that the text of his statement to the HRA (see paragraphs 52-54 above), which he had drawn up himself, was somewhat ambiguous. His family had not been prevented from burying Yakup but pressure had been brought to bear on them to hold the funeral on the same day the body was delivered to the family, that is to say 26 November 1990. This had been because the authorities feared trouble.

However, the family and the district chairman of the DYP had pleaded with the chief superintendent of police to be allowed to hold the funeral the next day so that the body could be kept at home for one night in accordance with local custom. There had been security forces all over Derik until the body had been buried. Neither a delegation of the HRA nor the press had been allowed to attend the funeral.

182. Major Dursun Şeker, who had been appointed investigator by the Emergency Region Governor, had summoned his mother, his brother Mahmut and himself to Derik police station on 14 March 1991 to take statements from them. Although as an investigator Major Şeker was supposed to put questions objectively, the interview had not been conducted in such a manner at all. He felt that Major Şeker's questions had been designed to protect Major Şeker's own personnel and to cover up the incident. He felt that psychological pressure had been brought to bear on him. For instance, Major Şeker had asked questions like, "Why are you making a complaint? Why do you not believe that your brother died of a heart attack? Why do you not believe that the cause of death is not torture?" Major Şeker had further commented: "There is no need for you to complain. We would not do such a thing"; and also: "It is wrong for you to think like that about security forces personnel. The allegations of torture are wrong."

183. Major Şeker had not asked him whether he had seen Yakup's body or what its condition was, but both his mother, his brother Mahmut and himself had told Major Şeker that Yakup's death was a result of torture. It had been his brother Mahmut who had told Major Şeker that Yakup had had a small pustule on his penis for which he had received medical treatment, as the applicant had not been aware of this previously. When the record of his statement to Major Şeker (see paragraphs 66-69 above) was put to him, he denied having said to Major Şeker: "If death has occurred because of natural causes, it is God's will". Yakup had been a very healthy man who would not have died of natural causes within a week and it was therefore not possible that he would have described Yakup's death as God's will. Moreover, why would he have said such a thing when only two months prior to that he had complained to the public prosecutor of torture? Therefore, the record of his statement to Major Şeker was not completely accurate. He had been told to sign the record and had not read it.

184. Subsequently, the Provincial Administrative Council had decided that no prosecution was to be instituted. That decision had been overturned by the Council of State which had referred the case to the Mardin Assize Court. Although according to the law that court had jurisdiction *ratione materiae* as well as *ratione loci*, it had declined to exercise it, for the sole purpose of delaying the proceedings. Following a decision by the Ankara Assize Court that it had no jurisdiction either, the Court of Cassation had decided that it was the Mardin Assize Court which was the competent court to deal with the case. However, in the meantime two years had passed.

185. He had been an intervening party in the criminal proceedings and had attended many hearings. He characterised the trial as disorganised and said that the case had not been actively prosecuted. It was his opinion that the two accused ought to have been in custody while the trial was proceeding but the public prosecutor had told the court that it was not necessary to arrest the two men. In fact, the accused had not attended court even once to give evidence and on some occasions their counsel had also failed to attend. Most of the witnesses had moved to different places and their testimonies had not been obtained. In spite of all the available evidence the two accused had been acquitted.

186. It was put to him that, despite his objections voiced to the Derik public prosecutor on 26 November 1990, he had told the Mardin Assize Court on 7 July 1993 that he had nothing to say about the autopsy report or the report of the Institute of Forensic Medicine. He explained that although the report of the Institute of Forensic Medicine had not satisfied him, as he had also pointed out to the Assize Court, according to the law there was no organisation above the Institute of Forensic Medicine. Furthermore, by that time three years had passed and his family had not wanted another autopsy carried out.

ii. Mahmut Aktaş

187. As reported by the Commission, several times during his testimony this witness became very emotional and cried.

188. Mr Mahmut Aktaş said that he had been born in 1963. He was an elder brother of the applicant and Yakup Aktaş. At the relevant time, Yakup had been married and had a six-month-old baby. Yakup's widow and child continued to live with him. Following the death of their father in 1987 Yakup and himself had become the heads of the family, looking after the younger brothers and sisters who were still at school. They had lived in the same house. He had been very close to Yakup. They had both been traders and every day they used to go together to the marketplace, where they both had business premises. They had both enjoyed the sport of wrestling and would frequently wrestle together of an evening. Although he was older than Yakup, Yakup had been the stronger.

189. He had last seen Yakup alive on the morning after his arrest. Yakup had been held overnight at the Derik gendarmerie. He had gone there and had found Yakup sitting in the canteen. He had observed Yakup to be in good condition. He had brought Yakup breakfast but because Yakup had been handcuffed he had only given him a glass of milk. Yakup did not know why he had been arrested. He had asked Yakup whether the gendarmes had done anything to him, which Yakup had denied. Then a gendarme had taken Yakup out of the canteen and half an hour later he had observed Yakup being put in a vehicle and driven away.

190. Like Yakup, he was also a delegate of the DYP. He had gone to see the district chairman of the DYP who had found out from the gendarmerie that Yakup had been taken to Mardin. Although the family had attempted to gain access to Yakup this had been refused.

191. At 6 a.m. on Monday 26 November 1990 – although he said 25 November 1990, the Commission considered that this was a mistake since 25 November 1990 was a Sunday – Mr Mahmut Aktaş had gone to the Provincial Governor's office in Mardin, thinking that would be a likely day for detainees to be brought before the court and hoping that he would be able to see Yakup if that happened. Around midday he had been approached by an acquaintance from Derik who had told him that Yakup had died and his body taken to Derik.

192. He had subsequently learned that at around 7 a.m. the gendarmes had come looking for him. As they had not found him at home, they had gone to his uncle Süleyman who had been taken to Mardin State Hospital. At the entrance to the hospital his uncle had been met by the captain of the gendarmerie who had asked what relation Süleyman was to Yakup. When Süleyman said that Yakup was his elder brother's son, the captain had extended his hand and had said, "Please accept my condolences. Yakup died yesterday evening." Upon this, his uncle had made telephone calls to Derik and all the relatives and many acquaintances had immediately rushed to Mardin: almost half the population of Derik had gone there, including fellow shopkeepers who had closed their shops. In view of the large number of cars, the security forces had brought the body back to Derik under military escort.

193. When Yakup's body had arrived home the chief superintendent of police had demanded that it be buried immediately. Since he had not yet returned from Mardin, his brother had refused. Upon his return in the evening they had pleaded with the chief superintendent, saying that there was not enough light left to arrange a funeral that night.

194. Yakup's body had been laid out in the house. He and the *imam* had washed the body. Yakup's forehead, above the left eye, had sunk in and appeared as if it had been hit with a piece of metal. The shoulders were bruised and had turned purple and black. On the right hand side of the lower back there had been a mark in the shape of a six-day-old new moon. There had been red and black bruising on the arms and on the back of the legs, from the calves down to the lower legs. There had been blood coming from the tip of a toe. The left hand side of Yakup's face was all bruised.

195. He had not accompanied his younger brother to the public prosecutor but another brother had done so. He had stayed behind to receive the people coming to express their condolences.

196. There had been no problem with Yakup's health or strength. On the day of his arrest, Yakup had been cutting firewood.

197. In March 1991 the witness had been summoned to the police station, together with his mother and brother Eshat. There, Major Dursun Şeker had not asked about the injuries he had seen on Yakup's body but only if Yakup had had an illness. The witness had replied that he had not and had in fact been stronger than he was. Major Şeker had said that Yakup had visited the health centre in relation to a urinary problem. He had said to Major Şeker that this might have been the case. He had also told Major Şeker that Yakup had been murdered by torture and that he wanted the perpetrators prosecuted. The witness said to the Delegates that even if Yakup had gone to the doctor's with a urinary problem this had not been around the time of his arrest.

198. He denied having said to Major Şeker that if Yakup's death was the result of natural causes this would have been God's will. He had not dared or considered reading the record of his statement when Major Şeker had given it to him to sign.

iii. Public Prosecutor Şevki Artar

199. Public Prosecutor Şevki Artar stated that he was born in 1961. In November 1990 he had been working as public prosecutor in Mardin. He had left Mardin in 1991.

200. He remembered having attended the post-mortem examination and autopsy that had been performed on Yakup Aktaş's body on 25 November 1990, although he had no clear recollection of the details. He had been telephoned at home by the gendarmerie and been informed that a person had become ill while in custody and had died on the way to hospital.

201. In view of the importance of the incident he had contacted the chief public prosecutor who had instructed him to have a second public prosecutor attend the autopsy also. The seriousness of the incident, referred to in the beginning of the report of the post-mortem examination and autopsy (see paragraph 153 above), had lain in the fact that a person had died while in the custody of the security forces and also in the fact that this kind of incident could cause speculation. He illustrated this by relating how previously there had been speculation that terrorists who had surrendered to the authorities had been killed by the security forces when they had in fact been killed by other terrorists. Moreover, there had been allegations to the effect that when an autopsy report was drawn up by a public prosecutor, only some of the findings would be listed and certain matters would be omitted altogether. If two prosecutors attended, they could act as witnesses for each other if the need arose.

202. The four photographs submitted by the Government (see paragraphs 171-172 above) were shown to him and he was reasonably certain that the body depicted in the photographs was that of the man on which he had performed the post-mortem examination on 25 November 1990. They had been taken by the photographer of the Mardin provincial

gendarmérie. The negatives would usually be kept at the offices of the photographer's employer.

203. In a post-mortem examination it was the public prosecutor who would dictate the findings, drawing on the expertise of the doctor present. However, an autopsy would be performed by a doctor. In the present case, it had not been possible to determine the exact cause of death from the post-mortem examination, although the doctors had suggested at the end of the examination that the death could have resulted from a heart attack. For this reason it had been decided that a full autopsy should be performed. As the exact cause of death had not appeared from the autopsy either, a joint decision had been taken to send tissue samples from the body to the Institute of Forensic Medicine.

204. Although they had been able to observe in the process of the autopsy that the heart had been of normal appearance, he did not know whether this meant that cardiac failure had been ruled out. He did not agree with the suggestion that by the end of the autopsy the doctors and he himself would have had good grounds for suspecting that death had been caused by beating. On the contrary, the doctors had determined during the post-mortem examination that the injuries observed on the body could not have constituted the cause of death.

205. He was not aware that the form of torture known as "Palestinian hanging" could lead to death by asphyxiation. As he had never heard of this form of torture, he did not know whether Yakup Aktaş's injuries were consistent with somebody having been subjected to such treatment.

206. If, in the course of the post-mortem examination, any opinion, provisional or otherwise, had been expressed as to the possible cause of the blunt traumata with which some of the observed areas of ecchymosis were consistent, this would have been recorded in the report. Given that such traumata could have many different causes he did not think it likely that the doctors would have been able to determine their exact cause from a post-mortem examination. Forensic experts might be able to establish the exact cause, and this might also be determined in a subsequent judicial investigation. Asked whether it had not occurred to him to enquire of the doctors whether the marks on the body were consistent with ill-treatment while in custody, he said that they had probably assumed that this would be determined by the subsequent investigation.

207. When asked whether it would not have been extremely important to find out immediately whether or not there had been any instrument or object present in the place of detention capable of having produced the injuries found on the body, he said that the cause of those injuries had not yet been established. In reply to the subsequent question whether a search for an object capable of producing such injuries was not precisely how the cause of the injuries might be established, he conceded that this was probably the case. Given that he had had no jurisdiction in the matter, however, he had

not given an instruction for the interrogation rooms at Mardin provincial gendarmerie headquarters to be inspected. In any event, it had been established that these injuries were not the cause of death.

208. He had attended the post-mortem examination and the autopsy in his capacity of public prosecutor because time had been of the essence. However, pursuant to Article 4 § 1 of Decree no. 285 establishing a state of emergency regional governorate it was not him but the Mardin Provincial Administrative Council which was the competent authority to investigate the incident. He was familiar with the fact that one of Yakup Aktaş's brothers had lodged a complaint with the Derik Public Prosecutor's Office. The complaint had been transferred to him because the Derik Public Prosecutor had no jurisdiction in the matter. However, the incident would have been investigated regardless of whether or not a complaint had been brought.

209. On 29 November 1990 he had issued a decision of lack of jurisdiction in which he confirmed that the Mardin Public Prosecutor's Office had no jurisdiction. He had transferred the file to the Mardin Provincial Administrative Council. In his opinion, the most important part of the investigation had already been carried out by that stage, namely the examinations to establish the exact cause of death. After that, the only thing left to do was to take statements from witnesses and suspects.

210. In its investigation, the provincial administrative council had the same powers as a public prosecutor. He did not know at what stage the Mardin Provincial Administrative Council had been alerted to the incident – it might have been informed at the same time as he. In proceedings before the provincial administrative council an investigator would be appointed who was responsible for the collection of evidence. He thought that in a case like the present the investigator would not be a member of the gendarmerie in view of the fact that the case involved the gendarmerie.

211. He had only found out that a criminal prosecution had been instituted when he had been asked to testify by a rogatory letter at his new post in Buldan. The Mardin Assize Court had requested the Court in Buldan to take his statement in order to check the accuracy of the autopsy report and to confirm his signature.

iv. Professor Dr Özdemir Kolusayın

212. Professor Dr Kolusayın had been an expert in forensic medicine since 1977. He was not a pathologist. He had become a professor in 1988. From 1975 until 1982 he had worked at the morgue specialist department of the Institute of Forensic Medicine, performing autopsies in an expert capacity. From 1982 until 1992, and therefore at the time relevant to the present case, he had been the administrator of the morgue specialist department. From 1992 until 1996 he was President of the Institute of Forensic Medicine ("the Institute").

213. The witness was asked to explain certain parts of the report issued by the Institute on 20 February 1991 which bore his signature. He confirmed that the findings of the post-mortem examination and autopsy performed in Mardin had been set out at the beginning of that report.

214. In relation to the findings of the post-mortem examination he explained that a “mauve coloured cyanosis” was a dark blue discoloration of the skin. “Thorax” meant chest. An ecchymotic area referred to bruising, ecchymoses constituting the proof of a blunt trauma. The axis of the body was the vertical line that passed through the centre of the body. The humerus was the bone of the upper arm.

215. The hyperaemia, observed in the macroscopic examination of the tissue samples of the internal organs, referred to the appearance of the organs which contained more than the normal amount of blood. This in itself could have many causes, such as illness or poisoning.

216. After the macroscopic examination the samples had been prepared for microscopic examination and sent to a pathologist. The changes to the heart, liver, kidneys and brain that had occurred after death had been observed in this histopathological examination. It had further revealed hyperaemia in the lungs as well as acute swelling, meaning expansion, of the alveoli in particular. In the alveolar septa, that is the walls separating the alveoli, the capillary walls had been enlarged and had contained great quantities of red blood cells. In some places the alveolar septa had been ruptured, causing the alveolar cavities to enlarge. These were not changes that would occur after death. The rupturing of alveolar septa could occur in patients suffering from emphysema or chronically obstructed lungs, but also in persons who had met with a violent death or, as it was known in forensic medicine, a forcibly induced death such as strangulation, hanging or pressure exerted on abdomen or chest. However, in the case of a forcibly induced death one would expect to see red blood cells in the alveolar cavities in addition to tears in the septa, and this had not been observed.

217. The report did not admit of a conclusion as to whether the swelling of the lungs had been due to a disease or had occurred after death. Given that it was limited to the breakdown at cell level it could have been caused by cells decomposing. The fact that the lungs were of a hard and solid consistency had pointed to pneumonia but the histopathological examination had not revealed any infected cells which would have supported such a finding. Despite the fact that the heart at 400 grams had been observed to have been abnormally enlarged, the death had not been attributed to a disease.

218. The public prosecutor at Mardin had requested that the exact cause of death be established. As the findings of the examinations had not revealed very specific information it had not been possible to determine the exact cause. Even in the most advanced centres of forensic medicine approximately 5% of autopsies were inconclusive. Prior to 1990 they would

have referred the question of the cause of death to the First Specialist Committee of the Institute if they themselves had been unable to establish the cause of death. However, the policy had been changed and they had been advised that as long as the public prosecutor did not request it, they should not send their reports to this Committee but rather evaluate their own findings and send them to the office of the public prosecutor. If the public prosecutor had only asked for the cause of death, as opposed to the exact cause, the Institute would have provided him with possible causes. In view of the breakdown in the heart and the septa, the witness suggested that death had possibly, but without certainty, been due to heart failure.

219. Furthermore, the Institute could only work on the basis of the information with which it was provided. In the present case, they had been told that Yakup Aktaş had suddenly fallen ill while in detention and had died in hospital. If death had occurred at the place of detention its cause might have been tied to mechanical asphyxia. Mechanical asphyxia was death caused by prevention of breathing by mechanical pressure. Typical examples would be hanging, strangulation by hand or rope, and death caused by pressure on the abdomen/chest. In the latter form of asphyxiation cyanosis of the face, resembling a mask, could appear.

220. When it was pointed out to the witness that according to the report of the post-mortem examination and autopsy Yakup Aktaş had died on the way to hospital (see paragraph 153 above) rather than at the hospital as mentioned in his report, he explained that he must have relied on the information contained in the official summary of the incident compiled by the public prosecutor which would have been attached to the autopsy report when it was sent to the Institute.

221. The marks observed on the body were not from the kind of violent trauma that could cause death. The signs of trauma described in the report were superficial: a skin abrasion on the forehead, ecchymoses on the arms. In the case of severe trauma the ecchymoses would not have been on the surface and there would have been broken bones and internal haemorrhaging.

222. Asked whether the extensive bruising on the left forearm and the hands were consistent with Yakup Aktaş having used his arms to try and prevent blows from striking the rest of his body, the witness said if the bruising had been caused by numerous blows he would have expected there to be spaces between the ecchymoses. He explained that blows delivered by a cane or a stick would result in ecchymoses in the shape of lines, and in the shape of railroad tracks if delivered by a truncheon.

223. The cut described in the report of the post-mortem examination would have been inflicted by an implement with cutting properties. In his estimation, the cut must have been inflicted less than seven or eight days previously, since it should have healed within seven days.

224. When the report was drawn up he had not had access to the photographs taken in Mardin; otherwise they would have been mentioned. On being shown the photographs, the witness remarked that the cyanosis described in the report of the post-mortem examination was not visible. In addition, in deaths caused by heart or lung failure the cyanosis might not be as large as a mask but would be visible on the ears and lips. On the body in the photographs the lips were pale. Also, some of the ecchymoses described in the post-examination report were visible, but not all.

225. Since there was no visible deformation of the head the skull did not appear crushed as alleged by the applicant in his statement to the HRA (see paragraph 54 above). Nevertheless, it would have been possible for the applicant to think that the skull had been fractured if he had seen the body after the autopsy, during which the bony part of the skull had been removed.

226. He confirmed that in every forensic autopsy the neck should be examined internally.

v. Dr Hüseyin Sarı

227. Dr Hüseyin Sarı stated that he had been born in 1960. At the beginning of 1991 he had been working as an expert of forensic medicine at the morgue specialist department of the Institute of Forensic Medicine.

228. At the morgue specialist department two types of work were carried out: autopsies, and examination of internal organ samples sent to the department from elsewhere. In the course of autopsies performed by the department photographs would be taken. No general guidelines existed as to how such photographs should be taken; whether, for example, maximum contrast should be shown to delimit areas of discoloration. Those photographs that were considered necessary as evidence later on would be taken. However, it was rare for internal organ samples to be accompanied by photographs.

229. He confirmed that in the present case the Mardin public prosecutor had requested the exact cause of death to be established. However, it was not the case that a public prosecutor would ever ask for a possible or probable cause of death. Therefore, he would have to be certain of the cause of death before offering his opinion. According to international medical literature between 2% and 8% of autopsies were inconclusive. He estimated that the percentage of inconclusive autopsies at the Institute would lie somewhere between those two figures.

230. He described cyanosis as a lesion related to an increased amount of carbon dioxide in the blood. It could only be observed visually and could not be detected by examining samples of skin tissue. Cyanosis did not only occur after death, but in cases where it had occurred before death it had to be clinically verified since the changes of gases which took place after death could result in erroneous positive findings. Therefore, a post-mortem evaluation alone did not always give the correct result and could give rise to

the suspicion that the deceased had been suffering from a disease or that death had been caused by asphyxiation.

231. Asked if there was a disease which could cause the lungs to be of a hard and solid consistency and of a multicoloured appearance, as described in the Institute's report, he said that these findings had been made in the macroscopic examination and pointed to lung oedema or pneumonia. A histopathological examination was required to distinguish oedema from pneumonia. In the present case, the histopathological examination had not revealed anything to support those findings. In any event, the fixative used to prevent the disintegration of the internal organs would lead to a hardening of those organs.

232. Although there had thus been no findings made of a disease this did not necessarily lead to the conclusion that the cause of death had been unnatural. For example, the heart, liver, kidneys and brain had undergone post-mortem changes and had not been evaluated. Post-mortem changes occurred for two reasons: one being the time that had elapsed between the death and the autopsy and the other a mishap in the course of transportation of the tissue samples. If the proper fixative was used and proper transportation procedures followed, such a sample would not undergo any change.

233. The marks of the traumata described in the report of the post-mortem examination had been rather small and simple, and most of them had been located on the arms and legs. In his opinion, the cause of death could not be determined from those traumata alone.

234. In all autopsies an internal examination of the neck would be carried out.

vi. Dr Güneş Pay

235. Dr Güneş Pay said that he had been born in 1967. He had graduated from medical school in August 1990. As part of his medical training he had had one or two months' training in forensic medicine. Only those students wanting to specialise in forensic medicine would be given extensive training. In November 1990 he had been working as a general practitioner at the Mardin State Hospital.

236. The witness confirmed that he had participated in the post-mortem examination and autopsy on the body of Yakup Aktaş and that he had signed the report dated 26 November 1990. Dr Aksaz, with whom he had performed the autopsy, was a surgeon. Since the autopsy had been performed seven years previously he had no clear recollection of the events and based his replies mainly on the content of his report. Moreover, at the present time he was specialising in neurology, not forensic medicine, and it had been years since he had last performed an autopsy.

237. Although he could not remember exactly, he assumed that he must have participated in other autopsies before the one which he performed on

the body of Yakup Aktaş. This would be part of a general practitioner's duty if there was no expert in forensic medicine at the place where the general practitioner was performing his obligatory service. While working in Mardin for nearly one year he had performed many autopsies.

238. He was referred to the phrase in the report reading: "With the exception of the findings stated above, there were no other pathological diagnoses or signs of injuries caused by sharp, pointed instruments, firearms or otherwise." He explained that this did not mean that in those "findings stated above" he had found marks of such instruments.

239. The fact that *rigor mortis* had begun to set in was one of the reasons why death had been estimated to have occurred three or four hours earlier. However, the purple colour of the corpse had also served as an indication of that. He confirmed that if a person died in hospital, and if it was a properly run hospital, the time of death would be recorded and it would not be necessary to give an estimate of this time in the subsequent examination.

240. He could not remember whether or not an internal examination of the neck had been carried out but he noted that nothing was mentioned about it in the report. He thought that if such an examination had been performed it would have been recorded, but it was also possible that if nothing unusual had been found in the course of that examination it had been omitted from the report altogether. He knew that in theory an internal examination of the neck area would be conducted in cases of death by hanging or by strangulation by hand or by rope. He did not think, however, that he had performed an autopsy on the body of a person having met with such a death.

241. As the autopsy had taken place such a long time ago he was unable to confirm that the photographs shown to him were of the person on whom he had performed the autopsy. The cyanosis described in the report was not visible in the photographs. Nevertheless, he was certain that there had been cyanosis as two doctors had come to that conclusion and had recorded it in the report. All but two of the marks visible on the body in the photographs corresponded with those recorded in the report. The cut, 8 cm in length, was not visible in the photographs and neither was the lesion above the scapula. Perhaps this was due to the quality of the photographs.

242. He had not formed any provisional view as to a likely or possible cause of death in the light of the marks he had seen.

(b) Witnesses who did not appear

243. The Commission's Delegates had also called as a witness Süleyman Aktaş, the uncle of the applicant and the person to whom Yakup Aktaş's body had been delivered. During the hearing, the applicant's representatives informed the Delegates that Süleyman Aktaş was too old and frail to travel to Ankara.

244. Dr Erol Aksaz, the second doctor who had performed the autopsy, did not attend the hearing as, according to the explanation given by the Acting Agent of the Government at the hearing, it was not possible for him to leave his post, no replacement being available. On 23 December 1997 the Government provided the Commission with a doctor's note dated 21 November 1997 prescribing Dr Erol Aksaz three days' rest.

245. On 18 and 19 November 1997 the Acting Agent informed the Commission's Delegates that the following members of the gendarmerie would only give evidence if certain security measures were put in place:

1. Major Aytekin Özen;
2. Master Sergeant Ercan Günay;
3. Captain Mehmet Göçmen;
4. Senior Major Haşim Üstünel;
5. Sergeant Major Ali Yavaş ;
6. Master Sergeant Yusuf Karakoç;
7. Corporal Hüseyin Hamamcıoğlu;
8. Private Ercüment Erbil;
9. Private Mehmet Bora;
10. Senior Sergeant İlhan Keskin;
11. Major Dursun Şeker.

246. In that connection, the Acting Agent submitted that most of these gendarmes were constantly exposed to terrorist attacks and would only feel secure if they were able to avoid confrontation with the applicant or his relatives and if a screen were placed between them and the applicant's representatives.

247. The Commission's consideration of this request is summarised in paragraph 15 above.

248. Following the hearing in Ankara, the Government requested that five members of the gendarmerie (Senior Major Üstünel, Master Sergeants Günay and Karakoç, Senior Sergeant Keskin and Sergeant Major Yavaş) be given the opportunity to give evidence. They insisted that these witnesses should not be seen either by the applicant or by his representatives and that the hearing should therefore take place in the absence of both.

249. The Commission's decisions on this request are summarised in paragraphs 25 and 30 above.

II. RELEVANT DOMESTIC LAW

A. State of Emergency

250. Since approximately 1985, serious disturbances have raged in the south-east of Turkey between security forces and members of the PKK (Workers' Party of Kurdistan). This confrontation has, according to the

Government, claimed the lives of thousands of civilians and members of the security forces.

251. Two principal decrees relating to the south-eastern region have been made under the Law on the State of Emergency (Law No. 2935, 25 October 1983). The first, Decree No. 285 (10 July 1987), established a State of Emergency Regional Governorate in ten of the eleven provinces of south-eastern Turkey. Under Article 4(b) and (d) of the Decree, all private and public security forces and the Gendarmerie Public Peace Command are at the disposal of the Regional Governor.

252. The second, Decree No. 430 (16 December 1990), reinforced the powers of the Regional Governor, for example to order transfers out of the region of public officials and employees, including judges and prosecutors, and provided in Article 8:

“No criminal, financial or legal responsibility may be claimed against the State of Emergency Regional Governor or a Provincial Governor within a state of emergency region in respect of their decisions or acts connected with the exercise of the powers entrusted to them by this decree, and no application shall be made to any judicial authority to this end. This is without prejudice to the rights of an individual to claim indemnity from the State for damage suffered by them without justification.”

B. Criminal law and procedure

253. The Criminal Code contains provisions dealing with unintentional homicide (Articles 452 and 459), intentional homicide (Article 448) and murder (Article 450). It is a criminal offence to subject someone to torture or ill-treatment (Articles 243 and 245) or to issue threats (Article 191).

254. For all 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, with 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.

C. Prosecution for terrorist offences and offences allegedly committed by members of the security forces

255. The public prosecutor has no jurisdiction with regard to offences alleged to have been committed by members of the security forces in the State of Emergency Region. Article 4 § 1 of Decree No. 285 provides that all security forces under the command of the Regional Governor (see paragraph 251 above) shall be subject, in respect of acts performed in the course of their duties, to the Law on the Prosecution of Civil Servants.

Thus, any prosecutor who receives a complaint alleging a criminal act by a member of the security forces must decline jurisdiction and transfer the file to a provincial or district administrative council. These councils are made up of civil servants and have been criticised for their lack of legal knowledge, as well as for being easily influenced by the Regional Governor or Provincial Governors, who also head the security forces. A decision by a provincial administrative council not to prosecute is subject to an automatic appeal to the Council of State.

D. Constitutional provisions on administrative liability

256. Article 125 of the Constitution provides as follows:

“All acts or decisions of the Administration are subject to judicial review ... The Administration shall be liable for damage caused by its own acts and measures.”

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

258. Proceedings against the Administration may be brought before the administrative courts, whose proceedings are in writing.

E. Civil law provisions

259. Any illegal act by civil servants, be it a crime or a tort, which causes pecuniary or non-pecuniary damage may be the subject of a claim for compensation in the ordinary civil courts. Pursuant to Article 41 of the Code of Obligations, an injured person may file a claim for compensation against an alleged perpetrator who has caused damage in an unlawful manner whether wilfully, negligently or imprudently. Compensation for pecuniary loss may be awarded by the civil courts pursuant to Article 46 of the Code of Obligations and for non-pecuniary damage pursuant to Article 47.

PROCEEDINGS BEFORE THE COMMISSION

260. Mr Eshat Aktaş applied to the Commission on 4 May 1994. He complained under Articles 2 and 3 of the Convention that Yakup Aktaş had been killed by torture during police custody. He also invokes Article 14 in

conjunction with Article 2 since only Turkish citizens of Kurdish origin are regularly subjected to unlawful killings and injuries.

The applicant complained under Article 6 of the failure to initiate or to follow through to a conclusion criminal proceedings against those responsible for the torture and killing of Yakup Aktaş, as a result of which he could not bring civil proceedings arising out of those events and was thus denied access to court. He also complained of a violation of Article 14 in conjunction with Article 6 since the breakdown of the investigation and prosecution system in relation to the acts of the security forces only arose on a systematic basis in South-East Turkey.

He further alleged that, due to the delays and complications confronting the applicant and his family in seeking to ascertain the cause of his brother's death and to have those responsible brought to justice, they had been denied an effective remedy, in violation of Article 13.

261. The Commission declared the application (no. 24351/94) admissible on 4 September 1995. In its report of 25 October 1999 (former Article 31 of the Convention), it expressed the unanimous opinion that there had been violation of Articles 2, 3 and 13 but not of Article 14.

THE LAW

I. THE COURT'S ASSESSMENT OF THE EVIDENCE AND ESTABLISHMENT OF THE FACTS

A. The parties' reactions to the Commission's findings

262. The applicant accepted the Commission's findings of fact as well as the inferences drawn from them, and asked the Court to endorse them.

263. The Government disputed the Commission's findings. In particular, they denied that the Commission were entitled to draw adverse inferences, which they dismissed as "biased presumptions". They also called into question the use made by the Commission of the available evidence.

264. The Government argued that the medical information was reliable but inconclusive. An external examination having proved insufficient to establish the exact cause of death, a classical autopsy had been performed. All injuries and abnormalities found had been recorded. Although the neck had not been examined internally, an external examination had shown nothing extraordinary, just normal articulation with no fracture or pathological development. The marks found – the erosion on the forehead, the ecchymoses on the arms, the scar on the back – were unconnected to

Yakup Aktaş's death. Moreover, the report was signed not only by the doctors who had performed the autopsy but also by two public prosecutors.

265. The autopsy had been followed by a histopathological examination of particular organs. It had revealed post-mortem changes of the heart, the liver, the kidneys and the brain and acute swelling and hyperaemia of the lungs. Also inside the lungs, the septal capillaries had been found enlarged and full of erythrocytes; in places the alveolar septa had been torn and the alveolar cavities had been enlarged. Thus, the report drawn up after that examination showed that it had been thorough; even so, no exact cause of death could be established.

266. The photographs stated to be of the body of Yakup Aktaş formed part of the autopsy report. The applicant and his family could not reasonably have been unaware of their existence; they had, however, never challenged them in the domestic courts. Their failure to submit them along with the written text of the report reflected bad faith on their part. In fact, the photographs sufficed to show that Yakup Aktaş had not been subjected to any maltreatment whatsoever, let alone any deserving of the special stigma of "torture".

267. The Government relied on the evidence given by Professor Kolusayın to the Delegates of the Commission. Professor Kolusayın had stated that in the event of death through asphyxiation by external violence, one would expect to see, in addition to tears in the alveolar septa, erythrocytes in the alveolar cavities (see paragraph 216 above). There had, however, not been any reference to the presence of erythrocytes in the report of the histopathological examination. On the other hand, if there had been such trauma that death had resulted other than from heart failure then one would have expected the autopsy to reveal the cause. However, even in those countries, such as the United States, where medical science was most advanced, about 5% of all autopsies failed to establish the cause of death (see paragraph 218 above).

268. The Commission had been wrong to disbelieve the report drawn up by Major Dursun Şeker. The discrepancies between the various statements it contained could be explained by the fact that the various persons involved had seen Yakup Aktaş at different moments and at different stages of his interrogation. The absence of any mention of bruises in the report could be explained by their superficial and insignificant nature.

269. Finally, Yakup Aktaş and his brother, Mahmut Aktaş, were known to have enjoyed friendly bouts of wrestling. Bruising might well have resulted from one of these.

B. The Court's decision

1. General Principles

270. The Court refers to its recent jurisprudence confirming the standard of proof “beyond reasonable doubt” in its assessment of evidence (*Avşar v. Turkey*, no. 25657/94, § 282, ECHR 2001). Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar un rebutted presumptions of fact. In this context, the conduct of the parties when evidence is being obtained has to be taken into account (*Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, p. 65, § 161).

271. The Court is sensitive to the subsidiary nature of its role and recognises that it must be cautious in taking on the role of a first instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case (see, for example, *McKerr v. the United Kingdom* (dec.), no. 28883/95, 4 April 2000). Nonetheless, where allegations are made under Articles 2 and 3 of the Convention the Court must apply a particularly thorough scrutiny (see, *mutatis mutandis*, the *Ribitsch v. Austria* judgment of 4 December 1995, Series A no. 336, § 32, and *Avşar v. Turkey*, cited above, § 283) even if certain domestic proceedings and investigations have already taken place.

2. Article 38 § 1 (a) of the Convention and consequent inferences drawn by the Court

272. The Court notes, not for the first time, that Convention proceedings do not in all cases lend themselves to a rigorous application of the principle *affirmanti incumbit probatio* (he who alleges something must prove that allegation). The Court has previously held 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 (now replaced by Article 34) that States should furnish all necessary facilities to make possible a proper and effective examination of applications (*Tanrıkulu v. Turkey* [GC], no. 23763/94, § 70, ECHR 1999-IV). It is inherent in proceedings relating to cases of this nature, where an individual applicant accuses State agents of violating rights under the Convention – his own or someone else's –, that in certain instances solely the respondent Government have access to information capable of corroborating or refuting these allegations. A failure on a Government's part to submit such information which is in their hands without a satisfactory explanation may not only give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations, but may also reflect negatively on the level of compliance by a respondent State with its obligations under Article 38 § 1 (a) of the Convention (*Timurtaş v. Turkey*, no. 23531/94 §§ 66 and 70, ECHR 2000-VI). The same applies to

delays by the State in submitting information which prejudices the establishment of facts in a case (*Orhan v. Turkey*, no. 25656/94, § 266).

273. In this respect, the Court has noted with concern the following three matters concerning the Government's response to the Commission's requests for information and witnesses.

274. In the first place, like the Commission the Court is struck by the Government's stated inability to trace the doctor who pronounced Yakub Aktaş dead. The Commission asked the Government to produce the name of this doctor by letter of 8 December 1997; by letter of 5 February 1998 the Government informed the Commission that this was impossible. According to an official document, namely the incident report dated 25 November 1990 (see paragraph 60 above), Yakup Aktaş died on the way to hospital and was pronounced dead on arrival; if that be the case, the name of the doctor who pronounced him dead ought to be a matter of record.

275. In the second place, the Court notes the position of the respondent Government with regard to eleven witnesses from whom the Delegates of the Commission wished to hear evidence. Like the Commission, the Court is not convinced that it was necessary for security reasons for them to be heard in the absence of the applicant, his family and representatives. Their names were known to the applicant's family. What is more, as the Commission observed in its report and the Government have not denied, one of those witnesses – Sergeant Yusuf Karakoç – gave evidence at a public hearing of the Mardin Assize Court; it has not been suggested that he was in any way threatened as a result. The Government's attitude is all the more regrettable in that, assuming that the aforementioned incident report of 25 November 1990 (see paragraph 60 above) contains an accurate description of events, some of these witnesses were the last persons to have seen Yakup Aktaş alive; their evidence would have been invaluable.

276. In the third place, the Court, again like the Commission, observes that prints of photographs of a body said to be that of Yakup Aktaş were handed to the Commission's Delegates during their hearing of witnesses, but only after the applicant and his brother had been heard. These photographs bore no identifying information, either on the front or on the back; certain features described in the autopsy report were not visible on them; and for reasons which were never explained the Government were unable to produce the negatives.

277. In these circumstances the Court finds that it is entitled to draw inferences from the Government's conduct (see the above-mentioned *Orhan* judgment, § 274).

3. *The Court's evaluation of the facts in the present case*

278. The Court reiterates its settled case-law that under the Convention system prior to 1 November 1998 the establishment and verification of the facts was primarily a matter for the Commission (former Articles 28 § 1 and

31). While the Court is not bound by the Commission's findings of fact and remains free to make its own assessment in the light of all the material before it, it is only in exceptional circumstances that it will exercise its powers in this area (see, among other authorities, *Tanrıkulu v. Turkey* [GC], cited above, § 67).

279. In the instant case the Court notes that the Commission reached its findings of fact after a delegation had heard evidence over a period of two days in Ankara. It considers that the Commission approached its task of assessing the evidence before it with the requisite caution, giving detailed consideration to the elements which supported the applicant's allegations and to those which cast doubt on their credibility.

280. Yakup Aktaş was apprehended by police officers on 18 November 1990 and handed over to the gendarmerie. The available medical evidence, such as it is (see paragraphs 78-79 above), indicates that he was not, at that time, suffering from any potentially fatal condition and did not then bear the bruises and scars that were subsequently observed in the post-mortem examination; like the Commission, the Court finds that at least some of these marks would have been visible to even the most casual observer and even if Yakup Aktaş was fully clothed at the time. The applicant's and Yakup Aktaş's brother, Mahmut Aktaş, stated before the Delegates of the Commission that he had gone to see Yakup Aktaş at Derik gendarmerie on the day following his arrest; he too had found Yakup Aktaş in apparent good health (see paragraph 189 above).

281. Like the Commission, the Court accepts that the report of the autopsy is a more reliable description of the external injuries noted on the body of Yakup Aktaş following his death than the photographs produced by the Government to the Commission's Delegates. The Court will therefore proceed on the finding that the body showed a mask-like mauve discoloration (cyanosis) starting from the upper section of the thorax, 15 cm below the jaw towards the thorax, and covering the complete surface of the neck including the ears and the back of the neck; a one- or two-day-old graze measuring 1 x 0,5 cm consistent with trauma in the frontal section of the forehead, 3 cm above the middle of the left eyebrow; an area of ecchymosis measuring 10 x 2 cm, consistent with blunt trauma, on the outer section of the left arm humerus and parallel to the axis of the body; extensive ecchymoses on the left forearm and hand, including the fingers; an area of ecchymosis measuring 4 x 1 cm, consistent with trauma, on the outer section of the upper right arm humerus and parallel to the axis of the body; 5 cm below this, another area of ecchymosis 4 x 2 cm in size; a clean cut, 8 cm in length and 3 cm in width, perpendicular to the axis of the body under the right armpit and starting near the back and trailing towards the middle of the armpit; a further ecchymotic area on the right forearm near the wrist; a widespread ecchymotic area covering one half of the outer surface of the left foot; dirt and calluses covering the soles of the feet; and an 8 cm

long scar, seven to eight days old, in the shape of a half moon on the right shoulder blade.

282. The Court dismisses as implausible the Government's suggestions that any of this bruising might have been caused by a friendly wrestling bout between Yakup Aktaş and his brother Mahmut Aktaş no later than seven days before the autopsy took place.

283. Like the Commission, the Court is of the opinion that the evidence of Professor Kolusayın cannot suffice to rule out the possibility that Yakup Aktaş died as a result of mechanical asphyxia. It notes in this respect that Professor Kolusayın had been given to understand that Yakup Aktaş had died in hospital; faced with the possibility that Yakup Aktaş had died in detention, he accepted that the death might have been linked to mechanical asphyxia (see paragraph 219 above).

284. The Court further notes that both the report of Dr Christopher Mark Milroy and the evidence given by Dr Hüseyin Sarı to the Delegates of the Commission show that, in the absence of any indication of fatal disease, the injuries described, and in particular the cyanosis, were consistent with mechanical asphyxia.

285. It is not known when exactly Yakup Aktaş died. However, like the Commission the Court notes the absence of any hospital record of his death and the failure of the Government to produce the doctor who pronounced him dead, and infers that Yakup Aktaş was dead on arrival at the hospital – and, consequently, that he died while in the hands of the gendarmerie.

286. The Court finds it proven beyond reasonable doubt that Yakup Aktaş became a prisoner of the authorities of the respondent State on 19 October 1990, and was subjected while in custody to external violence which directly caused his death.

II. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

287. Article 2 of the Convention provides as follows:

“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.”

The applicant, in agreement with the Commission, alleged that Yakup Aktaş had been a victim of a violation of Article 2 of the Convention in that he had died in detention as a result of treatment meted out to him by the authorities of the respondent State. The applicant also complained that the investigations conducted by the respondent State were inadequate.

288. The Government denied that there had been a violation of this Article in either respect.

A. General considerations

289. 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 (*McCann and Others v. the United Kingdom*, judgment of 27 September 1995, Series A no. 324, §§ 146-147).

290. 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. Detained persons are in a vulnerable position and the authorities are under a duty to protect them. Consequently, where an individual is taken into police custody in good health and is found to be injured on release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused (see, amongst other authorities, *Avşar v. Turkey*, cited above, § 391). The obligation on the authorities to account for the treatment of a detained individual is particularly stringent where that individual dies or disappears thereafter (*Orhan*, cited above, § 326).

291. 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 detention, 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 (*Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII; *Çakıcı v. Turkey* [GC], no. 23657/94, § 85, ECHR 1999-IV; *Ertak v. Turkey*, no. 20764/92, § 32, ECHR 2000-V; *Timurtaş v. Turkey*, cited above, § 82, ECHR 2000-VI; and *Orhan*, cited above, § 327).

B. The circumstances of Yakup Aktaş's death

292. The applicant referred to the Commission's findings. He pointed to the medical evidence, which was strongly suggestive of mechanical asphyxia as the cause of Yakup Aktaş's death. He asked the Court to find that the Government was responsible for depriving Yakup Aktaş of his life in circumstances in which no justification had been established.

293. As already set out above, the Government disputed the Commission's findings.

294. The Court refers to its establishment of the facts, in particular to its conclusion set out in paragraph 286 above. It therefore finds that Yakup Aktaş was deprived of his life in circumstances engaging the responsibility of the respondent State. There is nothing to suggest that this was necessary for any of the reasons set out in the second paragraph of Article 2 of the Convention.

295. There has therefore been a violation of that Article in this respect.

C. Alleged inadequacy of the investigation

296. The applicant, referring to the Commission's opinion, alleged that the investigation into Yakup Aktaş's death undertaken by the Turkish authorities had been inadequate.

297. He argued that contrary to normal forensic practice, no examination of the internal appearance of Yakup Aktaş's neck had been carried out. The photographs provided by the Government were unreliable. The doctors performing the post-mortem examination had been inexperienced. The inspection of the interrogation centre carried out the evening after Yakup Aktaş's death was suspect: all four persons who carried out the inspection were members of the gendarmerie, on top of which three of them had been attached to the intelligence unit of the Mardin provincial gendarmerie. The provincial administration council had only become aware of the case on 29 November 1990, several days after Yakup Aktaş's death; in any event, for the reasons stated in the Court's *Oğur v. Turkey* judgment of 20 May 1999 (no. 21594/93, ECHR 1999-III, § 91), this administrative body could not be considered independent and was unlikely to instigate effective investigative measures. No statements had been taken from the gendarmerie officers until March 1991, and then they had not been asked to account for the bruises and injuries on Yakup Aktaş's body. Finally, the Mardin Assize Court had not heard the case until 1993, and again no member of the gendarmerie had been asked to account for the injuries.

298. In the Government's submission, the Commission had been wrong to find that Major Dursun Şeker had been involved in the interrogation of Yakup Aktaş. He had not been. Major Şeker admittedly belonged to the gendarmerie forces, but was not a member of a unit that questioned

suspects. In any event, the domestic courts had not accepted his report unquestioningly but had obtained further statements from relevant persons.

299. 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", also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see, *mutatis mutandis*, the *McCann and Others* judgment, cited above, § 161, and the *Kaya v. Turkey* judgment of 19 February 1998, *Reports* 1998-I, § 105). The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving state agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigatory procedures (see, for example, *mutatis mutandis*, *İlhan v. Turkey* [GC] no. 22277/93, § 63, ECHR 2000-VII).

300. For an investigation into an alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events (*Güleç v. Turkey* judgment of 27 July 1998, *Reports* 1998-IV, §§ 81-82, and *Oğur*, cited above, no. 21594/93, §§ 91-92, ECHR 1999-III). The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances (for example, the *Kaya* judgment, cited above, § 87) and to the identification and punishment of those responsible (*Oğur*, cited above, § 88). This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eye-witness testimony (see, concerning witnesses, for example, *Tanrıkulu v. Turkey*, cited above, § 109). Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling foul of this standard (*Orhan*, cited above, § 355).

301. In the present case, the Court notes in the first place that an inspection of the premises used by the interrogation centre of the Mardin gendarmerie was carried out almost straightaway at 8.10 p.m. on 25 November 1990, the day on which Yakup Aktaş was brought to hospital dead (see paragraph 61 above). It has not been disputed, however, that the persons who carried out the inspection were members of the gendarmerie

itself. It is likewise common ground that three of them – Senior Major Haşim Üstünel, Master Sergeant Yusuf Karakoç and Sergeant Major Ali Yavaş – were actually attached to the intelligence unit of the Mardin gendarmerie. The Court agrees with the Commission and the applicant that that inspection cannot therefore be considered part of an “effective investigation” for the purposes of Article 2 of the Convention. Furthermore, it is worth noting that Senior Major Üstünel, Master Sergeant Karakoç and Sergeant Major Yavaş were also among the group of witnesses who refused to give evidence to the Commission's Delegates except on condition that they were screened from the applicant and his representatives (see paragraphs 246 and 248 above).

302. Secondly, the Court, like the Commission, notes that on 29 November 1990 – four days after Yakup Aktaş's body arrived at the hospital – the Mardin Public Prosecutor, Şevki Artar, declined jurisdiction *ratione materiae* after the case had been referred to him by the Derik Public Prosecutor who lacked jurisdiction *ratione loci*. Mr Artar then referred the case to the provincial administrative council. The latter council appointed Major Dursun Şeker to investigate the case.

303. The Court finds it striking that no responsible gendarmerie official seems to have taken the initiative to alert any competent authority to Yakup Aktaş's death in custody immediately. The attention of the provincial administrative council was drawn to the case four days later, and even then only as a result of the applicant's lodging a complaint with the Derik Public Prosecutor.

304. Thirdly, like the applicant and the Commission the Court notes that the provincial administrative council does not itself satisfy the requirement of independence; the Court has, moreover, held in the past that such councils are unlikely to initiate effective investigative measures (*Oğur*, cited above, § 91).

305. Fourthly, whether or not Major Dursun Şeker took part in the interrogation of Yakup Aktaş, the fact remains that he too was a member of the gendarmerie and therefore part of the same chain of command as the men whose actions he was investigating (*Oğur*, *ibid.*).

306. Fifthly, the Court also notes with concern that, as is undisputed, Major Şeker took no statements from any members of the Mardin gendarmerie until March 1991. The Government have offered no explanation for this delay. Nor is it apparent that he asked any of the gendarmerie officers involved in the interrogation of Yakup Aktaş to account for the bruising and injuries found on the body.

307. In these circumstances, the Court finds, as the Commission did, that the investigation was capable neither of yielding the information required to determine whether the force used was justified under Article 2 of the Convention, nor of securing evidence sufficient to bring the perpetrators to justice.

308. There has therefore been a violation of Article 2 in this respect also.

III. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

309. Article 3 of the Convention provides as follows:

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

The applicant, in agreement with the Commission, alleged that Yakup Aktaş had been a victim of a violation of Article 3 of the Convention in that he had been subjected to inhuman treatment amounting to torture at the hands of the authorities. The applicant also complained that the investigations conducted by the respondent Party were inadequate. The Government denied that there had been a violation of this Article in either respect.

A. General considerations

310. The Court recalls that Article 3 enshrines one of the fundamental values of a democratic society. Even in the most difficult of circumstances, such as the fight against terrorism, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment. No provision is made, as in other substantive clauses of the Convention and its Protocols, for exceptions and no derogation from it is possible under Article 15 (*Aksoy v. Turkey* judgment of 18 December 1996, *Reports* 1996-VI, § 62, *Dulaş v. Turkey*, no. 25801/94, § 52, ECHR 2001, *Selçuk and Asker v. Turkey* judgment of 24 April 1998, *Reports* 1998-II, § 75; and *Orhan*, cited above, § 351).

311. In respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his or her own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention (see *Tekin v. Turkey*, judgment of 9 June 1998, *Reports* 1998-IV, pp. 1517-18, §§ 52 and 53, and *Labita v. Italy* [GC], no. 26772/95, § 120, ECHR 2000-IV).

312. The Court further recalls that, having regard to the strict standards applied in the interpretation of Article 3 of the Convention, ill-treatment must attain a minimum level of severity before it will be considered to fall within the provision's scope. The assessment of this minimum is relative and depends on all of the circumstances of the case including the duration of its treatment, the physical or mental effects and, in some cases, the age, sex and health of the individual. The practice of the Convention organs requires compliance with a standard of proof “beyond reasonable doubt” that ill-treatment of such severity occurred (as cited above, *Ireland v. the United Kingdom*, §§ 161-162; *Dulaş*, § 53; *Çiçek*, § 154; and *Orhan*, § 352).

313. In determining whether a particular form of ill-treatment should be qualified as torture, consideration must be given to the distinction, embodied in Article 3, between this notion and that of inhuman or degrading treatment. As noted in previous cases, it appears that it was the intention that the Convention should, by means of this distinction, attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering (see the *Ireland v. the United Kingdom* judgment cited above, pp. 66-67, § 167). In addition to the severity of the treatment, there is a purposive element, as recognised in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which came into force on 26 June 1987, which defines torture in terms of the intentional infliction of severe pain or suffering with the aim, *inter alia*, of obtaining information, inflicting punishment or intimidating (Article 1 of the United Nations convention – see *Salman*, cited above, § 114).

B. The treatment inflicted on Yakup Aktaş

314. The applicant, relying on the findings of the Commission, alleged that it had been proved beyond reasonable doubt that Yakup Aktaş had been subjected, during his detention, to physical ill-treatment leading to his death. He accepted the inferences drawn by the Commission that the ill-treatment had been deliberate.

315. The applicant further argued that the ill-treatment had caused very serious and cruel suffering and that it was apparent that the purpose of the perpetrators had been to obtain a confession. It was therefore appropriate to find that Yakup Aktaş had been subjected to torture.

316. The Government denied the applicant's allegations. As outlined above, they offered alternative explanations for the injuries and bruises found on Yakup Aktaş's body.

317. The Court has already dismissed as implausible the Government's conjecture as to how the body of Yakup Aktaş came to show the injuries described, and found that Yakup Aktaş was maltreated while captive in the interrogation centre of the Mardin gendarmerie.

318. It has not been alleged, nor is it apparent, that that maltreatment was occasioned by Yakup Aktaş's own conduct. The Court is left with no alternative but to find that Yakup Aktaş was the victim of inhuman and degrading treatment within the meaning of Article 3 of the Convention.

319. There can be no doubt that the maltreatment was particularly serious, since it resulted in Yakup Aktaş's death. Moreover, as is borne out by the expert opinion of Dr Milroy and the evidence given by Professor Kolusayın to the Commission's Delegates, the marks on the body – and in particular the cyanosis – are consistent with mechanical asphyxiation such as would result from pinioning the chest so as to prevent breathing,

crucifixion or “Palestinian hanging”. The Court has no difficulty drawing the inference that the suffering inflicted on Yakup Aktaş was particularly severe and cruel. Finally, since it is not in dispute that Yakup Aktaş was interrogated and since Major Dursun Şeker recorded statements by several gendarmerie officers that Yakup Aktaş had confessed to supplying money and rifles to the PKK, the Court considers it reasonable to infer that the purpose of the perpetrators was to obtain information or a confession of guilt. It is therefore appropriate to find that Yakup Aktaş was tortured.

320. In conclusion, there has been a violation of Article 3 of the Convention.

C. Alleged inadequacy of the investigation

321. The applicant complained that the investigation undertaken by the authorities into the treatment inflicted on Yakup Aktaş was inadequate. He referred to the arguments made in the same context under Article 2 of the Convention.

322. The Government denied that the investigation had been inadequate.

323. The Court refers to its findings in paragraphs 299 to 306 above and to its conclusion contained in paragraph 307. It finds, on the same grounds, that there has been a violation of Article 3 on this account also.

IV. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

324. Article 6 of the Convention, in relevant part, provides as follows:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal...”

In his original application, the applicant alleged a violation of this provision in that he had not had access to a court. However, in his observations before the Court the applicant endorsed the Commission's decision to examine this complaint under Article 13 taken alone.

325. The Court has taken note of the applicant's position. It sees no need to examine this matter of its own motion.

V. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION TAKEN TOGETHER WITH ARTICLES 2 AND 3 OF THE CONVENTION

326. Article 13 of the Convention provides as follows:

“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.”

The applicant, who agreed with the Commission's finding, alleged a violation of this provision in that there had been no thorough and effective investigation capable of leading to the identification and punishment of the persons responsible for the substantive violations found and the victim's relatives had been denied effective access to the investigative process.

327. The Government stated that there had been an official investigation followed by court proceedings at two instances in which the applicant and his brother had intervened.

328. As the Court has held many times, Article 13 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 (*Aksoy*, cited above, *Reports* 1996-VI, § 95, and *Aydın v. Turkey*, judgment of 25 September 1997, *Reports* 1997-VI, § 103; *Kaya* cited above, § 89; and *Orhan* cited above, § 383).

329. The nature of the rights safeguarded under Articles 2 and 3 of the Convention has implications for Article 13. Where there is an arguable claim that an individual has been tortured or subjected to serious ill-treatment, or deprived of his or her life, by agents of the State, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the treatment in question or the deprivation of life, including effective access for the complainant to the investigation procedure (*Tekin* cited above, § 66, and *Salman* cited above, § 121).

330. The Court considers that, since the applicant made no attempt to take any proceedings before the domestic civil courts, it is not possible in the instant case to determine whether these courts would have been able to adjudicate on his claims (*Ülkü Ekinçi v. Turkey*, no. 27602/95, § 156, 16 July 2002).

331. However, the matter does not end there. As the applicant's complaint of lack of access to a court is bound up with his more general complaint concerning the manner in which the investigating authorities dealt with the maltreatment and death of Yakup Aktaş and the repercussions which this had on access to effective remedies that would help redress the

grievances which he harboured as a result, the Court finds it appropriate to examine this complaint in relation to the more general obligation on States under Article 13 to provide an effective remedy in respect of alleged violations of the Convention.

332. On the basis of the evidence adduced in the present case, the Court has found that the Government are responsible under Articles 2 and 3 of the Convention for the torture and death in custody of Yakup Aktaş. The applicant's complaints in this regard are therefore “arguable” for the purposes of Article 13 (see the *Boyle and Rice v. the United Kingdom* judgment of 27 April 1988, Series A no. 131, p. 23, § 52, the *Kaya* judgment cited above, § 107, and *Tanlı v. Turkey*, no. 26129/95, § 172).

333. The authorities thus had an obligation to carry out an effective investigation into the circumstances of the maltreatment in custody and the death of Yakup Aktaş. For the reasons set out above (see paragraphs 301-306), no effective criminal investigation can be considered to have been conducted in accordance with Article 13, the requirements of which may be broader than the obligation to investigate imposed by Articles 2 and 3 (*Kaya* cited above, pp. 330-31, § 107, and *Salman* cited above, § 123). The Court finds, therefore, that the applicant has been denied an effective remedy in respect of the death of Yakup Aktaş and thereby access to any other available remedies at his disposal, including a claim for compensation.

334. There has consequently been a violation of Article 13.

VI. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN TOGETHER WITH ARTICLES 2 AND 3 OF THE CONVENTION

335. Article 14 of the Convention provides as follows:

“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.”

The applicant argued that there was no plausible reason for the respondent's action in torturing and killing Yakup Aktaş other than the fact that he was Kurdish; Yakup Aktaş had therefore suffered discrimination on the grounds of his “national origin” and his “association with a national minority”.

336. The Commission considered the applicant's complaints under this head unsubstantiated.

337. The Government offered no argument on this point.

338. The evidence available suggests that Yakup Aktaş was apprehended and questioned as a suspected purveyor of financial support and weapons to the PKK. The Court cannot find that the reprehensible treatment inflicted on Yakup Aktaş leading to his death was linked to his

ethnic origins as such. No violation of Article 14 has therefore been established.

VII. ALLEGED VIOLATION OF ARTICLE 34 OF THE CONVENTION

339. Article 34 of the Convention, in relevant part, provides as follows:

“The Court may receive applications from any person ... claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.”

Until 1 November 1998, Article 25 of the Convention, in relevant part, provided as follows:

“1. The Commission may receive petitions addressed to the Secretary General of the Council of Europe from any person ... claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention ... The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

...”

340. The applicant stated that, due to acts and omissions imputable to the Government, the Commission had been faced with difficulties which “highlighted forcefully the importance of the Government's primary undertaking under Article 1 [of the Convention] to secure the rights guaranteed under the Convention, including Article 13”. He submitted that the Government had thus also failed to discharge their duty under Article 34 not to hinder in any way the effective exercise of the right of application.

341. It has not been alleged that any authority subordinate to the respondent Government tried to enter into direct contact with the applicant in connection with the present application, as has happened in some other cases (compare, for example, the *Orhan* judgment cited above). The applicant's complaint under Article 34 appears to be that by failing to provide a proper remedy as required by Article 13, and in particular by failing to conduct a proper investigation into the facts of the case, the respondent Government had made it more difficult for him to present his case to the Commission and the Court.

342. The Court observes that it has already found violations of Articles 2 and 3 of the Convention in that the investigations conducted by the domestic authorities failed to meet the appropriate standards. It has also found a violation of Article 13 on that account. Although the fact that the investigation was inadequate led to a lack of information that undoubtedly made matters more difficult for the applicant, the Court is of the opinion that it would serve no useful purpose in the present case to consider this question under Article 34 (or its predecessor, former Article 25 § 1) as well.

VIII. ALLEGED VIOLATION OF ARTICLE 38 OF THE CONVENTION

343. Article 38 of the Convention, in relevant part, provides:

“1. If the Court declares the application admissible, it shall

(a) pursue the examination of the case, together with the representatives of the parties, and if need be, undertake an investigation, for the effective conduct of which the States concerned shall furnish all necessary facilities;

...”

Until 1 November 1998, Article 28 § 1 of the Convention, in relevant part, provided as follows:

“i. In the event of the Commission accepting a petition referred to it:

(a) it shall, with a view to ascertaining the facts, undertake together with the representatives of the parties an examination of the petition and, if need be, an investigation, for the effective conduct of which the States concerned shall furnish all necessary facilities...”

The applicant invited the Court to find that the respondent Government had failed in its duty to furnish all necessary facilities required by the Commission to undertake its investigation into the case.

344. The Government did not make any observations on this matter.

345. In its report of 25 October 1999 (drawn up under former Article 31 of the Convention), the Commission expressed the following opinion:

“258. The Commission notes in the first place that the request for security measures in respect of ten witnesses was brought to the attention of the Delegates on 18 November 1997 (...) which was one day before the first of these witnesses had been scheduled to give evidence. On 19 November 1997 the Government extended their request to include also Mr Şeker (...) who had been scheduled to appear before the Delegates that very day. The Commission finds it utterly inappropriate for a request of this nature to be made at such a late stage and notes that no reason whatsoever has been put forward to explain why it could not have been made earlier.

259. The Commission further observes that the Government have on two occasions been invited to provide reasons in writing for their request... Nevertheless, they only submitted observations pertaining to this matter at a stage when the Commission had already decided on the request (...). The Commission considers that the Government's way of dealing with this matter has been less than helpful.

260. In general, the Commission considers that a request for security measures should be decided in the light of the particular circumstances of the individual application to which the request pertains. To this end it is imperative that due notice be given of the request by the party concerned and that it be accompanied by sufficient reasoning allowing the Commission to examine whether there exists an objective situation justifying the measures requested as well as a reasonable, plausible subjective fear on the part of each witness to whom the request applies.

261. In their observations of 5 June 1998 the Government submitted that the gendarmes at issue had indicated that they were targets for terrorist attacks. The Government argued that they had been unable to ignore both the objective danger to which these persons would be exposed following the communication – involuntarily or otherwise – of their descriptions to a sequence of contacts which would undoubtedly lead to terrorists and the subjective danger felt by persons who had first hand knowledge of the methods of terrorist violence.

262. The Commission recalls that since 1995 delegates have carried out fact-finding missions in individual applications concerning alleged wrongdoing by security forces in south-east Turkey on a regular basis. In that time many members of the security forces, including security force personnel stationed in Mardin, have appeared before delegates without a need for security measures having been expressed either by the Government or the witnesses concerned. The Commission notes, moreover, that one of the witnesses in respect of whom the request for security measures in the present case was made, Mehmet Göçmen, had already appeared before delegates on a previous occasion [footnote omitted].

263. Only in one other application concerning alleged wrongdoing by security forces in south-east Turkey has a request for special security arrangements been made. This request, which concerned a witness with the rank of general, was granted but the Commission recalls that the Delegates in that case maintained their view, which was communicated to the Government, that certain of the conditions required by the Government were not necessary (no. 23954/96, Mehmet Emin Akdeniz and Others v. Turkey, Comm. Rep. 10.9.99, § 34 ...). Against the background of the considerable number of members of the security forces having appeared before delegates as outlined above (...), therefore, and having regard to the rank of general of the witness concerned in the Akdeniz case, the Commission finds that this instance cannot serve as a relevant precedent in the particular circumstances of the present case.

264. The Commission would, furthermore, wish to draw a parallel with the case of Van Mechelen and Others v. the Netherlands in which the Court pointed out that the position of members of the police force who are called upon to give evidence was to some extent different from that of a disinterested witness or a victim. While recognising that the interests of these witnesses also deserved protection under the Convention, the Court found that it ensued from this different position that police officers' anonymity should only be maintained in exceptional circumstances (judgment of 23 April 1997, *Reports of Judgments and Decisions* 1997-III, p. 712, § 56). The Court also held that when it was nevertheless deemed necessary to resort to certain measures to preserve a police officer's anonymity, that measure which would least restrict the rights of the defence should be applied (op. cit., p. 712, § 58).

265. Although the Commission by no means underestimates the dangers faced by members of the security forces working in regions afflicted by terrorism, it notes nevertheless that the Government have not provided any indication of the way in which the present case falls to be distinguished from other cases where members of the gendarmerie have testified before delegates and in the presence of the representatives of applicants. Moreover, it observes that Yusuf Karakoç gave evidence to the Mardin Assize Court (...) in proceedings which, unlike those before the Commission, were held in public. The Commission considers that it has not been established that the present case discloses circumstances of an exceptional nature justifying a departure from the way in which evidence is customarily taken.

266. In addition, the Commission fails to see why the measure proposed by its Delegates at the hearing in Ankara to take evidence from the eleven witnesses in the absence of the applicant and his relatives would not have sufficed to allay the concerns said to be felt by those witnesses. The taking of evidence in this manner would at least have given the applicant's representatives the opportunity to observe the demeanour and comportment of the individual witnesses and have allowed them to contribute to the Delegates' taking of evidence by structuring their own questions in that light. In this respect the Commission is alarmed by the Government's comment contained in their observations mentioned above which appears to suggest that the appearance of the eleven members of the gendarmerie might well have led to their descriptions being communicated to terrorists. Insofar as this comment is directed at any of the applicant's representatives, the Commission considers that it is unbecoming, unsubstantiated and moreover in clear contradiction to the statement made by the Acting Agent of the Government during the hearing to the effect that the Government had no specific objections against any member of the applicant's team of representatives.

267. In conclusion, the Commission deeply regrets the stance adopted by the Government in the present case which has hampered the possibilities of the Commission to establish the facts. For these reasons the Commission finds that the Government have fallen short of their obligation under former Article 28 § 1(a) of the Convention to furnish all necessary facilities to the Commission in its task of establishing the facts of this case."

346. Having regard to the importance of respondent Governments cooperating in Convention proceedings (see paragraph 272 above) and mindful of the difficulties inevitably arising from an evidence-taking exercise of this nature (see *Timurtaş* cited above, § 70), the Court finds that the Government fell short of their obligations under Article 38 § 1 (a) (formerly Article 28 § 1(a)) of the Convention to furnish all necessary facilities to the Commission and Court in their task of establishing the facts (*Orhan*, § 274).

IX. APPLICATION OF ARTICLE 41 OF THE CONVENTION

347. 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."

348. The applicant made claims in respect of damage and costs and expenses, which the Government contested.

A. Damage

1. Pecuniary damage

(a) Loss of future earnings

349. In respect of pecuniary damage, the applicant claimed a total of 149,482.01 pounds sterling (GBP). Of this, GBP 139,482.01 was intended to compensate Yakup Aktaş's widow and daughter for the loss of future income.

350. The applicant estimated that Yakup Aktaş had, at the relevant time, been earning GBP 6,579.34 a year as the owner of a shop that sold food products. The figure GBP 139,482.01 was arrived at through the use of the Ogden actuarial tables, based on Yakup Aktaş's age at the time of his death – 24 – and the assumption that he would have continued working until the age of 65.

351. The Government considered those sums excessive.

352. The Court reiterates that there must be a clear causal connection between the damage claimed by the applicant and the violation of the Convention and that this may, in the appropriate case, include compensation in respect of loss of earnings (*Barberà, Messegue and Jabardo v. Spain*, judgment of 13 June 1994 (former Article 50), Series A no. 285-C, §§ 16-20; *Çakıcı* cited above, § 127; *Selçuk and Asker* cited above, § 112; and *Orhan* cited above, § 430).

353. In addition, it is recalled that a precise calculation of the sums necessary to make complete reparation (*restitutio in integrum*) in respect of the pecuniary losses suffered by an applicant may be prevented by the inherently uncertain character of the damage flowing from the violation (*Young, James and Webster v. the United Kingdom*, judgment of 18 October 1982 (former Article 50), Series A no. 55, § 11). An award may still be made notwithstanding the large number of imponderables involved in the assessment of future losses, though the greater the lapse of time involved the more uncertain the link between the breach and the damage becomes. The question to be decided in such cases is the level of just satisfaction, in respect of either past and future pecuniary loss, which it is necessary to award to an applicant, the matter to be determined by the Court at its discretion, having regard to what is equitable (*Sunday Times v. the United Kingdom*, judgment of 6 November 1989 (former Article 50), Series A no. 38, p. 9, § 15; *Lustig-Prean and Beckett v. the United Kingdom* (just satisfaction), nos. 31417/96 and 32377/96, §§ 22-23; and *Orhan*, § 431).

354. In the present case the Court has found the respondent State responsible for Yakup Aktaş's death; it must follow that the loss of his future earnings is also imputable to the respondent State. An award in this respect is therefore clearly in order.

355. The Court has had regard to the applicant's detailed actuarial submissions and calculations as to the capital sum claimed for lost future income. The Court therefore awards 226,065 euros (EUR) for future loss of earnings.

(b) Cost of educating Yakup Aktaş's child

356. A further claim made by the applicant on his own behalf, in an amount of GBP 10,000 related to the cost of educating Yakup Aktaş's daughter.

357. The Government pointed out that in Turkey education was free.

358. The Court assumes that, had he lived, the cost of educating Yakup Aktaş's daughter would have been borne by Yakup Aktaş himself, out of his earnings. The applicant has not explained why it is necessary to make a separate award in this respect. The Court therefore rejects this claim.

2. Non-pecuniary damage

(a) On behalf of Yakup Aktaş

359. The applicant claimed, on behalf of his late brother Yakup Aktaş, GBP 40,000 in respect of the torture he had suffered which had led to his death, the inadequacy of the investigation and the ineffectiveness of the domestic remedies.

360. In the Government's view an award of such magnitude would amount to unjust enrichment.

361. Having regard to the sums which it has awarded in comparable cases and deciding on an equitable basis, the Court awards EUR 58,000 to [Rectified on 23 October 2003. Text deleted: "be held by the applicant for"] Yakup Aktaş's widow and daughter.

(b) On behalf of the applicant himself

362. The applicant claimed GBP 10,000 on his own behalf in respect of inhuman treatment.

363. In the Government's submission the applicant was not entitled to any non-pecuniary damage.

364. The Court has not found a breach of Article 3 as regards the applicant; nor can he be considered to have been a "victim" in his own right of the violations found. However, he was undoubtedly affected by the violations found by the Court and may be regarded as an "injured party" for the purposes of Article 41. Having regard to the gravity of the violations and to equitable considerations, the Court awards EUR 4,000 to the applicant.

B. Costs and expenses

365. The applicant claimed a total sum for costs and expenses of GBP 23,950.51 plus value-added tax, minus the sums paid and payable by the Council of Europe by way of legal aid. He submitted a schedule of costs.

366. The applicant's claims comprised:

- (a) GBP 9,665 for the fees of Mr William Bowring (100 hours);
- (b) GBP 165 for the fees of Mr D. Christopher Decker (administrative time, 11 hours);
- (c) GBP 6,750 for the fees of the Kurdish Human Rights Project lawyers (135 hours);
- (d) GBP 856 for administrative costs incurred in the United Kingdom;
- (e) GBP 2,675 for translation;
- (f) GBP 3,840 for the fees of his two Turkish lawyers (64 hours each); and
- (g) GBP 164.31 for their administrative costs.

The applicant asked the Court to order these amounts to be paid in sterling directly into a sterling bank account in the United Kingdom.

367. The Government considered those sums excessive. They also questioned the need for the applicant to have retained foreign lawyers.

368. The Court will make an award in respect of costs and expenses in so far as these were actually and necessarily incurred and were reasonable as to quantum (see, as a recent authority, *Sawicka v. Poland*, 1 October 2002, no. 37654/97, § 54).

369. The Court observes that this case involved complex issues of fact and law requiring detailed examination and involving the taking of evidence from witnesses in Ankara. Moreover, having regard to the fact that an applicant is free to designate a legal representative of his or her own choosing, the applicant's recourse to United Kingdom-based lawyers specialising in the international protection of human rights cannot be criticised (*Kurt v. Turkey*, 25 May 1998, *Reports* 1998-III, § 179). There is consequently no reason of principle to dismiss any claims made in this respect.

370. As regards the sum claimed in respect of the KHRP, the Court considers that the sums claimed in respect of administrative costs – items (b), (d) and (g) – and in respect of translation costs – item (e) – are excessive. The Court further observes that no hearing was held before it; it is therefore not convinced that the expenses claimed in respect of items (a) and (c) were all necessarily incurred.

371. Making its own estimate based on the information available, the Court awards the applicant in respect of costs and expenses EUR 30,000, plus any value-added tax that may be chargeable, minus EUR 725 paid by the Council of Europe by way of legal aid. The net award is to be paid in sterling into the bank account in the United Kingdom designated by the applicant.

C. Default interest

372. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been a violation of Article 2 of the Convention;
2. *Holds* unanimously that there has been a violation of Article 3 of the Convention;
3. *Holds* unanimously that it is not necessary to determine whether there has been a violation of Article 6 of the Convention;
4. *Holds* by six votes to one that there has been a violation of Article 13 of the Convention;
5. *Holds* unanimously that there has been no violation of Article 14 of the Convention taken together with Articles 2 and 3;
6. *Holds* unanimously that it is not necessary to determine whether there has been a violation of Article 34 or of former Article 25 § 1 of the Convention;
7. *Holds* unanimously that the respondent State has failed to fulfil its obligation under Article 38 (formerly Article 28 § 1 (a)) of the Convention to furnish all necessary facilities to the Commission and Court in their task of establishing the facts;
8. *Holds* by six votes to one
 - (a) that the respondent State is to pay [Rectified on 23 October 2003. "the applicant" replaced by "Yakup Aktaş's widow and daughter"] Yakup Aktaş's widow and daughter, within three months from the date of delivery of the present judgment, EUR 226,065 (two hundred and twenty-six thousand and sixty-five euros) in respect of pecuniary damage, to be converted into Turkish liras at the rate applicable on the date of settlement; [Rectified on 23 October 2003. Text deleted: "and to be held by the applicant for Yakup Aktaş's widow and daughter"]
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate

equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

9. *Holds* unanimously

(a) that the respondent State is to pay [Rectified on 23 October 2003. Text deleted: "the applicant"], within the above-mentioned three months, the following amounts in respect of non-pecuniary damage, to be converted into Turkish liras at the rate applicable on the date of settlement:

(1) to [Rectified on 23 October 2003. Text deleted: "be held by the applicant for"] Yakup Aktaş's widow and daughter, EUR 58,000 (fifty-eight thousand euros);

(2) to the applicant himself, EUR 4,000 (four thousand euros);

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

10. *Holds* unanimously

(a) that the respondent State is to pay the applicant, within the above-mentioned three months and into the bank account in the United Kingdom designated by him, in respect of costs and expenses, EUR 29,275 (twenty-nine thousand, two hundred and seventy-five euros) plus any value-added tax that may be chargeable, to be converted into sterling [Rectified on 23 October 2003. "Turkish liras" replaced by "sterling"] at the rate applicable on the date of settlement;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 24 April 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER
Registrar

Ireneu CABRAL BARRETO
President

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

I.C.B.
V.B.

PARTLY DISSENTING OPINION OF JUDGE GÖLCÜKLÜ*(Translation)*

I disagree with the majority on the application of Article 41 of the Convention.

Allow me to explain:

1. In the vast majority of cases in which pecuniary damage has been sought for an alleged violation of the Convention, the Court has refused to make an award on the ground that the claim was speculative or fictitious, especially when it has entailed “actuarial calculations”. Does it need repeating that the Court does not have the resources to engage in this type of activity as if it were an “insurance company”. In the rare cases in which it has awarded a fixed amount, it has been able to calculate the loss with precision on the basis of documentary evidence, for instance in cases where movable or immovable property has been destroyed or medical costs have been incurred. Such calculations have always been restricted to what is reasonable, thereby avoiding any speculation or unjust enrichment.

2. However, in the instant case, not only has the Court proceeded to perform “speculative calculations”, it has also decided that it is just and reasonable to award a sum that is more than exorbitant (226,065 euros – EUR) and at a level never previously attained. Like considerations apply to the non-pecuniary damage, for which it awarded EUR 58,000.

To justify what I have just said, I should like to refer (by way of example) to judgments that have been delivered by the Court in similar cases. These are the relevant paragraphs (emphasis added to certain phrases and figures):

**KURT JUDGMENT OF 25 MAY 1998
(disappearance - violation)****[Claim]**

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

[Decision of the Court]

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

**TEKIN JUDGMENT OF 9 JUNE 1998
(violation of Article 3)**

[Claim and Decision of the Court]

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

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

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

**ERGI JUDGMENT OF 28 JULY 1998
(violation of Articles 3 and 13)**

[Claim]

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

[Decision of the Court]

“110. The Court observes from the outset that the initial application to the Commission was brought by the applicant not only on his own and his sister's behalf but also on behalf of his niece, Havva Ergi's daughter. The Court considers that they must have suffered non-pecuniary damage which cannot be compensated solely by the findings of violations. Having regard to the gravity of the violations (see paragraphs 86 and 98 above) and to equitable considerations, it awards the applicant GBP 1,000 and Havva Ergi's daughter GBP 5,000, which amount is to be paid to the applicant's niece or her guardian to be held on her behalf.

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

OĞUR JUDGMENT OF 20 MAY 1999
(violation of Article 2)**[Claim]**

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

[Decision of the Court]

“98. ...

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

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

As to non-pecuniary damage, the Court considers that the applicant undoubtedly suffered considerably from the consequences of the double violation of Article 2. On an equitable basis, the Court assesses that non-pecuniary damage at FRF 100,000.”

CAKICI JUDGMENT OF 8 JULY 1999 (Grand Chamber)
(violation of Articles 2, 3, 5 and 13)**[A. Pecuniary damage]****[Claim]**

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

[Decision of the Court]

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

...

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

[B. Non-pecuniary damage]

[Claim]

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

[Decision of the Court]

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

MAHMUT KAYA JUDGMENT OF 28 MARCH 2000
(violation of Articles 2, 3 and 13)**[A. Pecuniary damage]****[Claim]**

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

[Decision of the Court]

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

[B. Non-pecuniary damage]**[Claim]**

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

[Decision of the Court]

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

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

KILIÇ JUDGMENT OF 28 MARCH 2000
(violation of Article 2)

[A. Pecuniary damage]

[Claim]

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

[Decision of the Court]

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

[B. Non-pecuniary damage]

[Claim]

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

[Decision of the Court]

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

ERTAK JUDGMENT OF 9 MAY 2000
(violation of Article 2)**[Claim]**

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

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

[Decision of the Court]

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

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