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

FIRST SECTION

CASE OF KILIÇ v. TURKEY

(Application no. 22492/93)

JUDGMENT

STRASBOURG

28 March 2000

In the case of Kılıç v. Turkey,

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

Mrs E. PALM, *President*,
Mr J. CASADEVALL,
Mr L. FERRARI BRAVO,
Mr B. ZUPANČIČ,
Mrs W. THOMASSEN,
Mr R. MARUSTE, *judges*,
Mr F. GÖLCÜKLÜ, ad hoc *judge*,
and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 18 January and 7 March 2000,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 8 March 1999, within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 22492/93) against the Republic of Turkey lodged with the Commission under former Article 25 by a Turkish national, Mr Cemil Kılıç, on 13 August 1993.

The application concerned the applicant's allegations that his brother, Kemal Kılıç, was killed by or with the connivance of State agents and that there was no effective investigation or remedy for his complaints. The applicant relied on Articles 2, 10, 13 and 14 of the Convention.

The Commission declared the application admissible on 9 January 1995. In its report of 23 October 1998 (former Article 31 of the Convention), it expressed the opinion that there had been a violation of Articles 2 and 13 (unanimously) and that no separate issues arose under Article 10 (twenty-five votes to three) or Article 14 (unanimously)[1].

2. Following the entry into force of Protocol No. 11 to the Convention on 1 November 1998, and in accordance with the provisions of Article 5 § 4 thereof read in conjunction with Rules 100 § 1 and 24 § 6 of the Rules of Court, a panel of the Grand Chamber decided on 31 March 1999 that the case would be examined by a Chamber constituted within one of the Sections of the Court.

3. In accordance with Rule 52 § 1, the President of the Court, Mr L. Wildhaber, assigned the case to the First Section. The Chamber

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

constituted within that Section included *ex officio* Mr R. Türmen, the judge elected in respect of Turkey (Article 27 § 2 of the Convention and Rule 26 § 1 (a)), and Mrs E. Palm, President of the Section (Rule 26 § 1 (a)). The other members designated by the latter to complete the Chamber were Mr J. Casadevall, Mr L. Ferrari Bravo, Mr B. Zupančič, Mrs W. Thomassen and Mr R. Maruste (Rule 26 § 1 (b)).

4. Subsequently Mr Türmen withdrew from sitting in the Chamber (Rule 28). The Turkish Government ("the Government") accordingly appointed Mr F. Gölcüklü to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

5. On 14 September 1999 the Chamber decided to hold a hearing.

6. Pursuant to Rule 59 § 3, the President of the Chamber invited the parties to submit memorials on the issues raised in the application. The Registrar received the Government's and the applicant's memorials on 23 and 26 July 1999 respectively.

7. In accordance with the Chamber's decision, a hearing took place in public in the Human Rights Building, Strasbourg, on 18 January 2000.

There appeared before the Court:

(a) *for the Government*
Mr Ş. ALPASLAN, *Co-Agent*,
Ms Y. KAYAALP,
Mr B. ÇALIŞKAN,
Mr S. YÜKSEL,
Mr E. GENEL,
Ms A. EMÜLER,
Mr N. GÜNGÖR,
Mr E. HOÇAOĞLU,
Ms M. GÜLSEN, *Advisers*;

(b) *for the applicant*
Ms F. HAMPSON,
Ms R. YALÇINDAĞ,
Ms C. AYDIN, *Counsel.*

The Court heard addresses by Ms Hampson, Ms Yalçındağ and Mr Alpaslan.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. Kemal Kılıç, the applicant's brother, was a journalist working for the newspaper *Özgür Gündem* in Şanlıurfa.

Özgür Gündem was a daily newspaper, with its main office in Istanbul. Its owners described the newspaper as seeking to reflect Turkish Kurdish opinion. It was published between 30 May 1992 and April 1994. By the time it ceased publication, numerous prosecutions had been brought against it on the grounds, *inter alia*, that it had published the declarations of the PKK (Workers' Party of Kurdistan) and disseminated separatist propaganda. Following a search-and-arrest operation at the *Özgür Gündem* office in Istanbul on 10 December 1993, charges were brought against, *inter alia*, the editor, the manager and the owner of the newspaper, alleging that they were members of the PKK and had assisted the PKK and made propaganda in its favour. On 2 December 1994 the Istanbul office, which had been taken over by *Özgür Gündem*'s successor, the newspaper *Özgür Ülke*, was blown up by a bomb.

9. Kemal Kılıç, who was unmarried, lived with his father in the village of Külünçe, outside Şanlıurfa. Besides working as a journalist, he was a member of the Şanlıurfa Human Rights Association.

10. On 23 December 1992 Kemal Kılıç sent a press release to the governor of Şanlıurfa. This stated that death threats had been made against the United Press Distribution representative carrying out the distribution of *Özgür Gündem* and against the driver and owner of the taxi used for deliveries. It stated that it was known that persons working for *Özgür Gündem* had been attacked or killed and that those involved in the sale and distribution of the newspaper had been the victims of arson attacks and assaults. Reference was made to the fact that in other provinces in the south-east security officers were protecting the offices, employees and distributors. Kemal Kılıç requested that measures be taken to protect the safety of people working for the Şanlıurfa office, including himself, another journalist and the newspaper's distributor and driver.

11. By letter dated 30 December 1992, the governor's office replied that Kemal Kılıç's request for protection had been examined. No protection had been assigned to distributors of newspapers in any of the provinces nor had there been any attacks on, or threats to, distributors in the area. His request was refused.

12. On 11 January 1993 Kemal Kılıç issued a press release stating that attacks against persons involved in the sale and distribution of *Özgür Gündem* in Şanlıurfa were continuing, despite urgent requests for protective measures. Details were given of an arson attack on a news-stand on

5 January 1993 and on another news-stand on 10 January 1993. The press release criticised the governor for not ensuring the safe distribution of the newspaper and called on him and the police to fulfil their responsibilities.

13. Following a complaint by the governor, Kemal Kılıç was charged with insulting the governor through the publication and circulation of the press release. He was taken into detention at the Şanlıurfa Security Directorate on 18 January 1993 and released the same day.

14. At around 5 p.m. on 18 February 1993 Kemal Kılıç left the newspaper office in the centre of Şanlıurfa and walked to the coach station. At about 5.30, he caught the Şanlıurfa to Akçale coach from Kuyubaşı. Before the coach reached the junction of the main road with the road to Külünçe, it was overtaken by a white Renault car, which turned into the village road, turned around and parked, with its headlights off. The car was noticed at about 6.20 p.m. by Ahmet Fidan, a night watchman at a nearby construction site. Kemal Kılıç was the only passenger to leave the coach when it stopped at the junction. He walked up the road towards the village. Ahmet Fidan heard voices arguing and a cry for help, followed by two shots.

15. The incident was reported to the gendarmes who rapidly arrived on the scene. Kemal Kılıç's body was discovered with two bullet wounds in the head. The applicant and other members of his family came from the village to see what had happened.

16. Captain Kargılı, the central district gendarmerie commander, took charge of the investigation at the scene. Two cartridges were found and handed over to the public prosecutor when he arrived. The victim's mouth was found to have been covered with four strips of packaging tape and there was a rope around his neck. A piece of paper bearing the letters U and Y, stained with blood, was also discovered. A sketch map of the scene was drawn up. Captain Kargılı took photographs with his own camera and looked, unsuccessfully, for tyre marks. A statement was taken by the gendarmes from Ahmet Fidan, the night watchman, who stated that because of the darkness he had not seen the victim, the assailants or the car.

17. An examination of the body was carried out by a doctor in the presence of the public prosecutor on 19 February 1993. The report found that two bullets had entered the head and noted the mark of a blow to the right temple, a graze on the right hand, bruising on the back and a semi-circular lesion on the left hand, which resembled a bite mark. It concluded that Kemal Kılıç had died due to destruction of brain tissue and brain haemorrhage.

18. On 19 February statements were taken by the gendarmes from the driver of the Şanlıurfa coach and his assistant. The gendarmes also took statements between 19 and 23 February from the applicant, his father, three of his brothers and two passengers on the coach.

19. On 26 February 1993 Captain Kargılı carried out a search, with a warrant, of the house where Kemal Kılıç had lived, removing, *inter alia*, books, newspaper cuttings, a photograph and two cassettes for further examination.

20. On 15 March 1993 Captain Kargılı informed the public prosecutor of the search, enclosing several of the items removed from the house and other documents concerning the investigation.

21. On 12 August 1993 the public prosecutor issued a decision to continue the investigation, which stated that it had not been possible to identify or apprehend the perpetrators of the killing and that the search should continue until the expiry of the twenty-year limitation period.

22. On 24 December 1993 an armed attack was carried out on the Aydın Ticaret shop in Diyarbakır. The suspected perpetrators were pursued by police and a number of persons were arrested. The police incident report dated 24 December 1993 stated that the suspect Hüseyin Güney had been seen trying to escape by running up the stairs of a block of flats and was apprehended in a breathless, perspiring state. It was understood that he was returning to recover the Czech 9 mm pistol located in front of the building.

23. A ballistics report dated 27 December 1993 reported that the Czech pistol had been used in fifteen other shooting incidents, including the killing of Kemal Kılıç. In an indictment dated 3 February 1994, also concerning sixteen other defendants, Hüseyin Güney was charged with the offence of membership of the outlawed Hizbullah organisation and carrying out activities with the intention of removing part of the country from the sovereignty of the State and forming a Kurdish State based on Islamic principles. These activities were said to include the attack on Aydın Ticaret and the fifteen incidents in which the Czech pistol had been used.

24. In the undated interrogation notes taken at the Diyarbakır Security Directorate, Hüseyin Güney was recorded as admitting his membership of the Hizbullah and his participation in the attack on Aydın Ticaret. He denied participation in the killing of Kemal Kılıç and stated that he had been given the Czech pistol by another member of the group. In his statement of 6 January 1994 to the public prosecutor, Hüseyin Güney stated that his confessions to the police had been obtained by torture and denied that he had joined the Hizbullah or that he had attacked Aydın Ticaret.

25. The trial of Hüseyin Güney, with other defendants, was conducted before the Diyarbakır National Security Court no. 3 between February 1994 and 23 March 1999. On 3 March 1994 Hüseyin Güney denied his involvement in any of the incidents. At the hearing on 27 October 1994, the police officers who had arrested him confirmed the incident report of 24 December 1993 without adding anything further. On 17 December 1996 the court issued a request for documents relating to the killing of Kemal Kılıç to be obtained.

26. In its judgment of 23 March 1999, the court convicted Hüseyin Güney of being a member of a separatist organisation, the Hizbullah. The court noted that he had been found trying to escape in the vicinity of the Czech 9 mm pistol and that, although he later denied it, he had admitted to the police that he was a member of the Hizbullah and that he had participated in the attack on the shop. It noted, however, that pistols belonging to the organisation could have been used by different individuals and that the defendants had stated that the guns had been given to them by other members of the group before the attack. It was found that although Hüseyin Güney had participated in the attack on the shop he could not be held responsible for any other actions. Hüseyin Güney was sentenced to life imprisonment.

27. Following the court's decision, the Diyarbakır National Security Court chief public prosecutor opened an investigation into the killing of Kemal Kılıç (file no. 1999/1187). By letter dated 20 December 1999, the prosecutor instructed the Şanlıurfa gendarmerie command to report to him every three months concerning any evidence obtained about the Kılıç murder.

II. MATERIAL BEFORE THE CONVENTION ORGANS

A. Domestic investigation documents and court proceedings

28. The contents of the investigation file compiled by the gendarmes and public prosecutor at Şanlıurfa, as well as the minutes from the hearings in the trial of Hüseyin Güney in Diyarbakır National Security Court no. 3 from February 1994 to June 1997, were submitted to the Commission. The Government provided the Court with the judgment of the Diyarbakır National Security Court no. 3 of 23 March 1999.

B. The Susurluk report

29. The applicant provided the Commission with a copy of the so-called "Susurluk report"[1], produced at the request of the Prime Minister by Mr Kutlu Savaş, Vice-President of the Board of Inspectors within the Prime Minister's Office. After receiving the report in January 1998, the Prime

1. Susurluk was the scene of a road accident in November 1996 involving a car in which a member of parliament, a former deputy director of the Istanbul security services, a notorious far-right extremist, a drug trafficker wanted by Interpol and his girlfriend had been travelling. The latter three were killed. The fact that they had all been travelling in the same car had so shocked public opinion that it had been necessary to start more than sixteen judicial investigations at different levels and a parliamentary inquiry.

Minister made it available to the public, although eleven pages and certain annexes were withheld.

30. The introduction states that the report was not based on a judicial investigation and did not constitute a formal investigative report. It was intended for information purposes and purported to do no more than describe certain events which had occurred mainly in south-east Turkey and which tended to confirm the existence of unlawful dealings between political figures, government institutions and clandestine groups.

31. The report analyses a series of events, such as murders carried out under orders, the killings of well-known figures or supporters of the Kurds and deliberate acts by a group of "informants" supposedly serving the State, and concludes that there is a connection between the fight to eradicate terrorism in the region and the underground relations that have been formed as a result, particularly in the drug-trafficking sphere. The passages from the report that concern certain matters affecting radical periodicals distributed in the region are reproduced below.

> "... In his confession to the Diyarbakır Crime Squad, ... Mr G. ... had stated that Ahmet Demir[1] [p. 35] would say from time to time that he had planned and procured the murder of Behçet Cantürk[2] and other partisans from the mafia and the PKK who had been killed in the same way ... The murder of ... Musa Anter[3] had also been planned and carried out by A. Demir [p. 37].
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> ...
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> Summary information on the antecedents of Behçet Cantürk, who was of Armenian origin, are set out below [p. 72].
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> ...
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> As of 1992 he was one of the financiers of the newspaper *Özgür Gündem*. ... Although it was obvious who Cantürk was and what he did, the State was unable to cope with him. Because legal remedies were inadequate *Özgür Gündem* was blown up with plastic explosives and when Cantürk started to set up a new undertaking, when he was expected to submit to the State, the Turkish Security Organisation decided that he should be killed and that decision was carried out [p. 73].
>
> ...

1. One of the pseudonyms of a former member of the PKK turned informant who was known by the code name "Green" and had supplied information to several State authorities since 1973.
2. An infamous drug trafficker strongly suspected of supporting the PKK and one of the principal sources of finance for *Özgür Gündem*.
3. Mr Anter, a pro-Kurdish political figure, was one of the founding members of the People's Labour Party (HEP), director of the Kurdish Institute in Istanbul, a writer and leader writer for, *inter alia*, the weekly review *Yeni Ülke* and the daily newspaper *Özgür Gündem*. He was killed in Diyarbakır on 30 September 1992. Responsibility for the murder was claimed by an unknown clandestine group named "*Boz-Ok*".

> All the relevant State bodies were aware of these activities and operations. ... When the characteristics of the individuals killed in the operations in question are examined, the difference between those Kurdish supporters who were killed in the region in which a state of emergency had been declared and those who were not lay in the financial strength the latter presented in economic terms. ... The sole disagreement we have with what was done relates to the form of the procedure and its results. It has been established that there was regret at the murder of Musa Anter, even among those who approved of all the incidents. It is said that Musa Anter was not involved in any armed action, that he was more concerned with the philosophy of the matter and that the effect created by his murder exceeded his own real influence and that the decision to murder him was a mistake. (Information about these people is to be found in Appendix 9[1]). Other journalists have also been murdered [p. 74][2].”

32. The report concludes with numerous recommendations, such as improving co-ordination and communication between the different branches of the security, police and intelligence departments; identifying and dismissing security-force personnel implicated in illegal activities; limiting the use of “confessors”[3]; reducing the number of village guards; terminating the use of the Special Operations Bureau outside the south-east region and incorporating it into the police outside that area; opening investigations into various incidents; taking steps to suppress gang and drug-smuggling activities; and recommending that the results of the Grand National Assembly Susurluk inquiry be forwarded to the appropriate authorities for the relevant proceedings to be undertaken.

C. The 1993 report of the Parliamentary Investigation Commission (10/90 no. A.01.1.GEC)

33. The applicant provided this 1993 report into extra-judicial or “unknown perpetrator” killings by a Parliamentary Investigation Commission of the Turkish Grand National Assembly. The report referred to 908 unsolved killings, of which nine involved journalists. It commented on the public lack of confidence in the authorities in south-east Turkey on and referred to information that the Hizbullah had a camp in the Batman region where they received political and military training and assistance from the security forces. It concluded that there was a lack of accountability in the region and that some groups with official roles might be implicated in the killings.

1. The appendix is missing from the report.
2. The page following this last sentence is also missing from the report.
3. Persons who cooperate with the authorities after confessing to having been involved with the PKK.

D. Evidence given before the Commission's delegates

34. A delegation from the Commission heard evidence from four witnesses: the applicant, Captain Cengiz Kargılı, the gendarme in charge of the investigation into the killing of Kemal Kılıç, Mr Cafer Tüfekçi, public prosecutor at the Diyarbakır National Security Court who had initiated the proceedings against Hüseyin Güney, and Mr Mustafa Çetin Yağlı, public prosecutor at the Diyarbakır National Security Court who had acted in the trial against Hüseyin Güney.

35. Three other witnesses did not appear. Ahmet Fidan, the night watchman, could not be traced. Mr Hüseyin Fidanboy, the Şanlıurfa public prosecutor, was due to attend but his flight to Ankara was cancelled due to snow. Mr Ziyaeddin Akbulut, the governor of Şanlıurfa at the material time, was asked to attend the hearings on 4 February and 4 July 1997 but did not appear. After the first hearing, the Agent of the Government provided the explanation that Mr Akbulut had been taking his annual leave. Regarding the second hearing, the Agent submitted a letter from Mr Akbulut which stated that he could not remember being petitioned by Kemal Kılıç, that the allegations made were false and that he could not attend due to his annual leave.

III. RELEVANT DOMESTIC LAW AND PRACTICE

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

A. Criminal prosecutions

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

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

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

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

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

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

40. By virtue of Article 4, paragraph (i), of Decree no. 285 of 10 July 1987 on the authority of the governor of a state of emergency region, the 1914 Law (see paragraph 39 above) also applies to members of the security forces who come under the governor's authority.

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

The Military Criminal Code makes it a military offence for a member of the armed forces to endanger a person's life by disobeying an order (Article 89). In such cases civilian complainants may lodge their complaints with the authorities referred to in the Code of Criminal Procedure (see paragraph 37 above) or with the offender's superior.

B. Civil and administrative liability arising out of criminal offences

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

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

> "All acts or decisions of the authorities are subject to judicial review ...
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> ...
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> The authorities shall be liable to make reparation for all damage caused by their acts or measures."

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

44. Article 8 of Decree no. 430 of 16 December 1990, the last sentence of which was inspired by the provision mentioned above (see paragraph 43 above), provides:

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

45. Under the Code of Obligations, anyone who suffers damage as a result of an illegal or tortious act may bring an action for damages (Articles 41 to 46) and non-pecuniary loss (Article 47). The civil courts are not bound by either the findings or the verdict of the criminal court on the issue of the defendant's guilt (Article 53).

However, under section 13 of Law no. 657 on State employees, anyone who has sustained loss as a result of an act done in the performance of duties governed by public law may, in principle, only bring an action against the authority by whom the civil servant concerned is employed and not directly against the civil servant (see Article 129 § 5 of the Constitution and Articles 55 and 100 of the Code of Obligations). That is not, however, an absolute rule. When an act is found to be illegal or tortious and, consequently, is no longer an "administrative" act or deed, the civil courts may allow a claim for damages to be made against the official concerned, without prejudice to the victim's right to bring an action against the authority on the basis of its joint liability as the official's employer (Article 50 of the Code of Obligations).

THE LAW

I. THE COURT'S ASSESSMENT OF THE FACTS

46. The Court observes in the present case that the facts as established in the proceedings before the Commission are no longer substantially in dispute between the parties.

47. Before the Commission, the applicant argued that the facts supported a finding that his brother had been killed either by undercover agents of the State or by members of the Hizbullah, acting under express or implied instructions and to whom the State gave support, including training and equipment. This assertion was denied by the Government.

48. After a Commission delegation had heard evidence in Ankara and Strasbourg (see paragraphs 20 and 24 of the Commission's report of 23 October 1998), the Commission concluded that it was unable to determine who had killed Kemal Kılıç. There was insufficient evidence to establish beyond reasonable doubt that State agents or persons acting on their behalf had carried out the murder. It also found that there was no direct evidence linking the suspect Hüseyin Güney to that incident (see the Commission's report cited above, §§ 187-89 and 201-03).

In their memorials and pleadings before the Court, the applicant and the Government accepted the Commission's conclusions.

49. 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], no. 23763/94, § 67, ECHR 1999-IV).

50. Having regard to the parties' submissions and the detailed consideration given by the Commission in its task of assessing the evidence before it, the Court finds no elements which might require it to exercise its own powers to verify the facts. It accordingly accepts the facts as established by the Commission.

51. In addition to the difficulties inevitably arising from a fact-finding exercise of this nature, the Commission found that it was hindered in its task of establishing the facts by the failure of Mr Ziyaeddin Akbulut, the governor of Şanlıurfa at the material time, to appear to give evidence. The Government were requested to obtain the attendance of Mr Akbulut on two occasions. The Commission considered that the evidence of Mr Akbulut was of importance in shedding light on what steps were taken by the authorities in regard to the claims that Kemal Kılıç and others working for

Özgür Gündem in Şanlıurfa were at risk and concerning the information which was available to the authorities (see paragraph 182 of the Commission's report cited above).

52. The Court would observe 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 Article 34), not only that applicants or potential applicants should be able to communicate freely with the Convention organs without being subjected to any form of pressure from the authorities, but also that States should furnish all necessary facilities to make possible a proper and effective examination of applications (see former Article 28 § 1 (a) of the Convention, which concerned the fact-finding responsibility of the Commission, now replaced by Article 38 of the Convention as regards the Court's procedures).

53. The Court notes the lack of any satisfactory or convincing explanation by the Government as to the non-attendance of an important witness, who was a State official, at the hearings before the Commission's delegates (see paragraph 35 above).

Consequently, it confirms the finding reached by the Commission in its report that in this case the Government fell short of their obligations under former Article 8 § 1 (a) of the Convention to furnish all necessary facilities to the Commission in its task of establishing the facts.

II. ALLEGED VIOLATIONS OF ARTICLE 2 OF THE CONVENTION

54. The applicant alleged that the State was responsible for the death of his brother Kemal Kılıç through the lack of protection and for the failure to provide an effective investigation into his death. He invoked Article 2 of the Convention, which provides:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
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> 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:
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> (a) in defence of any person from unlawful violence;
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> (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."

55. The Government disputed those allegations. The Commission expressed the opinion that on the facts of the case, which disclosed a lack of effective guarantees against unlawful conduct by State agents, the State,

through their failure to take investigative measures or otherwise respond to the concerns of Kemal Kılıç about the pattern of attacks on persons connected with *Özgür Gündem* and through the defects in the investigative and judicial procedures carried out after his death, did not comply with their positive obligation to protect Kemal Kılıç's right to life.

A. Submissions of those who appeared before the Court

1. The applicant

56. The applicant submitted, agreeing with the Commission's report and citing the Court's judgment in the Osman case (Osman v. the United Kingdom judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII) that the authorities had failed to ensure the effective implementation and enforcement of law in the south-east region in or about 1993. He referred to the Susurluk report as strongly supporting the allegations that unlawful attacks were being carried out with the support and knowledge of the authorities. He relied on the defects in investigations into unlawful killings found by the Convention organs as showing that public prosecutors were unlikely to carry out effective inquiries into allegations against the security forces. He also pointed to the way in which the jurisdiction to investigate complaints against the security forces was transferred from the public prosecutors to administrative councils, which were not independent, and to the use of National Security Courts, which were also lacking in independence due to the presence of a military judge, to deal with alleged terrorist crime.

57. These elements together disclosed a lack of accountability on the part of the security forces or those acting under their control or with their acquiescence which was, in the view of the applicant and the Commission, incompatible with the rule of law. In the particular circumstances of this case where Kemal Kılıç, as a journalist for *Özgür Gündem*, was at risk of being targeted, the authorities, in failing to take adequate measures following his request for protection, had failed to protect his life as required by law.

58. The applicant, again relying on the Commission's report, further argued that the investigation into Kemal Kılıç's death was fundamentally flawed. After the initial investigative measures at the scene, the authorities took few steps to find the perpetrators. They failed to broaden the investigation to discover if the killing was related to Kemal Kılıç's employment as a journalist by *Özgür Gündem* even though the gendarmerie captain in charge of the investigation was aware of the difficulties experienced by journalists at this time, and by Kemal Kılıç in particular. Although a suspect, Hüseyin Güney, was accused among other things of killing Kemal Kılıç, the applicant pointed out that there was no evidence at

his trial linking him to the murder. Nonetheless the trial, which was still pending at the date of the Commission's report in October 1998, had had the practical effect of closing the investigation into the killing, despite its lack of relevance to that event.

2. The Government

59. The Government rejected the Commission's approach as general and imprecise. They argued strongly that the Susurluk report had no evidential or probative value and could not be taken into account in assessing the situation in south-east Turkey. The report was prepared for the sole purpose of providing information to the Prime Minister's Office and making certain suggestions. Its authors emphasised that the veracity and accuracy of the report were to be evaluated by that Office. Speculation and discussion about the matters raised in the report were rife and all based on the assumption that its contents were true. The State, however, could only be held liable on the basis of facts that had been proved beyond reasonable doubt.

60. As regards the applicant's and the Commission's assertions that Kemal Kılıç had been at risk from unlawful violence, the Government pointed out that the State had been dealing with a high level of terrorist violence since 1984 which reached its peak between 1993 and 1994, causing the death of more than 30,000 Turkish citizens. The situation in the south-east was exploited by many armed terrorist groups, including the PKK and the Hizbullah, who were involved in a struggle for power in that region in 1993/94. While the security forces did their utmost to establish law and order, they faced immense obstacles and, as in other parts of the world, terrorist attacks and killings could not be prevented. Indeed, in the climate of widespread intimidation and violence, no one in society could have felt safe at that time. All journalists could be said to have been at risk, for example, not only Kemal Kılıç.

61. As regards the investigation into the death of Kemal Kılıç, the Government asserted that this was carried out with utmost precision and professionalism. All necessary steps were taken promptly and efficiently, including an investigation at the scene, an autopsy, a ballistics examination and the taking of statements from witnesses. The investigation continued even after Hüseyin Güney was put on trial as it was known that there were three others involved in the murder. Further, once the Diyarbakır National Security Court found that it had not been established that Hüseyin Güney had committed the killing, an investigation was opened in the National Security Court which will continue until the end of the relevant prescription period.

B. The Court's assessment

Alleged failure to protect the right to life

(a) Alleged failure to take protective measures

62. The Court recalls that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see the L.C.B. v. the United Kingdom judgment of 9 June 1998, *Reports* 1998-III, p. 1403, § 36). This involves a primary duty on the State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. It also extends in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual or individuals whose life is at risk from the criminal acts of another individual (see the Osman judgment cited above, p. 3159, § 115).

63. Bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk (see the Osman judgment cited above, pp. 3159-60, § 116).

64. In the present case, it has not been established beyond reasonable doubt that any State agent or person acting on behalf of the State authorities was involved in the killing of Kemal Kılıç (see paragraphs 48 and 50 above). The question to be determined is whether the authorities failed to comply with their positive obligation to protect him from a known risk to his life.

65. The Court notes that Kemal Kılıç made a request for protection to the governor of Şanlıurfa on 23 December 1992, just under two months before he was shot dead by unknown gunmen. His petition shows that he considered himself and others to be at risk because they worked for *Özgür Gündem.* He claimed that distributors and sellers of the newspaper had been threatened and attacked in Şanlıurfa and in other towns in the south-east

region. In his press release of 11 January 1993, he detailed specific attacks on two news-stands in Şanlıurfa.

66. The Government have claimed that Kemal Kılıç was not more at risk than any other person or journalist in the south-east, referring to the tragic number of victims to the conflict in that region. The Court has previously found, however, that in early 1993 the authorities were aware that those involved in the publication and distribution of *Özgür Gündem* feared that they were falling victim to a concerted campaign tolerated, if not approved, by State officials (see the Yaşa v. Turkey judgment of 2 September 1998, *Reports* 1998-VI, p. 2440, § 106). It is undisputed that a significant number of serious incidents occurred involving killings of journalists, attacks on newspaper kiosks and distributors of the newspaper (see the Yaşa judgment cited above, p. 2440, § 106, and the case of Ersöz and Others v. Turkey pending before the Court, application no. 23144/93, Commission's report of 29 October 1998, §§ 28-62 and 141-42, unpublished). The Court is satisfied that Kemal Kılıç, as a journalist for *Özgür Gündem*, was at this time at particular risk of falling victim to an unlawful attack. Moreover, this risk could in the circumstances be regarded as real and immediate.

67. The authorities were aware of this risk. The governor of Şanlıurfa had been petitioned by Kemal Kılıç who had requested protective measures. In Diyarbakır, the police were in consultation with the *Özgür Gündem* office there about protective measures.

68. Furthermore, the authorities were aware, or ought to have been aware, of the possibility that this risk derived from the activities of persons or groups acting with the knowledge or acquiescence of elements in the security forces. A 1993 report by a Parliamentary Investigation Commission (see paragraph 33 above) stated that it had received information that a Hizbullah training camp was receiving aid and training from the security forces and concluded that some officials might be implicated in the 908 unsolved killings in the south-east region. The Susurluk report, published in January 1998, informed the Prime Minister's Office that the authorities were aware of killings being carried out to eliminate alleged supporters of the PKK, including the murders of Musa Anter and other journalists during this period. The Government insisted that this report did not have any judicial or evidential value. However, even the Government described the report as providing information on the basis of which the Prime Minister was to take further appropriate measures. It may therefore be regarded as a significant document.

The Court does not rely on the report as establishing that any State official was implicated in any particular killing. The report does, however, provide further strong substantiation for allegations, current at the time and since, that "contra-guerrilla" groups or terrorist groups were targeting individuals perceived to be acting against State interests, with the acquiescence, and possible assistance, of members of the security forces.

69. The Court has considered whether the authorities did all that could reasonably be expected of them to avoid the risk to Kemal Kılıç.

70. It recalls that, as the Government submit, there were large numbers of security forces in the south-east region pursuing the aim of establishing public order. They faced the difficult task of countering the violent armed attacks of the PKK and other groups. There was a framework of law in place with the aim of protecting life. The Turkish Criminal Code prohibited murder and there were police and gendarmerie forces with the role of preventing and investigating crime, under the supervision of the judicial branch of public prosecutors. There were also courts applying the provisions of the criminal law in trying, convicting and sentencing offenders.

71. The Court observes, however, that the implementation of the criminal law in respect of unlawful acts allegedly carried out with the involvement of the security forces discloses particular characteristics in the south-east region in this period.

72. Firstly, where offences were committed by State officials in certain circumstances, the competence to investigate was removed from the public prosecutor in favour of administrative councils which took the decision whether to prosecute (see paragraph 39 above). These councils were made up of civil servants, under the orders of the governor, who was himself responsible for the security forces whose conduct was in issue. The investigations which they instigated were often carried out by gendarmes linked hierarchically to the units concerned in the incident. The Court accordingly found in two cases that the administrative councils did not provide an independent or effective procedure for investigating deaths involving members of the security forces (see the Güleç v. Turkey judgment of 27 July 1998, *Reports* 1998-IV, pp. 1731-33, §§ 77-82, and *Oğur v. Turkey* [GC], no. 21594/93, §§ 85-93, ECHR 1999-III).

73. Secondly, the cases examined by the Convention organs concerning the region at this time have produced a series of findings of failure by the authorities to investigate allegations of wrongdoing by the security forces, both in the context of the procedural obligations under Article 2 of the Convention and the requirement for effective remedies imposed by Article 13 (see, concerning Article 2, the Kaya v. Turkey judgment of 19 February 1998, *Reports* 1998-I, pp. 324-26, §§ 86-92; the Ergi v. Turkey judgment of 28 July 1998, *Reports* 1998-IV, pp. 1778-79, §§ 82-85; the Yaşa judgment cited above, pp. 2454-57, §§ 98-108; *Çakıcı v. Turkey* [GC], no. 23657/94, § 87, ECHR 1999-IV; and *Tanrıkulu* cited above, §§ 101-11; concerning Article 13, see the judgments cited above and the Aksoy v. Turkey judgment of 18 December 1996, *Reports* 1996-VI, pp. 2286-87, §§ 95-100; the Aydın v. Turkey judgment of 25 September 1997, *Reports* 1997-VI, pp. 1895-98, §§ 103-09; the Menteş and Others v. Turkey judgment of 28 November 1997, *Reports* 1997-VIII, pp. 2715-16, §§ 89-92; the Selçuk and Asker v. Turkey judgment of 24 April 1998, *Reports* 1998-

II, pp. 912-14, §§ 93-98; the Kurt v. Turkey judgment of 25 May 1998, *Reports* 1998-III, pp. 1188-90, §§ 135-42; and the Tekin v. Turkey judgment of 9 June 1998, *Reports* 1998-IV, pp. 1519-20, §§ 62-69).

A common feature of these cases is a finding that the public prosecutor has failed to pursue complaints by individuals claiming that the security forces were involved in an unlawful act, for example not interviewing or taking statements from implicated members of the security forces, accepting at face value the reports of incidents submitted by members of the security forces and attributing incidents to the PKK on the basis of minimal or no evidence.

74. Thirdly, the attribution of responsibility for incidents to the PKK had particular significance as regards the investigation and judicial procedures which ensue since jurisdiction for terrorist crimes has been given to the National Security Courts (see paragraph 38 above). In a series of cases, the Court has found that the National Security Courts do not fulfil the requirement of independence imposed by Article 6 of the Convention, due to the presence of a military judge whose participation gives rise to legitimate fears that the court may be unduly influenced by considerations which had nothing to do with the nature of the case (see the Incal v. Turkey judgment of 9 June 1998, *Reports* 1998-IV, pp. 1571-73, §§ 65-73).

75. The Court finds that these defects undermined the effectiveness of the protection afforded by the criminal law in the south-east region during the period relevant to this case. It considers that this permitted or fostered a lack of accountability of members of the security forces for their actions which, as the Commission stated in its report, was not compatible with the rule of law in a democratic society respecting the fundamental rights and freedoms guaranteed under the Convention.

76. In addition to these defects which removed the protection which Kemal Kılıç should have received by law, there was an absence of any operational measures of protection. The Government have disputed that they could have effectively provided protection against attacks. The Court is not convinced by this argument. A wide range of preventive measures were available which would have assisted in minimising the risk to Kemal Kılıç's life and which would not have involved an impractical diversion of resources. On the contrary however, the authorities denied that there was any risk. There is no evidence that they took any steps in response to Kemal Kılıç's request for protection either by applying reasonable measures of protection or by investigating the extent of the alleged risk to *Özgür Gündem* employees in Şanlıurfa with a view to taking appropriate measures of prevention.

77. The Court concludes that in the circumstances of this case the authorities failed to take reasonable measures available to them to prevent a real and immediate risk to the life of Kemal Kılıç. There has, accordingly, been a violation of Article 2 of the Convention.

(b) Alleged inadequacy of the investigation

78. The Court reiterates that the obligation to protect life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention "to secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see, *mutatis mutandis*, the McCann and Others v. the United Kingdom judgment of 27 September 1995, Series A no. 324, p. 49, § 161, and the Kaya judgment cited above, p. 329, § 105).

79. The Court recalls that in the present case an investigation was carried out at the scene of the killing by the gendarmerie captain Kargılı, who also took steps to identify and interview potential witnesses and to obtain a ballistics examination of the cartridges found at the scene.

80. However, no investigative step was taken by Captain Kargılı after his letter of 15 March 1993 transmitting information and documents to the Şanlıurfa public prosecutor. Furthermore, although the indictment lodged against the suspect Hüseyin Güney arrested in Diyarbakır on 24 December 1993 listed the killing of Kemal Kılıç as one of the separatist offences committed by him as a Hizbullah member, there was no direct evidence linking him with that particular crime (see paragraphs 48 and 50 above). The Diyarbakır National Security Court did not hear any witnesses concerning the Kılıç incident nor had Hüseyin Güney made any admissions as to his involvement. No steps had been taken to link Hüseyin Güney, who had previously lived in Batman, to the killing of Kemal Kılıç in Şanlıurfa. While the prosecution relied on a ballistics examination which showed that the gun allegedly used by Hüseyin Güney in an attack on a shop in Diyarbakır had also been used in fifteen other incidents, including the shooting of Kemal Kılıç, there was no evidence to show that it had been in his possession before the attack on the shop. This finding is confirmed by the decision of 29 March 1999 of the Diyarbakır National Security Court, which found that it was not proved that Hüseyin Güney had used the gun in any other incident (see paragraph 26 above).

81. The Government contested the applicant's and the Commission's view that the misconceived inclusion of the murder of Kemal Kılıç in the prosecution of Hüseyin Güney had the practical effect of closing the investigation. However, the Court notes that on 16 February 1994 the Şanlıurfa public prosecutor issued a decision of non-jurisdiction in respect of the incident, stating that the incident fell within the jurisdiction of the National Security Court to which he therefore transferred the file. It is not apparent that any steps were taken by the Diyarbakır National Security Court prosecution with a view to continuing the investigation in any concrete form. The inactive status of the file is also supported by the Government's information that following the National Security Court

decision of 29 March 1999 a new file has been opened into the matter by its public prosecutor, who has sent out a general request for information to be forwarded to him concerning the incident.

82. The Court observes that the investigation by the gendarmes and the Şanlıurfa public prosecutor after the incident did not include any inquiries as to the possible targeting of Kemal Kılıç due to his job as an *Özgür Gündem* journalist. The fact that the case was transferred to the National Security Court prosecutor indicates that it was regarded as a separatist crime. There is no indication that any steps have been taken to investigate any collusion by security forces in the incident.

83. Having regard therefore to the limited scope and short duration of the investigation in this case, the Court finds that the authorities have failed to carry out an effective investigation into the circumstances surrounding Kemal Kılıç's death. It concludes that there has in this respect been a violation of Article 2 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

84. The applicant complained that the killing of his brother Kemal Kılıç also disclosed a violation of Article 10 of the Convention which provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

85. The applicant argued that his brother was killed because he was a journalist. As he was targeted on account of his journalistic activities, this was an unjustified interference with his freedom of expression. The killing was therefore an act with a dual character which should give rise to separate violations under Articles 2 and 10 of the Convention.

86. The Government rejected the applicant's submissions.

87. The Court notes that the applicant's complaints arise out of the same facts as those considered under Article 2 of the Convention. It therefore does not consider it necessary to examine this complaint separately.

IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

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

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

89. The Government argued that in light of the investigation carried out and the criminal prosecution which followed the apprehension of Hüseyin Güney, no problem arose concerning effective remedies.

90. The Commission, with whom the applicant agreed, was of the opinion that the applicant had arguable grounds for claiming that the security forces were implicated in the killing of his brother. Referring to its findings relating to the inadequacy of the investigation, it concluded that the applicant had been denied an effective remedy.

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

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

92. On the basis of the evidence adduced in the present case, the Court has not found it proved beyond reasonable doubt that agents of the State carried out, or were otherwise implicated in, the killing of the applicant's brother. As it has held in previous cases, however, that does not preclude the complaint in relation to Article 2 from being an "arguable" one for the purposes of Article 13 (see the Boyle and Rice v. the United Kingdom judgment of 27 April 1988, Series A no. 131, p. 23, § 52, and the Kaya and Yaşa judgments cited above, pp. 330-31, § 107, and p. 2442, § 113,

respectively). In this connection, the Court observes that it is not in dispute that the applicant's brother was the victim of an unlawful killing and he may therefore be considered to have an "arguable claim".

93. The authorities thus had an obligation to carry out an effective investigation into the circumstances of the killing of the applicant's brother. For the reasons set out above (see paragraphs 79-82), no effective criminal investigation can be considered to have been conducted in accordance with Article 13, the requirements of which are broader than the obligation to investigate imposed by Article 2 (see the Kaya judgment cited above, pp. 330-31, § 107). The Court finds therefore that the applicant has been denied an effective remedy in respect of the death of his brother and thereby access to any other available remedies at his disposal, including a claim for compensation.

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

V. ALLEGED PRACTICE BY THE AUTHORITIES OF INFRINGING ARTICLES 2 AND 13 OF THE CONVENTION

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

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

VI. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

96. The applicant submitted that his brother was killed because he was a journalist and because of his Kurdish origin and that he was thus, contrary to the prohibition contained in Article 14 of the Convention, a victim of discrimination on grounds of presumed political or other opinion and of national origin in relation to the exercise of his right to life as protected by Article 2. Article 14 reads:

> "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."

97. The Government did not address this issue in their memorial or at the hearing.

98. The Court considers that these complaints arise out of the same facts as those considered under Articles 2 and 13 of the Convention and does not find it necessary to examine them separately.

VII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

99. Article 41 of the Convention provides:

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

A. Pecuniary damage

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.

101. The Government, pointing out that the applicant had failed to establish any direct State involvement in the death of his brother, rejected the applicant's claims as exaggerated and likely to lead to unjust enrichment. They disputed that his brother would have earned the sum claimed, which was an immense amount in Turkish terms.

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

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.

104. The Government claimed that these amounts were excessive and unjustified.

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. It has previously awarded sums as regards the deceased where it was found that there had been arbitrary detention or torture before his disappearance or death, such sums to be held for the person's heirs (see the Kurt judgment cited above, p. 1195, §§ 174-75, and *Çakıcı* cited above, § 130). 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 Kılıç, 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.

106. 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.

C. Costs and expenses

107. The applicant claimed a total of GBP 32,327.36 for fees and costs incurred in bringing the application, less the amounts received by way of legal aid from the Council of Europe. This included fees and costs incurred in respect of attendance at the taking of evidence before the Commission's delegates at hearings in Ankara and Strasbourg and attendance at the hearing before the Court in Strasbourg. A sum of GBP 5,255 is listed as fees and administrative costs incurred in respect of the Kurdish Human Rights Project in its role as liaison between the legal team in the United Kingdom and the lawyers and the applicant in Turkey, as well as a sum of GBP 3,570 in respect of work undertaken by lawyers in Turkey.

108. The Government regarded the professional fees as exaggerated and unreasonable and submitted that regard should be had to the applicable rates for the Bar in Istanbul.

109. In relation to the claim for costs, the Court, deciding on an equitable basis and having regard to the details of the claims submitted by

the applicant, awards him the sum of GBP 20,000 together with any value-added tax that may be chargeable, less the 4,200 French francs received by way of legal aid from the Council of Europe.

D. Default interest

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

FOR THESE REASONS, THE COURT

1. *Holds* by six votes to one that the respondent State failed to protect the life of Kemal Kılıç in violation of Article 2 of the Convention;

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

3. *Holds* unanimously that it is unnecessary to examine whether there has been a violation of Article 10 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 it is unnecessary to examine whether there has been a violation of Article 14 of the Convention;

6. *Holds* by six votes to one that the respondent State is to pay the applicant in respect of his brother, within three months, by way of compensation for non-pecuniary damage, GBP 15,000 (fifteen thousand pounds sterling) to be converted into Turkish liras at the rate applicable at the date of settlement, which sum is to be held by the applicant for his brother's heirs;

7. *Holds* unanimously that the respondent State is to pay the applicant, within three months, in respect of compensation for non-pecuniary damage, GBP 2,500 (two thousand five hundred pounds sterling) to be converted into Turkish liras at the rate applicable at the date of settlement;

8. *Holds* unanimously that the respondent State is to pay the applicant, within three months, in respect of costs and expenses, GBP 20,000 (twenty thousand pounds sterling), together with any value-added tax that may be chargeable, less FRF 4,200 (four thousand two hundred French francs) to be converted into pounds sterling at the rate applicable at the date of delivery of this judgment;

9. *Holds* unanimously that simple interest at an annual rate of 7.5% shall be payable on these sums from the expiry of the above-mentioned three months until settlement;

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

Done in English, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 28 March 2000.

Michael O'BOYLE
Registrar

Elisabeth PALM
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.

E.P.
M.O'B.

PARTLY DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

(Translation)

To my great regret, I am unable to agree with the majority on points 1, 4 and 6 of the operative provisions of the Kılıç judgment for the following reasons.

1. The Court reached the conclusion that the respondent State had violated Article 2 by failing to take the necessary measures to protect the life of Kemal Kılıç.

There is not a shadow of doubt in anyone's mind that south-east Turkey is a high-risk area for all its inhabitants. PKK and Hizbullah terrorists and members of the far left, encouraged and supported by foreign powers, seize every opportunity to perpetrate their crimes. Moreover, gangsters and rogues take advantage of the presence of these terrorist groups in the region. The authorities have taken – and continue to take – all necessary measures within their power to combat these threats to life (see paragraph 70 of the judgment). The Court itself recognises that the positive obligation imposed on the State by the Convention is not absolute but merely one to use best endeavours (see paragraphs 63 to 66 of the judgment).

Thus, surely, someone like Kemal Kılıç, who was living in the region, carrying on a profession which he said put him at risk (he was a journalist) and feeling threatened – not even he could say by whom – should have exercised greater care than others and taken his own safety precautions rather than wait for the authorities to protect him against those dangers.

While, according to the findings of the Commission, Kemal Kılıç was aware of the risk he was running, he nonetheless chose to take the coach home at 5.30 p.m. on 18 February 1993 although it was already dark and an allegedly suspicious car had been spotted following the coach. Without taking any precautions, he got off at a deserted stop where there was no one to come to his aid if necessary.

Unfortunately, no government is able to make security agents available to accompany persons who feel threatened or to provide them with personal protection in a high-risk area where perhaps hundreds or even thousands of people are in a like situation.

Consequently, I do not share the opinion that the respondent State failed, in breach of Article 2 of the Convention, in any duty it had to protect Kemal Kılıç's life.

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

Thus, I agree with the Commission that once the conclusion has been reached that there has been a violation of Article 2 of the Convention on the grounds that there was no effective investigation into the death that has

given rise to the complaint, no separate question arises under Article 13. The fact that there was no satisfactory and adequate investigation into the death which resulted in the applicant's complaints, both under Article 2 and Article 13, automatically means that there was no effective remedy before a national court. On that subject, I refer to my dissenting opinion in the case of Kaya v. Turkey (judgment of 19 February 1998, *Reports* 1998-I) and the opinion expressed by the Commission with a large majority (see the opinions of the Commission annexed to the following judgments: Aytekin v. Turkey, 23 September 1998, *Reports* 1998-VII; Ergi cited above; and Yaşa v. Turkey, 2 September 1998, *Reports* 1998-VI).

3. The Court awarded the applicant 15,000 pounds sterling (GBP) "in respect of his brother ... by way of compensation for non-pecuniary damage ... which sum is to be held by the applicant for his brother's heirs".

The *actio popularis* is excluded under the Convention system, with all the consequences that logically follow. It is for that reason that the Court has up till now awarded compensation in respect of non-pecuniary damage for individual violations only to very close relatives such as the surviving spouse or children of the deceased person or, exceptionally, when it has appeared equitable, the father or mother if an express claim has been made (see paragraph 105 of the judgment in the instant case and *Tanrıkulu v. Turkey* [GC], no. 23763/94, § 138, ECHR 1999-IV).

It is completely alien and contrary to the Convention system and devoid of any legal justification for an abstract, anonymous and undefined group (perhaps very distant heirs) that has suffered no non-pecuniary damage as a result of the violations found to be awarded compensation.

Kemal Kılıç was single. He had no companion or children and therefore no heirs deserving compensation for non-pecuniary damage. Yet, even more surprisingly, the Court awarded the applicant's brother the sum of GBP 2,500 for non-pecuniary damage (see paragraph 106 of the judgment). As one of the deceased's heirs, that brother will also receive part of the award of GBP 15,000. He will thus receive two lots of compensation for the same loss, a fact that goes to highlight the inequitable nature of the Court's decision in this case.

4. Before closing, I feel bound to express my views on what I consider to be an important point. In cases where the presumed offender is a State agent, he may only be prosecuted if the administrative body (the "administrative council") has given prior authorisation. However, that body is, by law, made up of public servants and is neither independent nor impartial. The Court, whose view I agree with entirely, has consistently criticised the Turkish government for that state of affairs.

However, the Court's inadmissibility decision of 5 October 1999 in *Grams v. Germany* ((dec.), no. 33677/96, ECHR 1999-VII) is instructive on the point. The case concerned the death of a presumed member of the Red Army Faction. The Court noted that the Schwerin public prosecutor's office

had decided to drop the prosecution on the ground that the police officers had fired in lawful self-defence and Grams had committed suicide by shooting himself in the head. In arriving at that conclusion, the public prosecutor's office had relied on a 210-page report (*Abschlußvermerk*) in which the special unit responsible for the investigation of the case had set out its findings. What is interesting in this example – and it will be noted in passing that the application was not even communicated to the Government – is that the investigation was conducted not by a judicial body but by a special unit, that is to say a purely administrative body.