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

COURT (CHAMBER)

CASE OF AKSOY v. TURKEY

(Application no. 21987/93)

JUDGMENT

STRASBOURG

18 December 1996

In the case of Aksoy v. Turkey[1],

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A[2], as a Chamber composed of the following judges:

MM R. RYSSDAL, *President*,
THÓR VILHJÁLMSSON,
F. GÖLCÜKLÜ,
L.-E. PETTITI,
J. DE MEYER,
J.M. MORENILLA,
A.B. BAKA,
J. MAKARCZYK,
U. LOHMUS,

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

Having deliberated in private on 27 April, 24 October and 26 November 1996,

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

PROCEDURE

1. The case was referred to the Court on 4 December 1995 by the Government of Turkey ("the Government") and on 12 December 1995 by the European Commission of Human Rights ("the Commission"), within the three-month period laid down by Article 32 para. 1 and Article 47 of the Convention (art. 32-1, art. 47). It originated in an application (no. 21987/93) against the Republic of Turkey lodged with the Commission under Article 25 (art. 25) on 20 May 1993 by Mr Zeki Aksoy, a Turkish citizen.

The Government's application referred to Article 48 (art. 48); the Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Turkey recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request and of the

[1] The case is numbered 100/1995/606/694. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

[2] Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

application 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 3, 5 para. 3, 6 para. 1 and 13 of the Convention (art. 3, art. 5-3, art. 6-1, art. 13).

2. On 16 April 1994 the applicant was shot and killed. On 20 April 1994 his representatives informed the Commission that his father wished to continue with the case.

3. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicant's father (who shall, henceforward, also be referred to as "the applicant") stated that he wished to take part in the proceedings and designated the lawyers who would represent him.

On 26 March 1996 the President granted leave, pursuant to Rule 30 para. 1, to Ms Françoise Hampson, a Reader in Law at the University of Essex, to act as the applicant's representative.

4. The Chamber to be constituted included ex officio Mr F. Gölcüklü, the elected judge of Turkish nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 5 December 1995, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr L.-E. Pettiti, Mr J. De Meyer, Mr J.M. Morenilla, Mr F. Bigi, Mr A.B. Baka, Mr J. Makarczyk and Mr U. Lohmus (Article 43 in fine of the Convention and Rule 21 para. 5) (art. 43). Following the death of Mr Bigi, Mr Thór Vilhjálmsson, the first substitute, became a member of the Chamber.

5. As President of the Chamber (Rule 21 para. 6), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Government, the applicant's lawyers and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicant's memorial on 7 March 1996 and the Government's memorial on 15 March 1996.

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 26 April 1996. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Mr B. ÇAGLAR, Ministry of Foreign Affairs, *Agent*,
Ms D. AKÇAY,
Mr T. ÖZKAROL,
Mr A. KURUDAL,
Mr F. ERDOGAN,
Mr O. SEVER,
Ms M. GÜLSEN, *Counsel*;

- for the Commission

Mr H. DANELIUS, *Delegate*;

- for the applicant
Ms F. HAMPSON, University of Essex,
Mr K. BOYLE, Barrister-at-Law, *Counsel*,
Mr K. YILDIZ,
Mr T. FISHER,
Ms A. REIDY, *Advisers*.

The Court heard addresses by Mr Danelius, Ms Hampson, Mr Çaglar and Ms Akçay.

AS TO THE FACTS

I. CIRCUMSTANCES OF THE CASE

A. The applicant

7. The applicant, Mr Zeki Aksoy, was a Turkish citizen who, at the time of the events in question, lived in Mardin, Kiziltepe, in South-East Turkey, where he was a metal worker. He was born in 1963 and was shot and killed on 16 April 1994. Since then, his father has indicated that he wishes to pursue the case (see paragraph 3 above).

B. The situation in the South-East of Turkey

8. Since approximately 1985, serious disturbances have raged in the South-East of Turkey between the security forces and the members of the PKK (Workers' Party of Kurdistan). This confrontation has so far, according to the Government, claimed the lives of 4,036 civilians and 3,884 members of the security forces.

9. At the time of the Court's consideration of the case, ten of the eleven provinces of south-eastern Turkey had since 1987 been subjected to emergency rule.

C. The detention of the applicant

10. The facts in the case are in dispute.

11. According to the applicant, he was taken into custody on 24 November 1992, between 11 p.m. and midnight. Approximately twenty policemen had come to his home, accompanied by a detainee called Metin who, allegedly, had identified the applicant as a member of the PKK, although Mr Aksoy told the police that he did not know Metin.

12. The Government submitted that the applicant was arrested and taken into custody on 26 November 1992 at around 8.30 a.m., together with thirteen others, on suspicion of aiding and abetting PKK terrorists, being a member of the Kiziltepe branch of the PKK and distributing PKK tracts.

13. The applicant stated that he was taken to Kiziltepe Security Headquarters. After one night, he was transferred to Mardin Antiterrorist Headquarters.

He was allegedly detained, with two others, in a cell measuring approximately 1.5 x 3 metres, with one bed and a blanket, but no pillow. He was provided with two meals a day.

14. He was interrogated about whether he knew Metin (the man who had identified him). He claimed to have been told: "If you don't know him now, you will know him under torture."

According to the applicant, on the second day of his detention he was stripped naked, his hands were tied behind his back and he was strung up by his arms in the form of torture known as "Palestinian hanging". While he was hanging, the police connected electrodes to his genitals and threw water over him while they electrocuted him. He was kept blindfolded during this torture, which continued for approximately thirty-five minutes.

During the next two days, he was allegedly beaten repeatedly at intervals of two hours or half an hour, without being suspended. The torture continued for four days, the first two being very intensive.

15. He claimed that, as a result of the torture, he lost the movement of his arms and hands. His interrogators ordered him to make movements to restore the control of his hands. He asked to see a doctor, but was refused permission.

16. On 8 December 1992 the applicant was seen by a doctor in the medical service of the sub-prefecture. A medical report was prepared, stating in a single sentence that the applicant bore no traces of blows or violence. According to Mr Aksoy, the doctor asked how his arms had been injured and was told by a police officer that he had had an accident. The doctor then commented, mockingly, that everyone who came there seemed to have an accident.

17. The Government submitted that there were fundamental doubts as to whether the applicant had been ill-treated while in police custody.

18. On 10 December 1992, immediately before his release, Mr Aksoy was brought before the Mardin public prosecutor.

According to the Government, he was able to sign a statement denying any involvement with the PKK and made no complaint about having been tortured.

The applicant, however, submitted that he was shown a statement for signature, but said that its contents were untrue. The prosecutor insisted he sign it but Mr Aksoy told him that he could not because he could not move his hands.

D. Events on the applicant's release

19. Mr Aksoy was released on 10 December 1992. He was admitted to Dicle University Medical Faculty Hospital on 15 December 1992, where he was diagnosed as suffering from bilateral radial paralysis (that is, paralysis of both arms caused by nerve damage in the upper arms). He told the doctor who treated him that he had been in custody and strung up with his arms tied behind his back.

He remained at the hospital until 31 December 1992 when, according to the Government, he left without having been properly discharged, taking his medical file with him.

20. On 21 December 1992, the public prosecutor decided that there were no grounds to institute criminal proceedings against the applicant, although eleven of the others detained with him were charged.

21. No criminal or civil proceedings have been brought in the Turkish courts in relation to the alleged ill-treatment of the applicant.

E. The death of the applicant

22. Mr Aksoy was shot dead on 16 April 1994.

According to his representatives, he had been threatened with death in order to make him withdraw his application to the Commission, the last threat being made by telephone on 14 April 1994, and his murder was a direct result of his persisting with the application.

The Government, however, submitted that his killing was a settling of scores between quarrelling PKK factions.

A suspect, allegedly a member of the PKK, has been charged with the murder.

F. The Commission's findings of fact

23. Delegates of the Commission heard evidence from witnesses in the case in Diyarbakir between 13 and 14 March 1995 and in Ankara between 12 and 14 April 1995, in the presence of representatives from both sides who were able to cross-examine the witnesses. In addition, the Commission heard oral submissions on admissibility and the merits at hearings in Strasbourg on 18 October 1994 and 3 July 1995.

After evaluating the oral and documentary evidence, the Commission came to the following conclusions with regard to the facts:

a) It was not possible to make a definite finding as to the date on which Mr Aksoy was arrested, although this clearly took place no later than 26 November 1992. He was released on 10 December 1992, therefore he was detained for at least fourteen days.

b) On 15 December 1992 he was admitted to hospital and was diagnosed with bilateral radial paralysis. He left hospital on 31 December 1992 on his own initiative, without having been properly discharged.

c) There was no evidence that he had suffered any disability prior to his arrest, nor any evidence of any untoward incident during the five days between his release from police custody and his admission to hospital.

d) The Commission noted that the medical evidence indicated that the applicant's injuries could have had various causes, but one of these could have been the trauma suffered by a person who had been strung up by his arms. Moreover, radial paralysis affecting both arms was apparently not a common condition, although it was consistent with the form of ill-treatment known as "Palestinian hanging".

e) The delegates heard evidence from one of the policemen who had interrogated Mr Aksoy and from the public prosecutor who saw him prior to his release; both claimed that it was inconceivable that he could have been ill-treated in any way. The Commission found this evidence unconvincing, since it gave the impression that the two public officers were not prepared even to consider the possibility of ill-treatment occurring at the hands of the police.

f) The Government offered no alternative explanation for Mr Aksoy's injuries.

g) There was insufficient evidence to enable any conclusions to be drawn with regard to the applicant's other allegations of ill-treatment by electric shocks and beatings. However, it did seem clear that he had been detained in a small cell with two other people, all of whom had had to share a single bed and blanket, and that he had been kept blindfolded during interrogation.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Criminal-law provisions against torture

24. The Turkish Criminal Code makes it an offence for a government employee to subject someone to torture or ill-treatment (Article 243 in respect of torture, and Article 245 in respect of ill-treatment).

25. Article 8 of Decree no. 430 of 16 December 1990 provides as follows:

> "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."

26. Prosecutors are under a duty to investigate allegations of serious offences which come to their attention, even if no complaint is made. However, in the state of emergency region, the investigation of criminal offences by members of the administration is taken up by local administrative councils, composed of civil servants. These councils are also empowered to decide whether or not to bring a prosecution, subject to an automatic judicial review before the Supreme Administrative Court in cases where they decide not to prosecute (Legislative Decree no. 285).

B. Administrative law remedies

27. Article 125 of the Turkish Constitution provides as follows:

> "All acts or decisions of the administration are subject to judicial review ...
>
> The administration shall be liable to indemnify any damage caused by its own acts and measures."

By virtue of this provision, the State is liable to indemnify any person who can prove that he has suffered damage in circumstances where the State has failed in its duty to safeguard individual life and property.

C. Civil proceedings

28. Any illegal act which causes damage committed by a civil servant (except the regional or district prefects in the state of emergency region) may be the subject of a claim for compensation before the ordinary civil courts.

D. The law relating to detention in police custody

29. Pursuant to Article 128 of the Code of Criminal Procedure, a person arrested and detained shall be brought before a justice of the peace within twenty-four hours. This period may be extended to four days when the individual is detained in connection with a collective offence.

The permissible periods of detention without judicial control are longer in relation to proceedings before the State security courts. In such a case, it is possible to detain a suspect for a period of forty-eight hours in connection with an individual offence, and fifteen days in connection with a collective offence (section 30 of Law no. 3842 of 1 December 1992, re-enacting Article 11 of Decree having the force of law no. 285 of 10 July 1987).

In the region under emergency rule, however, a person arrested in connection with proceedings before the State security courts may be detained for four days in the case of individual offences and thirty days in

the case of collective offences before being brought before a magistrate (ibid., re-enacting section 26 of Law no. 2935 of 25 October 1983).

30. Article 19 of the Turkish Constitution gives to a detained person the right to have the lawfulness of his detention reviewed, on application to the court with jurisdiction over his case.

E. The Turkish derogation from Article 5 of the Convention (art. 5)

31. In a letter dated 6 August 1990, the Permanent Representative of Turkey to the Council of Europe informed the Secretary General of the Council of Europe that:

> "The Republic of Turkey is exposed to threats to its national security in South East Anatolia which have steadily grown in scope and intensity over the last months so as to amount to a threat to the life of the nation in the meaning of Article 15 of the Convention (art. 15).
>
> During 1989, 136 civilians and 153 members of the security forces have been killed by acts of terrorists, acting partly out of foreign bases. Since the beginning of 1990 only, the numbers are 125 civilians and 96 members of the security forces.
>
> The threat to national security is predominantly occurring in provinces [i.e. Elazig, Bingöl, Tunceli, Van, Diyarbakir, Mardin, Siirt, Hakkâri, Batman and Sirnak] of South East Anatolia and partly also in adjacent provinces.
>
> Because of the intensity and variety of terrorist actions and in order to cope with such actions, the Government has not only to use its security forces but also take steps appropriate to cope with a campaign of harmful disinformation of the public, partly emerging from other parts of the Republic of Turkey or even from abroad and with abuses of trade-union rights.
>
> To this end, the Government of Turkey, acting in conformity with Article 121 of the Turkish Constitution, has promulgated on May 10, 1990 the decrees with force of law nos. 424 and 425. These decrees may in part result in derogating from rights enshrined in the following provisions of the European Convention for Human Rights and Fundamental Freedoms: Articles 5, 6, 8, 10, 11 and 13 (art. 5, art. 6, art. 8, art. 10, art. 11, art. 13). A descriptive summary of the new measures is attached hereto. The issue of their compatibility with the Turkish Constitution is currently pending before the Constitutional Court of Turkey.
>
> The Government of Turkey will inform the Secretary General of the Council of Europe when the measures referred to above have ceased to operate.
>
> This notification is given pursuant to Article 15 (art. 15) of the European Convention of Human Rights."

Attached to this letter was a "descriptive summary of the content of the Decrees which have the force of law nos. 424 and 425". The only measure therein described relating to Article 5 of the Convention (art. 5) was as follows:

"The Governor of the state of emergency region can order persons who continuously violate the general security and public order, to settle at a place to be specified by the Minister of the Interior outside the state of emergency region for a period which shall not exceed the duration of the state of emergency ..."

32. By a letter of 3 January 1991 the Permanent Representative of Turkey informed the Secretary General that Decree no. 430 had been enacted, which limited the powers previously afforded to the Governor of the state of emergency region under Decrees nos. 424 and 425.

33. On 5 May 1992 the Permanent Representative wrote to the Secretary General that:

"As most of the measures described in the decrees which have the force of Law nos. 425 and 430 that might result in derogating from rights guaranteed by Articles 5, 6, 8, 10, 11 and 13 of the Convention (art. 5, art. 6, art. 8, art. 10, art. 11, art. 13) are no longer being implemented, I hereby inform you that the Republic of Turkey limits henceforward the scope of its Notice of Derogation with respect to Article 5 of the Convention (art. 5) only. The Derogation with respect to Articles 6, 8, 10, 11 and 13 of the Convention (art. 6, art. 8, art. 10, art. 11, art. 13) is no longer in effect; consequently, the corresponding reference to these Articles (art. 6, art. 8, art. 10, art. 11, art. 13) is hereby deleted from the said Notice of Derogation."

PROCEEDINGS BEFORE THE COMMISSION

34. In his application of 20 May 1993 (no. 21987/93) to the Commission, Mr Aksoy complained that he had been subjected to treatment contrary to Article 3 of the Convention (art. 3) during his detention in police custody in November/December 1992; that, during the course of his detention, he was not brought before a judge or other authorised officer in violation of Article 5 para. 3 (art. 5-3); and that he was not provided with the opportunity to bring proceedings against those responsible for his ill-treatment, in violation of Articles 6 para. 1 and 13 (art. 6-1, art. 13).

Following Mr Aksoy's death on 16 April 1994, his representatives alleged that the killing was a direct result of his application to the Commission and was an interference with his right of individual petition under Article 25 of the Convention (art. 25).

35. The Commission declared the application admissible on 19 October 1994. In its report of 23 October 1995 (Article 31) (art. 31), it expressed the opinion, by fifteen votes to one, that there had been a violation of Article 3 (art. 3) and that there had been a violation of Article 5 para. 3 (art. 5-3); by thirteen votes to three, that there had been a violation of Article 6 para. 1 (art. 6-1) and that no separate issue arose under Article 13 (art. 13); and, unanimously, that no further action need be taken in respect of the alleged interference with the effective exercise of the right of individual petition under Article 25 (art. 25).

The full text of the Commission's opinion and of the two separate opinions contained in the report is reproduced as an annex to this judgment[3].

FINAL SUBMISSIONS TO THE COURT

36. At the hearing, the Government invited the Court to reject the application on the ground that the available domestic remedies had not been exhausted or, in the alternative, to find that there had been no violation of the Convention.

37. On the same occasion, the applicant asked the Court to find violations of Articles 3, 5, 6, 13 and 25 of the Convention (art. 3, art. 5, art. 6, art. 13, art. 25), and to rule that these breaches had been aggravated because the measures complained of formed part of an administrative practice. He also requested just satisfaction pursuant to Article 50 of the Convention (art. 50).

AS TO THE LAW

I. THE COURT'S ASSESSMENT OF THE FACTS

38. The Court recalls its constant case-law that under the Convention system the establishment and verification of the facts is primarily a matter for the Commission (Articles 28 para. 1 and 31) (art. 28-1, art. 31). While the Court is not bound by the Commission's findings of fact and remains free to make its own appreciation in the light of all the material before it, it is only in exceptional circumstances that it will exercise its powers in this area (see the Akdivar and Others v. Turkey judgment of 16 September 1996, Reports of Judgments and Decisions 1996-IV, p. 1214, para. 78).

39. In the instant case, it must be recalled that the Commission reached its findings of fact after a delegation had heard evidence in Turkey on two separate occasions, in addition to hearings in Strasbourg (see paragraph 23 above). In these circumstances, the Court considers that it should accept the facts as established by the Commission (see, mutatis mutandis, the above-mentioned Akdivar and Others judgment, p. 1214, para. 81).

40. It is thus against the background of the facts as found by the Commission (see paragraph 23 above) that the Court must examine the

[3] For practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions 1996-VI), but a copy of the Commission's report is obtainable from the registry.

Government's preliminary objection and the applicant's complaints under the Convention.

II. THE GOVERNMENT'S PRELIMINARY OBJECTION

A. The arguments of those appearing before the Court

41. The Government asked the Court to reject the applicant's complaint under Article 3 of the Convention (art. 3) on the ground that, contrary to Article 26 of the Convention (art. 26), he had failed to exhaust the domestic remedies available to him. Article 26 (art. 26) provides:

> "The Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken."

The applicant (see paragraph 3 above), with whom the Commission agreed, argued that he had done all that could be expected of him to exhaust domestic remedies.

42. The Government contended that the rule relating to the exhaustion of domestic remedies was clearly established in international law and in the case-law of the Convention organs, and required the applicant to avail himself of all national remedies unless these clearly offered him no chance of success. In fact, Mr Aksoy could have had recourse to three different types of domestic remedy: a criminal prosecution, a civil action and/or administrative proceedings (see paragraphs 24-28 above).

43. With regard to the first of these options, they submitted that he could have complained about the alleged ill-treatment to the public prosecutor who saw him on 10 December 1992 (see paragraph 18 above). However, according to the Government, Mr Aksoy gave no indication on that occasion or at any time subsequently that he had been ill-treated during his time in police custody.

Articles 243 and 245 of the Criminal Code, which were in force throughout Turkey, penalised the use of torture and ill-treatment for the extraction of confessions (see paragraph 24 above). Legislative Decree no. 285 on the state of emergency region transferred the power to carry out investigations into criminal acts allegedly committed by civil servants from the public prosecutors to the administrative councils (see paragraph 26 above). However, decisions by the administrative councils not to prosecute were always reviewed by the Supreme Administrative Court. In this connection, the Government submitted a number of judgments reversing orders made by administrative councils in the state of emergency region and ordering criminal proceedings to be brought against members of the

gendarmerie and security police in respect of allegations of ill-treatment of detainees, and other rulings on sentencing for similar forms of misconduct.

44. Nonetheless, the Government reasoned that criminal proceedings were perhaps not the most appropriate remedy in this type of case, because of the emphasis placed on the rights of the accused as opposed to those of the complainant. They therefore drew the Court's attention to the existence of an administrative remedy under Article 125 of the Turkish Constitution (see paragraph 27 above). In order to receive compensation under this provision, an individual needed only to show that there was a causal link between the acts committed by the administration and the wrong suffered; there was no requirement to prove serious misconduct on the part of a government agent. In this connection, the Government submitted examples of administrative decisions in which compensation had been awarded in respect of death caused by torture in police custody.

45. In addition, the Government argued that Mr Aksoy could have brought a civil action for damages. Again, they referred to a number of decisions of the domestic courts, including a judgment of the Court of Cassation in a case concerning a claim for damages for torture, where it was held that offences committed by members of the security forces were governed by the Code of Obligations and that, under Article 53 of that Code, an acquittal for lack of evidence in criminal proceedings was not binding on the civil courts.

46. While the applicant did not deny that the remedies identified by the Government were formally part of the Turkish legal system, he claimed that, in the region under emergency rule, they were illusory, inadequate and ineffective because both torture and the denial of effective remedies were carried out as a matter of administrative practice.

In particular, he argued that reports by a number of international bodies showing that the torture of detainees continued to be systematic and widespread in Turkey raised questions about the commitment of the State to bringing an end to this practice. In this respect he referred to the European Committee for the Prevention of Torture's Public Statement on Turkey (15 December 1992); the United Nations Committee against Torture's Summary Account of the Results of the Proceedings Concerning the Inquiry on Turkey (9 November 1993); and the United Nations Special Rapporteur on Torture's Report of 1995 (E/CN.4/1995/34).

47. He stated that there was a policy on the part of the State authorities of denying that torture ever took place, which made it extremely difficult for victims to succeed in receiving compensation and in having those responsible brought to justice. For example, it was now impossible for individuals alleging torture to obtain medical reports proving the extent of their injuries, because the forensic medical service had been reorganised and doctors who issued such reports were either threatened or moved to a different area. Prosecutors in the state of emergency region routinely failed

to open investigations into alleged abuses of human rights and frequently refused even to acknowledge complaints. Such investigations as were carried out were biased and inadequate. Furthermore, lawyers and others who acted for the victims of human rights violations were subjected to threats, intimidation and abusive prosecutions and individuals were afraid to pursue domestic remedies because reprisals against complainants were so common.

In these circumstances, the applicant claimed that he should not be required to pursue domestic remedies before making a complaint to Strasbourg.

48. In any case, he maintained that he had informed the public prosecutor on 10 December 1992 that he had been tortured (see paragraph 18 above) and asserted that, even if he had not, the prosecutor could plainly have observed that he did not have the proper use of his hands.

The failure of the prosecutor to start a criminal investigation made it extremely difficult for the applicant to avail himself of any domestic remedy. It was not possible for him to take steps to ensure that a criminal prosecution was brought, for example by challenging a decision not to bring a prosecution in the administrative courts (see paragraph 26 above), because the lack of investigation meant that no formal decision not to prosecute was ever made. In addition, this failure prejudiced his chances of victory in civil or administrative proceedings, because in order to succeed with either type of claim it would have been necessary to prove that he had suffered torture, and in practice a ruling to that effect by a judge in criminal proceedings would have been required.

49. Finally, he reminded the Court that no remedy was available even in theory in relation to his complaint regarding the length of time he was detained without judicial control, since this was perfectly lawful under the domestic legislation (see paragraph 29 above).

50. The Commission was of the opinion that the applicant had been injured during his time in police custody (see paragraph 23 above). It followed that, although it was not possible to establish exactly what happened during his meeting with the public prosecutor on 10 December 1992, there must undoubtedly have been elements which should have prompted the latter to open an investigation or, at the very least, try to obtain further information about the applicant's state of health and the treatment to which he had been subjected. The applicant had done all that could be expected of him in the circumstances, particularly in view of the facts that he must have felt vulnerable as a result of his detention and ill-treatment and that he suffered health problems requiring hospitalisation following his release. The threats which he claimed to have received after making his application to the Commission and his death in circumstances which had not been fully clarified, were further elements which supported the view that the pursuance of remedies might have been attended by risks.

In view of its finding that the applicant had done all that could be required of him to exhaust domestic remedies, the Commission decided that it was not necessary to determine whether there was an administrative practice on the part of the Turkish authorities of tolerating human rights abuses.

B. The Court's assessment

51. The Court recalls that the rule of exhaustion of domestic remedies referred to in Article 26 of the Convention (art. 26) obliges those seeking to bring their case against the State before an international judicial or arbitral organ to use first the remedies provided by the national legal system. Consequently, States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal systems. The rule is based on the assumption, reflected in Article 13 of the Convention (art. 13) - with which it has close affinity -, that there is an effective remedy available in respect of the alleged breach in the domestic system whether or not the provisions of the Convention are incorporated in national law. In this way, it is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (see the Akdivar and Others judgment cited at paragraph 38 above, p. 1210, para. 65).

52. Under Article 26 (art. 26), normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness.

However, there is no obligation to have recourse to remedies which are inadequate or ineffective. In addition, according to the "generally recognised rules of international law" to which Article 26 (art. 26) makes reference, there may be special circumstances which absolve the applicant from the obligation to exhaust the domestic remedies at his disposal. The rule is also inapplicable where an administrative practice consisting of a repetition of acts incompatible with the Convention and official tolerance by the State authorities has been shown to exist, and is of such a nature as to make proceedings futile or ineffective (see the above-mentioned Akdivar and Others judgment, p. 1210, paras. 66 and 67).

53. The Court emphasises that its approach to the application of the rule must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting Parties have agreed to set up. Accordingly, it has recognised that Article 26 (art. 26) must be applied with some degree of flexibility and without excessive formalism. It has further recognised that the rule of exhaustion is neither

absolute nor capable of being applied automatically; in reviewing whether it has been observed it is essential to have regard to the particular circumstances of each individual case. This means amongst other things that it must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate, as well as the personal circumstances of the applicant (see the above-mentioned Akdivar and Others judgment, p. 1211, para. 69).

54. The Court notes the provision under Turkish law of criminal, civil and administrative remedies against the ill-treatment of detainees by the agents of the State and it has studied with interest the summaries of judgments dealing with similar matters provided by the Government (see paragraphs 43-45 above). However, as previously mentioned (paragraph 53), it is not here solely concerned with the question whether the domestic remedies were in general effective or adequate; it must also examine whether, in all the circumstances of the case, the applicant did everything that could reasonably be expected of him to exhaust the national channels of redress.

55. For the purposes of this examination, the Court reiterates that it has decided to accept the Commission's findings of fact in the present case (see paragraphs 39-40 above). The Commission, as has been seen (in paragraph 50 above), was of the view that the applicant was suffering from bilateral radial paralysis at the time of his interview with the public prosecutor.

56. The Court considers that, even if it were accepted that the applicant made no complaint to the public prosecutor of ill-treatment in police custody, the injuries he had sustained must have been clearly visible during their meeting. However, the prosecutor chose to make no enquiry as to the nature, extent and cause of these injuries, despite the fact that in Turkish law he was under a duty to investigate (see paragraph 26 above).

It must be recalled that this omission on the part of the prosecutor took place after Mr Aksoy had been detained in police custody for at least fourteen days without access to legal or medical assistance or support. During this time he had sustained severe injuries requiring hospital treatment (see paragraph 23 above). These circumstances alone would have given him cause to feel vulnerable, powerless and apprehensive of the representatives of the State. Having seen that the public prosecutor was aware of his injuries but had taken no action, it is understandable if the applicant formed the belief that he could not hope to secure concern and satisfaction through national legal channels.

57. The Court therefore concludes that there existed special circumstances which absolved the applicant from his obligation to exhaust domestic remedies. Having reached this conclusion it does not consider it necessary to examine the applicant's claim that there exists an

administrative practice of withholding remedies in breach of the Convention.

III. THE MERITS

A. Alleged violation of Article 3 of the Convention (art. 3)

58. The applicant alleged that he was subjected to treatment contrary to Article 3 of the Convention (art. 3), which states:

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

The Government considered the allegations of ill-treatment to be unfounded. The Commission, however, found that the applicant had been tortured.

59. The Government raised various objections to the way in which the Commission had evaluated the evidence. They pointed to a number of factors which, in their view, should have given rise to serious doubt as to whether Mr Aksoy had been ill-treated as he claimed.

For example, they questioned why the applicant had made no complaint to the public prosecutor about having been tortured (see paragraph 18 above) and found it difficult to understand why, if he had indeed been subjected to torture, he had not made any inculpatory confession. They also found it suspicious that he had waited for five days between being released from police custody and contacting the hospital (see paragraph 19 above) and observed that it could not be assumed that nothing untoward had occurred in the meantime. Finally, they raised a number of points relating to the medical evidence, including the facts that the applicant took his medical records with him when he left hospital and that there was no medical evidence of burns or other marks left by the application of electric shocks.

60. The applicant complained of having been ill-treated in different ways. He claimed to have been kept blindfolded during interrogation, which caused disorientation; to have been suspended from his arms, which were tied together behind his back ("Palestinian hanging"); to have been given electric shocks, which were exacerbated by throwing water over him; and to have been subjected to beatings, slapping and verbal abuse. He referred to medical evidence from Dicle University Medical Faculty which showed that he was suffering from a bilateral brachial plexus injury at the time of his admission to hospital (see paragraph 19 above). This injury was consistent with Palestinian hanging.

He submitted that the treatment complained of was sufficiently severe as to amount to torture; it was inflicted with the purpose of inducing him to admit that he knew the man who had identified him.

In addition, he contended that the conditions in which he was detained (see paragraph 13 above) and the constant fear of torture which he suffered while in custody amounted to inhuman treatment.

61. The Court, having decided to accept the Commission's findings of fact (see paragraphs 39-40 above), considers that where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation as to the causing of the injury, failing which a clear issue arises under Article 3 of the Convention (art. 3) (see the Tomasi v. France judgment of 27 August 1992, Series A no. 241-A, pp. 40-41, paras. 108-111 and the Ribitsch v. Austria judgment of 4 December 1995, Series A no. 336, p. 26, para. 34).

62. Article 3 (art. 3), as the Court has observed on many occasions, enshrines one of the fundamental values of democratic society. Even in the most difficult of circumstances, such as the fight against organised terrorism and crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4 (P1, P4), Article 3 (art. 3) makes no provision for exceptions and no derogation from it is permissible under Article 15 (art. 15) even in the event of a public emergency threatening the life of the nation (see the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 65, para. 163, the Soering v. the United Kingdom judgment of 7 July 1989, Series A no. 161, p. 34, para. 88, and the Chahal v. the United Kingdom judgment of 15 November 1996, Reports 1996-V, p. 1855, para. 79).

63. In order to determine whether any particular form of ill-treatment should be qualified as torture, the Court must have regard to the distinction drawn in Article 3 (art. 3) between this notion and that of inhuman or degrading treatment. As it has remarked before, this distinction would appear to have been embodied in the Convention to allow the special stigma of "torture" to attach only to deliberate inhuman treatment causing very serious and cruel suffering (see the Ireland v. the United Kingdom judgment previously cited, p. 66, para. 167).

64. The Court recalls that the Commission found, inter alia, that the applicant was subjected to "Palestinian hanging", in other words, that he was stripped naked, with his arms tied together behind his back, and suspended by his arms (see paragraph 23 above).

In the view of the Court this treatment could only have been deliberately inflicted; indeed, a certain amount of preparation and exertion would have been required to carry it out. It would appear to have been administered with the aim of obtaining admissions or information from the applicant. In addition to the severe pain which it must have caused at the time, the medical evidence shows that it led to a paralysis of both arms which lasted for some time (see paragraph 23 above). The Court considers that this

treatment was of such a serious and cruel nature that it can only be described as torture.

In view of the gravity of this conclusion, it is not necessary for the Court to examine the applicant's complaints of other forms of ill-treatment.

In conclusion, there has been a violation of Article 3 of the Convention (art. 3).

B. Alleged violation of Article 5 para. 3 of the Convention (art. 5-3)

65. The applicant, with whom the Commission agreed, claimed that his detention violated Article 5 para. 3 of the Convention (art. 5-3). The relevant parts of Article 5 (art. 5) state:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence ...
>
> ...
>
> 3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article (art. 5-1-c) shall be brought promptly before a judge or other officer authorised by law to exercise judicial power ..."

66. The Court recalls its decision in the case of Brogan and Others v. the United Kingdom (judgment of 29 November 1988, Series A no. 145-B, p. 33, para. 62), that a period of detention without judicial control of four days and six hours fell outside the strict constraints as to time permitted by Article 5 para. 3 (art. 5-3). It clearly follows that the period of fourteen or more days during which Mr Aksoy was detained without being brought before a judge or other judicial officer did not satisfy the requirement of "promptness".

67. However, the Government submitted that, despite these considerations, there had been no violation of Article 5 para. 3 (art. 5-3), in view of Turkey's derogation under Article 15 of the Convention (art. 15), which states:

> "1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under [the] Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2 (art. 2), except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 (art. 3, art. 4-1, art. 7) shall be made under this provision (art. 15-1).

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed."

The Government reminded the Court that Turkey had derogated from its obligations under Article 5 of the Convention (art. 5) on 5 May 1992 (see paragraph 33 above).

1. The Court's approach

68. The Court recalls that it falls to each Contracting State, with its responsibility for "the life of [its] nation", to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle better placed than the international judge to decide both on the presence of such an emergency and on the nature and scope of the derogations necessary to avert it. Accordingly, in this matter a wide margin of appreciation should be left to the national authorities.

Nonetheless, Contracting Parties do not enjoy an unlimited discretion. It is for the Court to rule whether, inter alia, the States have gone beyond the "extent strictly required by the exigencies" of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision. In exercising this supervision, the Court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation and the circumstances leading to, and the duration of, the emergency situation (see the Brannigan and McBride v. the United Kingdom judgment of 26 May 1993, Series A no. 258-B, pp. 49-50, para. 43).

2. Existence of a public emergency threatening the life of the nation

69. The Government, with whom the Commission agreed on this point, maintained that there was a public emergency "threatening the life of the nation" in South-East Turkey. The applicant did not contest the issue, although he submitted that, essentially, it was a matter for the Convention organs to decide.

70. The Court considers, in the light of all the material before it, that the particular extent and impact of PKK terrorist activity in South-East Turkey has undoubtedly created, in the region concerned, a "public emergency threatening the life of the nation" (see, mutatis mutandis, the Lawless v. Ireland judgment of 1 July 1961, Series A no. 3, p. 56, para. 28, the

above-mentioned Ireland v. the United Kingdom judgment, p. 78, para. 205, and the above-mentioned Brannigan and McBride judgment, p. 50, para. 47).

3. Whether the measures were strictly required by the exigencies of the situation

a) The length of the unsupervised detention

71. The Government asserted that the applicant had been arrested on 26 November 1992 along with thirteen others on suspicion of aiding and abetting PKK terrorists, being a member of the Kiziltepe branch of the PKK and distributing PKK tracts (see paragraph 12 above). He was held in custody for fourteen days, in accordance with Turkish law, which allows a person detained in connection with a collective offence to be held for up to thirty days in the state of emergency region (see paragraph 29 above).

72. They explained that the place in which the applicant was arrested and detained fell within the area covered by the Turkish derogation (see paragraphs 31-33 above). This derogation was necessary and justified, in view of the extent and gravity of PKK terrorism in Turkey, particularly in the South East. The investigation of terrorist offences presented the authorities with special problems, as the Court had recognised in the past, because the members of terrorist organisations were expert in withstanding interrogation, had secret support networks and access to substantial resources. A great deal of time and effort was required to secure and verify evidence in a large region confronted with a terrorist organisation that had strategic and technical support from neighbouring countries. These difficulties meant that it was impossible to provide judicial supervision during a suspect's detention in police custody.

73. The applicant submitted that he was detained on 24 November 1992 and released on 10 December 1992. He alleged that the post-dating of arrests was a common practice in the state of emergency region.

74. While he did not present detailed arguments against the validity of the Turkish derogation as a whole, he questioned whether the situation in South-East Turkey necessitated the holding of suspects for fourteen days or more without judicial supervision. He submitted that judges in South-East Turkey would not be put at risk if they were permitted and required to review the legality of detention at shorter intervals.

75. The Commission could not establish with any certainty whether the applicant was first detained on 24 November 1992, as he claimed, or on 26 November 1992, as alleged by the Government, and it therefore proceeded on the basis that he was held for at least fourteen days without being brought before a judge or other officer authorised by law to exercise judicial power.

76. The Court would stress the importance of Article 5 (art. 5) in the Convention system: it enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty. Judicial control of interferences by the executive with the individual's right to liberty is an essential feature of the guarantee embodied in Article 5 para. 3 (art. 5-3), which is intended to minimise the risk of arbitrariness and to ensure the rule of law (see the above-mentioned Brogan and Others judgment, p. 32, para. 58). Furthermore, prompt judicial intervention may lead to the detection and prevention of serious ill-treatment, which, as stated above (paragraph 62), is prohibited by the Convention in absolute and non-derogable terms.

77. In the Brannigan and McBride judgment (cited at paragraph 68 above), the Court held that the United Kingdom Government had not exceeded their margin of appreciation by derogating from their obligations under Article 5 of the Convention (art. 5) to the extent that individuals suspected of terrorist offences were allowed to be held for up to seven days without judicial control.

In the instant case, the applicant was detained for at least fourteen days without being brought before a judge or other officer. The Government have sought to justify this measure by reference to the particular demands of police investigations in a geographically vast area faced with a terrorist organisation receiving outside support (see paragraph 72 above).

78. Although the Court is of the view - which it has expressed on several occasions in the past (see, for example, the above-mentioned Brogan and Others judgment) - that the investigation of terrorist offences undoubtedly presents the authorities with special problems, it cannot accept that it is necessary to hold a suspect for fourteen days without judicial intervention. This period is exceptionally long, and left the applicant vulnerable not only to arbitrary interference with his right to liberty but also to torture (see paragraph 64 above). Moreover, the Government have not adduced any detailed reasons before the Court as to why the fight against terrorism in South-East Turkey rendered judicial intervention impracticable.

b) Safeguards

79. The Government emphasised that both the derogation and the national legal system provided sufficient safeguards to protect human rights. Thus, the derogation itself was limited to the strict minimum required for the fight against terrorism; the permissible length of detention was prescribed by law and the consent of a public prosecutor was necessary if the police wished to remand a suspect in custody beyond these periods. Torture was prohibited by Article 243 of the Criminal Code (see paragraph 24 above) and Article 135 (a) stipulated that any statement made in consequence of the administration of torture or any other form of ill-treatment would have no evidential weight.

80. The applicant pointed out that long periods of unsupervised detention, together with the lack of safeguards provided for the protection of prisoners, facilitated the practice of torture. Thus, he was tortured with particular intensity on his third and fourth days in detention, and was held thereafter to allow his injuries to heal; throughout this time he was denied access to either a lawyer or a doctor. Moreover, he was kept blindfolded during interrogation, which meant that he could not identify those who mistreated him. The reports of Amnesty International ("Turkey: a Policy of Denial", February 1995), the European Committee for the Prevention of Torture and the United Nations Committee against Torture (cited at paragraph 46 above) showed that the safeguards contained in the Turkish Criminal Code, which were in any case inadequate, were routinely ignored in the state of emergency region.

81. The Commission considered that the Turkish system offered insufficient safeguards to detainees, for example there appeared to be no speedy remedy of habeas corpus and no legally enforceable rights of access to a lawyer, doctor, friend or relative. In these circumstances, despite the serious terrorist threat in South-East Turkey, the measure which allowed the applicant to be detained for at least fourteen days without being brought before a judge or other officer exercising judicial functions exceeded the Government's margin of appreciation and could not be said to be strictly required by the exigencies of the situation.

82. In its above-mentioned Brannigan and McBride judgment (cited at paragraph 68), the Court was satisfied that there were effective safeguards in operation in Northern Ireland which provided an important measure of protection against arbitrary behaviour and incommunicado detention. For example, the remedy of habeas corpus was available to test the lawfulness of the original arrest and detention, there was an absolute and legally enforceable right to consult a solicitor forty-eight hours after the time of arrest and detainees were entitled to inform a relative or friend about their detention and to have access to a doctor (op. cit., pp. 55-56, paras. 62-63).

83. In contrast, however, the Court considers that in this case insufficient safeguards were available to the applicant, who was detained over a long period of time. In particular, the denial of access to a lawyer, doctor, relative or friend and the absence of any realistic possibility of being brought before a court to test the legality of the detention meant that he was left completely at the mercy of those holding him.

84. The Court has taken account of the unquestionably serious problem of terrorism in South-East Turkey and the difficulties faced by the State in taking effective measures against it. However, it is not persuaded that the exigencies of the situation necessitated the holding of the applicant on suspicion of involvement in terrorist offences for fourteen days or more in incommunicado detention without access to a judge or other judicial officer.

4. Whether the Turkish derogation met the formal requirements of Article 15 para. 3 (art. 15-3)

85. None of those appearing before the Court contested that the Turkish Republic's notice of derogation (see paragraph 33 above) complied with the formal requirements of Article 15 para. 3 (art. 15-3), namely to keep the Secretary General of the Council of Europe fully informed of the measures which were taken in derogation from the Convention and the reasons therefor.

86. The Court is competent to examine this issue of its own motion (see the above-mentioned Lawless judgment, p. 55, para. 22, and the above-mentioned Ireland v. the United Kingdom judgment, p. 84, para. 223), and in particular whether the Turkish notice of derogation contained sufficient information about the measure in question, which allowed the applicant to be detained for at least fourteen days without judicial control, to satisfy the requirements of Article 15 para. 3 (art. 15-3). However, in view of its finding that the impugned measure was not strictly required by the exigencies of the situation (see paragraph 84 above), the Court finds it unnecessary to rule on this matter.

5. Conclusion

87. In conclusion, the Court finds that there has been a violation of Article 5 para. 3 of the Convention (art. 5-3).

C. Alleged lack of remedy

88. The applicant complained that he was denied access to a court, in violation of Article 6 para. 1 of the Convention (art. 6-1), which provides, so far as is relevant:

> "In the determination of his civil rights ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law
>
> ..."

In addition, he claimed that there was no effective domestic remedy available to him, contrary to Article 13 of the Convention (art. 13), which states:

> "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 contended that, since the applicant had never even attempted to bring proceedings, it was not open to him to complain that he had been denied access to a court. They further argued, as they had in

connection with their preliminary objection (see paragraphs 41-45 above) that there were a number of effective remedies available.

90. For the applicant, the prosecutor's decision not to open an investigation had effectively rendered it impossible for him to enforce his civil right to compensation (see paragraph 48 above). He submitted that, under Turkish law, civil proceedings could not be contemplated until the facts concerning the events had been established and the perpetrators identified by a criminal prosecution. Without this, civil proceedings had no prospect of success. In addition, he stated that the ability to seek compensation for torture would represent only one part of the measures necessary to provide redress; it would be unacceptable for a State to claim that it fulfilled its obligation simply by providing compensation, since this would in effect be to allow States to pay for the right to torture. He claimed that the remedies necessary to meet his Convention claims either did not exist, even in theory, or did not operate effectively in practice (see paragraphs 46-47 above).

91. The Commission found a violation of Article 6 para. 1 (art. 6-1), for the same reasons that it found in the applicant's favour under Article 26 of the Convention (art. 26) (see paragraph 50 above). In view of this finding, it did not consider it necessary to examine the complaint under Article 13 (art. 13).

1. Article 6 para. 1 of the Convention (art. 6-1)

92. The Court recalls that Article 6 para. 1 (art. 6-1) embodies the "right to a court", of which the right of access, that is, the right to institute proceedings before a court in civil matters, constitutes one aspect (see, for example, the Holy Monasteries v. Greece judgment of 9 December 1994, Series A no. 301-A, pp. 36-37, para. 80). There can be no doubt that Article 6 para. 1 (art. 6-1) applies to a civil claim for compensation in respect of ill-treatment allegedly committed by agents of the State (see, for example, the Tomasi judgment cited at paragraph 61 above, p. 43, paras. 121-22).

93. The Court notes that it was not disputed by the applicant that he could in theory have brought civil proceedings for damages in respect of his ill-treatment. He did claim that the failure of the prosecutor to mount a criminal investigation in practice meant that he would have had no chance of success in civil proceedings (see paragraph 90 above). The Court recalls, however, that because of the special circumstances which existed in his case (see paragraph 57 above), Mr Aksoy did not even attempt to make an application before the civil courts. Given these facts, it is not possible for the Court to determine whether or not the Turkish civil courts would have been able to deal with Mr Aksoy's claim, had he brought it before them.

In any event, the Court observes that the crux of the applicant's complaint concerned the prosecutor's failure to mount a criminal investigation (see paragraph 90 above). It further notes the applicant's

argument that the possibility of seeking compensation for torture would represent only one part of the measures necessary to provide redress (also in paragraph 90 above).

94. In the Court's view, against this background, it is more appropriate to consider this complaint in relation to the more general obligation on States under Article 13 (art. 13) to provide an effective remedy in respect of violations of the Convention.

2. Article 13 of the Convention (art. 13)

95. The Court observes that Article 13 (art. 13) guarantees the availability at 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 this Article (art. 13) is thus to require the provision of a domestic remedy allowing the competent national authority both 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 obligations under this provision (art. 13) (see the Chahal judgment cited at paragraph 62 above, pp. 1869-70, para. 145). The scope of the obligation under Article 13 (art. 13) varies depending on the nature of the applicant's complaint under the Convention (see the above-mentioned Chahal judgment, pp. 1870-71, paras. 150-51). Nevertheless, the remedy required by Article 13 (art. 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.

96. The Court would first make it clear that its finding (in paragraph 57 above) that there existed special circumstances which absolved the applicant from his obligation to exhaust domestic remedies should not be taken as meaning that remedies are ineffective in South-East Turkey (see, mutatis mutandis, the Akdivar and Others judgment cited at paragraph 38 above, pp. 1213-14, para. 77).

97. Secondly, the Court, like the Commission, would take judicial notice of the fact that allegations of torture in police custody are extremely difficult for the victim to substantiate if he has been isolated from the outside world, without access to doctors, lawyers, family or friends who could provide support and assemble the necessary evidence. Furthermore, having been ill-treated in this way, an individual will often have had his capacity or will to pursue a complaint impaired.

98. The nature of the right safeguarded under Article 3 of the Convention (art. 3) has implications for Article 13 (art. 13). Given the fundamental importance of the prohibition of torture (see paragraph 62 above) and the especially vulnerable position of torture victims, Article 13 (art. 13) imposes, without prejudice to any other remedy available under the

domestic system, an obligation on States to carry out a thorough and effective investigation of incidents of torture.

Accordingly, as regards Article 13 (art. 13), where an individual has an arguable claim that he has been tortured by agents of the State, the notion of an "effective remedy" entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure. It is true that no express provision exists in the Convention such as can be found in Article 12 of the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which imposes a duty to proceed to a "prompt and impartial" investigation whenever there is a reasonable ground to believe that an act of torture has been committed. However, in the Court's view, such a requirement is implicit in the notion of an "effective remedy" under Article 13 (art. 13) (see, mutatis mutandis, the Soering judgment cited at paragraph 62 above, pp. 34-35, para. 88).

99. Indeed, under Turkish law the prosecutor was under a duty to carry out an investigation. However, and whether or not Mr Aksoy made an explicit complaint to him, he ignored the visible evidence before him that the latter had been tortured (see paragraph 56 above) and no investigation took place. No evidence has been adduced before the Court to show that any other action was taken, despite the prosecutor's awareness of the applicant's injuries.

Moreover, in the Court's view, in the circumstances of Mr Aksoy's case, such an attitude from a State official under a duty to investigate criminal offences was tantamount to undermining the effectiveness of any other remedies that may have existed.

100. Accordingly, in view in particular of the lack of any investigation, the Court finds that the applicant was denied an effective remedy in respect of his allegation of torture.

In conclusion, there has been a violation of Article 13 of the Convention (art. 13).

D. Alleged violation of Article 25 para. 1 of the Convention (art. 25-1)

101. The applicant alleged that there had been an interference with his right of individual petition, in breach of Article 25 para. 1 of the Convention (art. 25-1), which states:

> "The Commission may receive petitions addressed to the Secretary General of the Council of Europe from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognises the competence of the Commission to receive such petitions. Those of the High

Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right."

102. It is to be recalled that Mr Aksoy was killed on 16 April 1994; according to his representatives, this was a direct result of his persisting with his application to the Commission. It was alleged that he had been threatened with death in order to make him withdraw his application to the Commission, the last threat being made by telephone on 14 April 1994 (see paragraph 22 above).

103. The Government, however, denied that there had been any interference with the right of individual petition. They submitted that Mr Aksoy had been killed in a settling of scores between quarrelling PKK factions and told the Court that a suspect had been charged with his murder (see paragraph 22 above).

104. The Commission was deeply concerned by Mr Aksoy's death and the allegation that it was connected to his application to Strasbourg. Nonetheless, it did not have any evidence on which to form a conclusion as to the truth of this claim or the responsibility for the killing.

105. The Court reiterates that it is of the utmost importance for the effective operation of the system of individual petition instituted by Article 25 of the Convention (art. 25) that applicants or potential applicants are able to communicate freely with the Commission without being subjected to any form of pressure from the authorities to withdraw or modify their complaints (see the Akdivar and Others judgment cited at paragraph 38 above, p. 1219, para. 105).

106. That being so, in the present case the Commission was unable to find any evidence to show that Mr Aksoy's death was connected with his application, or that the State authorities had been responsible for any interference, in the form of threats or intimidation, with his rights under Article 25 para. 1 (art. 25-1), and no new evidence in this connection was presented to the Court.

The Court cannot therefore find that there has been a violation of Article 25 para. 1 of the Convention (art. 25-1).

E. Alleged administrative practice of violating the Convention

107. The applicant additionally asked the Court to rule that Articles 3, 5 para. 3, 6 para. 1, 13 and 25 para. 1 (art. 3, art. 5-3, art. 6-1, art. 13, art. 25-1) were violated as a matter of practice in South-East Turkey, with high-level official tolerance. This entailed that the Court should find aggravated violations of the Convention.

108. With reference to the reports of the international bodies cited above (paragraph 46), he argued that torture at the hands of the police was widespread in Turkey and that this had been the case for many years. The

State authorities were aware of the problem but had chosen not to implement recommended safeguards.

Furthermore, the victims of torture and of other human rights abuses were routinely denied access to judicial remedies in breach of Articles 6 para. 1 and 13 of the Convention (art. 6-1, art. 13) and were harassed, threatened and subjected to violence if they attempted to bring their complaints before the Strasbourg organs, contrary to Article 25 para. 1 (art. 25-1).

Finally, since the domestic law permitted suspects to be detained for long periods in violation of Article 5 para. 3 (art. 5-3), this was evidence of an administrative practice of breaching that provision (art. 5-3).

109. The Court is of the view that the evidence established by the Commission is insufficient to allow it to reach a conclusion concerning the existence of any administrative practice of the violation of the above Articles of the Convention (art. 3, art. 5-3, art. 6-1, art. 13, art. 25-1).

IV. APPLICATION OF ARTICLE 50 OF THE CONVENTION (ART. 50)

110. Under Article 50 of the Convention (art. 50),

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

111. In his memorial the applicant claimed compensation for pecuniary damage caused by his detention and torture, consisting of medical expenses of 16,635,000 Turkish liras and loss of earnings amounting to £40 (sterling).

In addition he sought non-pecuniary damages of £25,000, which, he submitted, should be increased by a further £25,000 in the event that the Court found an aggravated violation of the Convention on the grounds of administrative practice.

He also requested payment of his legal fees and expenses which totalled £20,710.

112. The Government offered no comment either in its memorial or during the hearing before the Court as regards these claims.

A. Damage

113. In view of the extremely serious violations of the Convention suffered by Mr Zeki Aksoy and the anxiety and distress that these undoubtedly caused to his father, who has continued with the application after his son's death (see paragraph 3 above), the Court has decided to

award the full amounts of compensation sought as regards pecuniary and non-pecuniary damage. In total this amounts to 4,283,450,000 (four thousand two hundred and eighty-three million, four hundred and fifty thousand) Turkish liras (based on the rate of exchange applicable on the date of adoption of the present judgment).

B. Costs and expenses

114. The Court considers that the applicant's claim for costs and expenses is reasonable and awards it in full, less the amounts received by way of legal aid from the Council of Europe which have not already been taken into account in the claim.

C. Default interest

115. With regard to the sum awarded in Turkish liras, default interest is to be payable at the rate of 30% per annum, which, according to the information available to the Court, is the statutory rate of interest applicable in Turkey at the date of adoption of the present judgment.

As the award in respect of costs and expenses is to be made in pounds sterling, the Court considers it appropriate that interest should be payable on this sum at the rate of 8% per annum, which, according to the information available to it, is the statutory rate applicable in England and Wales at the date of adoption of the present judgment.

FOR THESE REASONS, THE COURT

1. Dismisses by eight votes to one the preliminary objection concerning the exhaustion of domestic remedies;

2. Holds by eight votes to one that there has been a violation of Article 3 of the Convention (art. 3);

3. Holds by eight votes to one that there has been a violation of Article 5 para. 3 of the Convention (art. 5-3);

4. Holds by eight votes to one that it is not necessary to consider the applicant's complaint under Article 6 para. 1 of the Convention (art. 6-1);

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

6. Holds unanimously that no violation of Article 25 para. 1 of the Convention (art. 25-1) has been established;

7. Holds by eight votes to one
a) that the respondent State is to pay the applicant, within three months, in respect of compensation for pecuniary and non-pecuniary damage, 4,283,450,000 (four thousand two hundred and eighty-three million, four hundred and fifty thousand) Turkish liras;
b) that the respondent State is to pay the applicant, within three months, in respect of costs and expenses, £20,710 (twenty thousand seven hundred and ten pounds sterling) less 12,515 (twelve thousand, five hundred and fifteen) French francs to be converted into pounds sterling at the rate applicable on the date of delivery of the present judgment;
c) that simple interest at the following annual rates shall be payable from the expiry of the above-mentioned three months until settlement:
(i) 30% in relation to the sum awarded in Turkish liras;
(ii) 8% in relation to the sum awarded in pounds sterling.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 18 December 1996.

Rolv RYSSDAL
President

Herbert PETZOLD
Registrar

In accordance with Article 51 para. 2 of the Convention (art. 51-2) and Rule 53 para. 2 of Rules of Court A, the following separate opinions are annexed to this judgment:

- partly dissenting opinion of Judge de Meyer;

- dissenting opinion of Judge Gölcüklü.

R.R.
H.P.

PARTLY DISSENTING OPINION OF JUDGE DE MEYER

(Translation)

Although I agree with the rest of the judgment, I disagree with the line taken by the majority in respect of Articles 6 para. 1 and 13 (art. 6-1, art. 13).

In the present case the Court had to rule firstly on a preliminary objection that domestic remedies had not been exhausted.

It is clear from the reasoning on this in paragraphs 51 to 57 of the judgment that in the applicant's case these remedies were purely theoretical. This suggests a violation of Article 13 (art. 13), as is later made explicit in different terms in paragraphs 95 to 100 of the judgment. The present case thus shows up very clearly the link between Article 13 and Article 26 (art. 13, art. 26)[1].

The reasoning also, however, implies a fortiori that the applicant's right of access to a court was not effectively secured[2].

It follows that, in line with the decision we took on the preliminary objection, we should as a logical consequence have found that there had been a violation of both Article 6 para. 1 and Article 13 (art. 6-1, art. 13).

It would have sufficed if we had noted that it was clear from the considerations set out in paragraphs 51 to 57 of the judgment that in the circumstances of the case the applicant had no effective domestic remedies and was unable to exercise his right of access to a court.

[1] See paragraph 51 of the judgment.

[2] See paragraphs 54 and 56 of the judgment.

DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

(Translation)

1. With regard to the subsidiary nature of the protection system set up by the European Convention on Human Rights and its direct corollary, the exhaustion of domestic remedies, I refer to my dissenting opinion in the case of Akdivar and Others v. Turkey (see the judgment of 16 September 1996, Reports of Judgments and Decisions 1996-IV).

2. I would point out that Article 17 of the Turkish Constitution is a literal translation of Article 3 (art. 3) of the European Convention on Human Rights and that torture and ill-treatment attract heavy penalties under the Turkish Criminal Code (Articles 243 and 245) (criminal remedy).

3. As civil wrongs (unlawful acts), torture and ill-treatment open up the possibility of an action for compensation in respect of pecuniary or non-pecuniary damage (civil action or administrative proceedings, depending on the perpetrator's status).

4. Criminal proceedings are instituted by the prosecuting authorities of their own motion or on the lodging of a complaint, and must be brought where there is sufficient evidence that an offence has been committed.

5. In Turkish law, therefore, these three remedies are available equally, throughout the country, to every person who claims to be the victim of torture or ill-treatment.

6. With regard to the effectiveness and appropriateness of the above-mentioned remedies, there is not the shadow of a doubt in my mind. In this connection I refer to my dissenting opinion in the case of Akdivar and Others (ibid.). The respondent Government, both in that case and the present case, submitted to the Commission in the first place and later to the European Court - both in their memorial and at the public hearing - dozens of judgments of the courts of first instance or the supreme courts such as the Court of Cassation or the Supreme Administrative Court.

7. Most of these judgments concerned cases in south-eastern Turkey where acts of terrorism are being committed and where the present case occurred. The following examples give a brief summary of some of these decisions.

- Second Division of the Supreme Administrative Court - judgment of 23 March 1994

The Supreme Administrative Court, carrying out its statutory review of the decision to discontinue proceedings made by the Malatya Provincial Administrative Council, ruled that criminal proceedings under Article 245 of the Criminal Code (ill-treatment, recourse to violence by a public official empowered to use force in accordance with the law) had to be brought against the accused, four police officers of the Malatya Security Police who had allegedly beaten a suspect while he was being questioned.

Another judgment of the Supreme Administrative Court to the same effect (judgment of 7.10.1993) concerned the Adiyaman province. These two regions (Malatya and Adiyaman) are in south-eastern Turkey.

- Eighth Criminal Division of the Court of Cassation - judgment of 16 December 1987

The accused were sentenced to four years, five months and ten days' imprisonment for causing death by acts of torture (Articles 452/1 and 243/1-2 of the Criminal Code).

The Court of Cassation upheld these sentences imposed by the First Division of the Mardin Assize Court (in south-eastern Turkey).

- Eighth Criminal Division of the Court of Cassation - judgment of 25 September 1991

The Eighth Division of the Ankara Assize Court sentenced the accused to four years and two months' imprisonment and banned them from holding public office for two months and fifteen days for inflicting ill-treatment with a view to extracting confessions.

The Court of Cassation held that, as the file stood, the expert reports formed a sufficient basis for the lower court's judgment. However, it quashed it on account of a clerical error, as it stated that the court had applied the minimum sentence whereas it had based its calculations on the minimum sentence.

- Eighth Criminal Division of the Court of Cassation - judgment of 21 February 1990

The accused were sentenced to four years, five months and ten days' imprisonment for causing a prisoner's death. This conviction pronounced by the Sixth Division of the Istanbul Assize Court was based on the charge of fatal wounding (Article 452/1 of the Criminal Code).

The Court of Cassation upheld the conviction but ruled that Article 243, concerning death subsequent to an act of torture, should be applied.

8. Despite the existence of the three remedies I have mentioned above, the applicant did not make use of any of them but only complained to the Commission via London. He did not even lodge a complaint with the responsible authorities - the first step any individual has a duty to take when he claims to be a victim of anything at all.

9. I simply cannot agree with the opinion the majority reached on the basis of the applicant's bare allegations (that the Turkish courts in the region concerned afforded no protection when the acts complained of had been committed by members of the security forces) namely that the effectiveness of domestic remedies was open to doubt. I consider that "where there is doubt", and especially where there is doubt, domestic remedies must be exhausted as required by the Commission (decision of 14 March 1985, Garcia v. Switzerland, application no. 10148/82, Decisions and Reports 42, p. 98). And the applicant did nothing of the sort.

10. As Judge Gotchev rightly noted in his dissenting opinion in the above-mentioned Akdivar and Others case, in connection with the exhaustion-of-domestic-remedies rule, in order to reach such a conclusion after the respondent Government have demonstrated the existence of domestic remedies, the burden of proof should fall (once more) on the applicant, who should be required to prove that the authorities in that region of the country frustrated his attempts to set the appropriate proceedings in motion. The applicant has not adduced any evidence to that effect.

11. Above all, in this case a number of facts were in dispute between the parties. The applicant alleged that he had reported to the prosecuting authorities when interviewed that he had been subjected to ill-treatment while in police custody, whereas the respondent Government denied this and submitted arguments in support of their contention. The Court, on the basis of this unclarified question of fact, namely the alleged failure of the prosecuting authorities to set criminal proceedings in motion, concluded that the criminal remedy was ineffective.

12. Apart from the fact that there are procedures in Turkish law whereby the prosecuting authorities can be obliged to institute criminal proceedings, who else, if not the national authorities, could clarify this fact which is decisive for the outcome of the present case? For that reason alone, the applicant's complaints should first be brought before the Turkish courts so that it can be established whether domestic remedies are effective or not.

13. Since, therefore, the requirement in Article 26 of the Convention (art. 26) has not been satisfied, the Court should have upheld the respondent Government's preliminary objections concerning the non-exhaustion of domestic remedies.

14. The foregoing considerations dispense me from considering the merits of the case.