CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

CASE OF SÜHEYLA AYDIN v. TURKEY

(Application no. 25660/94)

JUDGMENT

STRASBOURG

24 May 2005

FINAL

24/08/2005

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Süheyla Aydın v. Turkey,

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

Mr J.-P. COSTA, *President*,
Mr A.B. BAKA,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Ms D. JOČIENĖ,
Mr D. POPOVIĆ, *judges*,
Mr F. GÖLCÜKLÜ, ad hoc *judge*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 3 May 2005,

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

PROCEDURE

1. The case originated in an application (no. 25660/94) against the Republic of Turkey lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Ms Süheyla Aydın ("the applicant"), on 4 October 1994.

2. The applicant was represented by Mr Kevin Boyle and Ms Françoise Hampson, lawyers practising in the United Kingdom. The Turkish Government ("the Government") did not designate an agent for the purposes of the proceedings before the Convention institutions.

3. The applicant alleged, in particular, that she and her husband had been taken into police custody where she had been subjected to inhuman and degrading treatment and her husband to torture. She also alleged that her husband had subsequently been killed by agents of the State and that the authorities had failed to carry out an effective investigation into the circumstances of his killing. She invoked Articles 2, 3, 6, 11, 13 and 14 of the Convention. However, in her observations on the merits the applicant did not maintain her complaint under Article 6 of the Convention.

4. The application was declared admissible by the Commission on 12 January 1998 and transmitted to the Court on 1 November 1999 in accordance with Article 5 § 3, second sentence, of Protocol No. 11 to the Convention, the Commission not having completed its examination of the case by that date.

5. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted

as provided in Rule 26 § 1. Mr Rıza Türmen, the judge elected in respect of Turkey, withdrew from sitting in the case (Rule 28). The Government accordingly appointed Professor Feyyaz Gölcüklü to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

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

7. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Second Section (Rule 52 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant, a Turkish citizen of Kurdish origin, was born in 1966 and lives in Switzerland where she has been granted political asylum. She was the wife of Necati Aydın, whose body was found on 9 April 1994 in a location outside Diyarbakır, with his hands tied at the back. He had been shot in the head with a single bullet.

A. Introduction

9. The facts of the case, particularly those events which occurred between 18 March 1994 and 9 April 1994, are disputed by the parties.

10. The facts as presented by the applicant are set out in Section B below (paragraphs 14-30). The Government's submissions concerning the facts are summarised in Section C below (paragraphs 31-37). The documentary evidence submitted by the applicant and the Government is summarised in Section D (paragraphs 38-73).

11. The Commission, in order to establish the facts disputed by the parties, conducted an investigation with the assistance of the parties, pursuant to former Article 28 § 1 (a) of the Convention. It appointed three delegates (Mr Jean-Claude Geus, Mr Marek Nowicki and Mr Marc Vila Amigó) who took evidence in Strasbourg on 17 September 1999 and in Ankara from 22 September 1999 to 24 September 1999. They interviewed the applicant as well as the following 11 witnesses: Ms Yasemin Aydın, Mr Şemsettin Aydın, Mr Sezgin Tanrıkulu, Mr Arif Altınkalem, Mr Bekir Selçuk, Mr Rıdvan Yıldırım, Mr Sami Güngör, Mr Ramazan Sürücü, Mr Yusuf Ercan, Mr Ali Uslu and finally Mr Cemil Çelik. A summary of the oral evidence given by these witnesses is found in Section E below (paragraphs 74-129).

12. Three other witnesses, Mr Osman Yetkin, Mr Raif Kalkıcı and Mr Tahir Baboğlu, were also summoned but did not appear before the Commission's delegates.

13. Following the questioning of the above mentioned witnesses, the Commission considered it important to hear two police officers who had accompanied Necati Aydın and Mehmet Ay to the Diyarbakır State Security Court (see paragraph 116 below)**.** The Commission informed the parties on 27 September 1999 that the delegates wanted to interview the police officers in Strasbourg on 28 October 1999. The Government were requested to identify the two police officers and summon them for the hearing in Strasbourg. The Government asked the Commission to explain why a need was felt to hear the police officers in person as opposed to questions being put to them in writing, and further asked the Commission to reconsider its decision. Despite the Commission's repeated explanations, the Government failed to identify the witnesses and informed the Commission on 26 October 1999 that they did not have time to identify the two police officers and therefore they would not be able to ensure their attendance at the proposed hearing. The Commission was therefore obliged to cancel the proposed hearing.

B. The applicant's submissions on the facts

14. In 1994 the applicant was working as an anaesthetics nurse, and her husband, Necati Aydın, as an environmental technician. They were civil servants. Necati was also the president of the Health Workers' Trade Union (*Tüm Sağlık Sen*). Previously, the applicant and her husband had been subjected to harassment and arrest by the security forces. Their activities on behalf of the trade union had drawn the unwelcome attention of the security forces and the police to them.

15. In March 1994 the applicant and her husband did not have a permanent residence as they had been subjected to several transfer orders and had been moving around Turkey to various places of work. The applicant was six months pregnant at the time.

16. On 18 March 1994 the applicant and her husband were at the house of Necati's relative, Mehmet Hafif Ay, in Diyarbakır. At that time, a large number of relatives were also in the house. At approximately 8.30 p.m. police arrived at the house with Mr Mehmet Ay, whom they had arrested earlier at a coffee shop. The police officers entered the apartment. They asked for the identity cards of all those present, and questioned various members of the family. The police then took into detention all the family members present, including a five year old child.

17. The detainees were placed in vehicles. The applicant was placed in a car by herself and was accompanied by at least two police officers. In the vehicles the detainees were blindfolded and they were then brought to the

rapid response force building (*Çevik Kuvvet*) for interrogation. The applicant was not feeling well due to her pregnancy.

18. When they arrived at the rapid response force building, the applicant was made to sit in a corridor waiting to be brought in for interrogation. As she sat in the corridor she could hear the screams of her husband as he was being tortured.

19. The applicant was taken in for interrogation at least three times. The first time, the applicant was questioned about where her husband had been during certain periods. The second time she was taken in, her husband was also present. Her blindfold was removed momentarily so that she could see her husband. She saw him naked and blindfolded in the middle of the room. His body was wet and he was crouched over, shivering. The applicant was made to listen while he was interrogated. During this time Necati gave a response to the police which contradicted an answer provided by the applicant. When this happened, Necati was removed from the room and the applicant was grabbed by the hair and slapped in the face.

20. On the third occasion the applicant was taken in for interrogation, the police ordered her to strip naked. Her husband was also in the room. The police threatened him that they would harm her if he did not answer their questions. The applicant was frightened and her condition deteriorated. She was removed from the room. Outside the room, the applicant was told by the police officers, "Do you know Yusuf Ekinci? His body was found in an empty lot. I do not think you want your husband to end up the same way". On each occasion that she was removed from the room, she could hear the screams of her husband as he was being tortured.

21. The applicant was taken from the rapid response force building to the Diyarbakır police station. She was put in a cell with Ms Hüsniye Ay and the latter's children, where they were kept for four nights. The applicant was released on 22 March 1994, without having been brought before a judge. During her time in detention, she had not been given the right of access to a lawyer, prosecutor or judge.

22. Ms Yasemin Aydın, a relative of the applicant's husband who, as president of the Patriotic Women's Association, was politically active on behalf of Kurdish women, was also detained and was tortured during her detention. This torture included hanging, beatings, electric shocks, insults and threats of rape. During her detention she was asked questions about the activities of Necati Aydın and Mehmet Ay. She was released on 29 April 1994, having been brought before Prosecutor Osman Yetkin.

23. On 4 April 1994 the applicant's husband and his cousin Mehmet Ay were finally brought before the Diyarbakır State Security Court (hereinafter "the Diyarbakır Court"). At 12.45 a.m. the two were taken for a medical examination. At 9 a.m. the two men signed for their possessions. At approximately 2 p.m. Mr Sezgin Tanrıkulu, a lawyer who had come to the Diyarbakır Court that day, saw Necati Aydın being brought into the court

building. After that, there were only a few persons who witnessed what happened to the two men.

24. The records from the proceedings show that the Prosecutor demanded that they remain in custody, but the duty judge ordered their release that day. The Prosecutor lodged an objection to Mehmet Ay's release with the Third Chamber of the Diyarbakır Court, but the appeal was rejected on 5 April.

25. At the time of their appearance before the judge, no lawyer was allowed to be present.

26. Despite the order of release from the Diyarbakır Court, the two men never emerged from the front door of the court building where family members and friends of the two men were waiting. When Sezgin Tanrıkulu came out of the building at approximately 2 or 2.30 p.m., he informed Hafif Ay that he had seen the two men. Mr Şemsettin Aydın, Necati's father, was also waiting. He had, in fact, been waiting for his son outside the court building for several days. The only times he was not outside the court building was when he had gone to the coffee house to pray, which would have taken him 15 minutes at some stage between 11.30 a.m. and 1.30 p.m. and again about 15 minutes between 4 and 4.30 p.m. According to Şemsettin, if Necati had been released during those 15-minute periods, he would have been told about this by other people who were waiting there. The only other exit which the men could have used to leave the court building was a door located in the basement of the Diyarbakır Court, adjacent to the registry of the court. That exit could only be used by police vehicles. Persons in the registry informed lawyers that they had seen Necati exit from that door.

27. The following day, 5 April 1994, the families of the two men applied to the Prosecutor in order to obtain information. The Prosecutor told them that Necati Aydın and Mehmet Ay had been released and that they had not been re-arrested. When Sezgin Tanrıkulu spoke with Mr Bekir Selçuk, the Chief Public Prosecutor at the Diyarbakır Court, the latter told Mr Tanrıkulu that Necati had probably gone to join the PKK (the Kurdistan Workers' Party). He said similar things to another lawyer, Mr Arif Altınkalem, when he made enquiries.

28. On 8 April 1994 Yasemin Aydın was telephoned and asked to meet with Osman Yetkin, the Prosecutor who had released her. Apart from Mr Yetkin, the President of the Third Chamber of the Diyarbakır Court and another prosecutor and judge were also present at this meeting, held at the Diyarbakır Court. Mr Selçuk joined the meeting later. The discussion at this meeting concerned the question how Necati Aydın and Mehmet Ay could have gone missing from inside the court building. The judge at the meeting noted that, apart from the front entrance, there was only one other entrance which was on the ground floor at the back of the building, which was used only by the police to transport prisoners to and from the Diyarbakır Court.

The judge wondered whether "the ones with the radio..." could have taken the two men away, but did not finish his sentence. The men also discussed the "dirty games" which were being played in Diyarbakır at the time. At the end of the meeting, Mr Yetkin exchanged telephone numbers with Yasemin Aydın.

29. On the evening of 9 April 1994 villagers working in a field in the Silvan district near the Pamuklu river, about 40 kilometres outside Diyarbakır, discovered three bodies. The bodies were in a shallow grave approximately 100 metres from the main Diyarbakır-Silvan road. The bodies had their hands tied behind their back and a bullet in the back of the head had killed each of them. They had been buried side by side at a depth of about one metre. The name Süheyla was engraved in a wedding ring which was found in the pocket of one of the dead men. The families identified the bodies of Necati Aydın and Mehmet Ay that evening.

30. The families retrieved the bodies the following day from the morgue at Diyarbakır State Hospital. Many people who wanted to visit the morgue were turned away. Three teachers, members of the teachers' union, were taken into custody. While in custody, they were threatened and told that Necati Aydın and Mehmet Ay had been killed in a clash.

C. The Government's submissions on the facts

31. Having been arrested on 18 November 1993, the applicant was examined by a doctor on 22 November 1993. According to a medical report drawn up at the time of her release, there were no signs of ill-treatment or torture on her body.

32. On 4 April 1994 the Anti-terrorist Department in Diyarbakır requested that Necati Aydin and Mehmet Ay be examined by a doctor. As a result of this request, on 4 April 1994 at 12.45 a.m., the applicant's husband and Mehmet Ay were examined by a doctor, who concluded that there were no signs of ill-treatment or torture on their bodies.

33. At 9 a.m. they were taken to the chief of the security forces, who drew up a record to the effect that their personal belongings had been returned to them. The applicant's husband signed this document. Later that day, the applicant's husband and Mehmet Ay were brought before a judge, who ordered their release. Necati Aydın and Mehmet Ay had then left the court building.

34. On 9 April 1994, the bodies of the applicant's husband, Mehmet Ay, and an unidentified person were found buried at a distance of 40 kilometres from Diyarbakır.

35. The autopsies performed concluded that they had been summarily executed, as the bodies were found with the hands tied behind their backs. As rigor mortis had not yet completely set in, the autopsy report stated that Necati Aydın had been dead for about 24 hours. This meant that the killing

must have taken place some four or five days after the release of the applicant's husband.

36. An *ex officio* investigation was opened under file no. 1994/2233 in order to identify the PKK terrorists who were the perpetrators of the murders. The investigation progressed very slowly, as the terrorists who had executed the applicant's husband were very mobile and often hid in neighbouring countries. They did not tend to return to the scene of the crime and witness statements were difficult to come by, since potential witnesses preferred to keep silent for fear of repercussions and intimidation.

37. Following the lodging of the application to the Commission, another *ex officio* investigation was opened in relation to the allegations of ill-treatment and torture during detention. However, on 6 October 1995, the Chief Public Prosecutor of Diyarbakır decided not to prosecute anyone as there was no evidence supporting the applicant's allegations.

D. Documentary evidence submitted by the parties

38. The following information appears from the documents submitted by the parties.

39. According to a report of the arrest and house search, drawn up on 18 March 1994, Necati Aydın, Süheyla Aydın, Mehmet Ay and nine other persons were arrested in a house in Diyarbakır that day at 10 p.m.

40. A single sentence in a document dated 22 March 1994 relating to nine of the detainees, including the applicant, states that the detainees bore no marks of ill-treatment.

41. Also on 22 March 1994, the applicant and two other detainees were released by police officers from the Diyarbakır Police upon the oral instructions of the Prosecutor at the Diyarbakır Court.

42. On 23 March 1994 Kerime Aydın, the sister of Necati Aydın, submitted a petition to the Public Prosecutor's Office at the Diyarbakır Court in which she expressed her concerns about her brother and asked to be provided with information about him.

43. On 25 March 1994 the Prosecutor at the Diyarbakır Court informed Kerime Aydın that her brother was being detained at the anti-terrorist branch of the Diyarbakır Police.

44. On 28 March 1994 a statement was taken from Mehmet Ay while he was in police custody. He stated that both he and Necati Aydın had been members of the PKK.

45. A statement was taken from Necati Aydın on 30 March 1994. He rejected the allegation that he had been an active member of the PKK. He also rejected the allegation that he and a number of his friends had been trying to set up a private hospital, which would be funded by the PKK and where wounded PKK members would be treated. He admitted that he had

been a PKK sympathiser and that he had been arrested in 1992, but the charges against him had later been dropped.

46. According to a medical report drawn up at the Diyarbakır State Hospital at 12.45 a.m. on 4 April 1994, neither Necati Aydın nor Mehmet Ay bore any marks of ill-treatment.

47. At 9 a.m. on 4 April 1994, the belongings of Necati Aydın and Mehmet Ay, which had been taken away from them following their arrest on 18 March 1994, were returned to them.

48. It appears from a letter signed by Ramazan Sürücü, the chief of the anti-terrorism branch of the Diyarbakır Police, that on 4 April 1994 Necati Aydın, Mehmet Ay and a certain Ramazan Keskin were referred to the Diyarbakır Court. It further appears from this letter that Ramazan Keskin had also been detained at the anti-terrorism branch.

49. On 4 April 1994 the Public Prosecutor at the Diyarbakır Court questioned Necati Aydın and Mehmet Ay. Necati Aydın repeated that he had not been a member of the PKK, whereas Mehmet Ay stated that he had wanted to join the PKK in the past but had not been admitted.

50. Finally, on 4 April 1994, Judge Raif Kalkıcı of the Diyarbakır Court questioned Mehmet Ay and Necati Aydın. Both Necati and Mehmet confirmed the statements they had made to the Prosecutor earlier the same day. The Judge then ordered their release.

51. On 5 April 1994 the Third Chamber of the Diyarbakır Court rejected the objection, which had been lodged by the Public Prosecutor at that court, against the decision ordering the release of Necati Aydın and Mehmet Ay.

52. On 9 April 1994 a report was drawn up by two gendarme officers, Ali Uslu and Cemil Çelik (see paragraphs 120-25 and 126-29 below), and signed by two gendarme privates. The report stated that a certain Mr Mehmet Korucu had come to their gendarmerie station and had informed them that he had found a body, buried in the Pamukçay area. The soldiers had visited the area at 1.30 p.m. and found the partially buried bodies of three men; their hands were tied at the back and each one had been shot in the head by a single bullet. There were no documents on the bodies to help establish their identities. However, the name "Süheyla" was engraved in one of two golden rings found in the pocket of the trousers of one of the bodies. The gendarmes had then informed the judicial authorities of their discovery.

53. On the same day Rıdvan Yıldırım, the Public Prosecutor of the Bismil district in whose jurisdiction the bodies had been found, visited the area together with Feyzi Kaymak, a doctor. The Prosecutor and the doctor drew up a report in which they recorded that each of the three men had been killed by a single gun shot to the head and that the bullets had exited the bodies. Rigor mortis had not yet set in at the time of the examination, and therefore it was estimated that the victims had been dead for about 24 hours. The doctor concluded on the spot that the cause of death was the destruction

of the brain and that there was no need, therefore, for full autopsies to be carried out. After having been photographed *in situ*, the bodies were transferred to the morgue in Diyarbakır.

54. According to this report, drawn up by the Prosecutor and the doctor, the body which had been found with the rings, bore a number of ecchymoses. There was a mark on the left shoulder, measuring 3x3 cm, that had been caused by a blow; two ecchymosed areas on the scapular region on the back of the left shoulder, measuring 5x5 cm and 3x3 cm, had been caused by blows; an ecchymosed area on the right scapular region of the shoulder, measuring 4x4 cm, had been caused by a blow; and finally an ecchymosed area on the chondral rib, measuring 6x6 cm, was noted.

55. On 10 April 1994 the bodies of Necati Aydın and Mehmet Ay were identified by their respective brothers. The third body remained unidentified. The bodies were photographed once more. The Prosecutor at the Diyarbakır Court issued a burial licence for Necati Aydın.

56. On 18 April 1994 the Bismil Prosecutor questioned Mehmet Naili Aydın, the brother of Necati Aydın. Mr Aydın confirmed that his brother's release had been ordered by the Diyarbakır Court on 4 April 1994, but his family had not heard anything from Necati until they had been contacted by hospital workers and were told that Necati's body was in the morgue.

57. On 26 April 1994 the Bismil Prosecutor questioned Mehmet Nuri Ay, the brother of Mehmet Ay. Mr Ay similarly confirmed that the Diyarbakır Court had ordered the release of his brother and Necati Aydın. He stated that he did not know how they had been killed and that he did not suspect anyone in particular. Mr Ay further stated that the third body, which had been found next to his brother and Necati Aydın, was that of Ramazan Keskin, a university student in Diyarbakır.

58. Also on 26 April 1994 the Bismil Prosecutor asked the commander of the Bismil gendarmerie to investigate whether the killings had any political aspects.

59. On 30 May 1994 the Bismil Prosecutor decided that the killing of the three persons had political aspects and therefore his office lacked jurisdiction to continue the investigation. The Prosecutor then sent the investigation file to the Diyarbakır Court which had jurisdiction to investigate the killings.

60. On 3 May 1995 Bekir Selçuk, the Chief Public Prosecutor at the Diyarbakır Court, sent a reply to a letter which had apparently been sent to him by the Ministry of Justice's International Law and Foreign Relations Directorate (hereinafter "the Directorate") on 4 April 1995 and which concerned the application made to the Commission by the applicant. Mr Selçuk stated in this letter that his office was overseeing the investigation into the killings. Mr Selçuk was of the opinion that Mehmet Ay and Necati Aydın, both of whom had stopped working for the PKK, had been killed by members of the PKK with the aim of attributing their killings

to the State and then making an application to the European Commission of Human Rights. The investigation into the killings was being conducted in the light of this information, but it had not yet been possible to apprehend the members of the PKK who had perpetrated the killings. Mr Selçuk finally stated that an indictment had been filed with the Diyarbakır Court on 30 November 1993 in which the applicant was charged with aiding and abetting a terrorist organisation.

61. On 6 October 1995 the Public Prosecutor's Office in Diyarbakır decided not to prosecute six police officers for allegedly having ill-treated Süheyla Aydın during police custody in 1991, 1992 and in 1994. It was noted in this decision that there was no evidence suggesting that her allegations of ill-treatment, detailed in her statement which had been taken from her by a letter rogatory on 4 July 1995, were true. The medical reports drawn up at the time of her releases did not mention any marks of ill-treatment.

62. On 27 November 1997 Prosecutor Sami Güngör at the Diyarbakır Court asked the Diyarbakır Police and the Diyarbakır Gendarmerie to search for the perpetrators of the killings of Necati Aydın, Mehmet Ay and Ramazan Keskin. According to this Prosecutor, the killings had been perpetrated by a group of PKK members.

63. On 27 March 1998 a Prosecutor at the Diyarbakır Court sent a letter to the anti-terrorism department of the Diyarbakır Police, requesting that the two police officers, who had questioned Necati Aydın and Mehmet Ay while they were in police custody and had then accompanied them to the Diyarbakır Court on 4 April 1994, be identified.

64. In his reply of 15 April 1998, the Diyarbakır Police Headquarters informed the Prosecutor at the Diyarbakır Court that Necati Aydın, Mehmet Ay and Ramazan Keskin had been questioned while they were in police custody by police commissioner Taner Şentürk and by a police officer named Hüseyin Karaca. The three detainees had then been referred to the Diyarbakır Court by the Police Commissioner, Ertan Uzundağ, on behalf of Ramazan Sürücü. The letter further states that, as at that time it was not the practice to draw up release reports, the authorities were unable to determine the identities of the police officers who had actually accompanied the three men to the Diyarbakır Court.

65. On 12 May 1998 a statement was taken from Hüseyin Karaca. He said that on 2 April 1994 he had questioned Ramazan Keskin, the third person whose body had been recovered together with the bodies of Necati Aydın and Mehmet Ay. Mr Karaca stated that he had not questioned Necati Aydın or Mehmet Ay and that he had not accompanied them to the Diyarbakır Court. He assumed that they had been taken there by officers working at the registry of the interrogation department.

66. On 22 May 1998 the Prosecutor Güngör at the Diyarbakır Court decided that he lacked jurisdiction to investigate the killings as there was no

evidence suggesting that the killings had been carried out by members of the PKK and hence it was a case of homicide as opposed to a political killing. The Prosecutor added that the decision of non-jurisdiction of 30 May 1994 (see paragraph 59 above) had been based on presumptions. The file was sent back to the Prosecutor's Office in Bismil in order for the investigation to continue.

67. On 28 May 1998 the Prosecutor in the town of İdil contacted his colleague in the nearby town of Bismil and informed him that a number of killings in the area, the majority of which had taken place between 1993 and 1996, had possibly been carried out by the same person or persons. The similarities lay in the way these killings had been carried out and in the weapons used. He asked the Bismil Prosecutor to forward to him details of the killings carried out in the jurisdiction of Bismil so that he could verify whether they were connected in any way.

68. On 9 September 1998 the Bismil Prosecutor sent a reply to his colleague in İdil, stating that seven persons had been killed in his jurisdiction between 1993 and 1996; three on 9 April 1994, and the remaining four on 14 September 1996. The bullets recovered after the killing of the four persons in 1996 had already been forwarded to the forensic department of the gendarmerie. No bullets or bullet cases had been recovered in relation to the killing of the three persons in 1994.

69. On 5 May 1999 the Directorate sent a letter to the Prosecutor's Office in Diyarbakır and asked whether any empty bullet cases, bullets or other similar evidence had been found at the site where the bodies were found and whether any forensic reports had been drawn up.

70. On 6 May 1999 the Prosecutor's Office in Diyarbakır forwarded to the Prosecutor's Office in the district of Bismil the Directorate's letter of 5 May 1999.

71. On 7 May 1999 the Bismil Prosecutor replied that no bullets or bullets cases had been found in the area.

72. According to a number of documents drawn up by public prosecutors and soldiers between 1996 and 1999, each of which is one paragraph long and most of which are identical pro-forma documents, it had not been possible to find the perpetrators of the killings despite the investigations carried out and the visits made to the area where the bodies had been found. These documents contained no information indicating what specific steps had been taken.

73. On 23 June 1999 the Bismil Prosecutor informed the Directorate, in an apparent response to a request from the latter of 18 June 1999, that the investigation into the killings was still ongoing and that his office was being informed every three months about the investigation by the soldiers. No personal belongings, other than the clothes which the deceased had been wearing, had been found at the site where the bodies were discovered.

E. Oral evidence

1. Süheyla Aydın, the applicant

74. At the time of the events, the applicant was working as a nurse in Adana. Neither she nor her husband had ever been harassed by any authority until they became members of the trade union. After joining the union, they were repeatedly arrested, detained and questioned about their activities within the trade union.

75. She and her husband were both civil servants, and on a number of occasions they had been posted to different cities which made it difficult for them to live together. When they had challenged their repeated postings through the courts, they were told that their existence in Diyarbakır constituted a threat to peace and security, and that it was for this reason that they had been sent away from that city. They had both resigned their jobs and stayed in Diyarbakır. Necati had then found another job in Adana. Had they not been arrested, Süheyla and Necati would have left Diyarbakır for Adana after the evening meal on 18 March 1994.

76. However, that day she was taken into detention, together with her husband and a number of other persons, including a five year old girl. At the time of their arrest, they were in the house of Hafif Ay in Diyarbakır. They were taken to the rapid reaction force building in Diyarbakır and were blindfolded upon arrival. She knew the building well because she had been detained there on three occasions in the past.

77. During her detention, which lasted four days, she was questioned three times. She was asked why she kept coming back to Diyarbakır. A police officer told the applicant, "We have sent you away from Diyarbakır so many times and still cannot manage to get rid of you". On one occasion she was held by her hair and slapped. During her time in detention, she often heard her husband Necati's screams. On one occasion, her blindfold was removed and she was able to see her husband standing naked and wet. He was shivering.

78. Those questioning Necati repeatedly told him that they would harm Süheyla and strip her naked if he did not cooperate. She was also told by those detaining her to behave herself if she did not want her husband to end up like Yusuf Ekinci who had been killed in Ankara (see *Ülkü Ekinci v. Turkey*, no. 27602/95, 16 July 2002). The applicant, another female detainee and the latter's children were then sent to the Police Headquarters in Diyarbakır where they were kept for four days. No statement was taken from the applicant while she was in detention. On the fourth day at midnight they were taken to the hospital for a medical examination (see paragraph 40 above) where a doctor, in the presence of police officers, asked the applicant if she had any marks of blows on her body. She replied that she did not. She was not physically examined by the doctor. She was then released at the hospital without having been brought before a prosecutor or judge.

79. On 4 April 1994 the applicant was informed by a lawyer that her husband had been brought before the judge at the Diyarbakır Court that day. She did not try to see her husband as she knew that it would be impossible to enter the building. In any event, her father-in-law Şemsettin and family members of Mehmet Ay were already waiting outside the court.

80. When Necati and Mehmet were not released that day, their families assumed that the judge had ordered their detention on remand and that they were transferred to the prison. When they contacted the prison that evening they were told, however, that the two men were not there.

81. The following day, i.e. on 5 April 1994, Şemsettin and the family lawyers contacted the Diyarbakır Court to ask about Necati and Mehmet. They were told that the two men had been released the previous day. The family members then began to fear that the two men would be killed. They continued their efforts to obtain information until the evening of 9 April 1994 when they were informed that the bodies of Necati and Mehmet had been found.

2. Yasemin Aydın

82. The witness was also in the house of Hafif Ay on the evening of 17 March 1994 and was also arrested together with Necati, Süheyla and the others. She was kept in a cell on her own and she was able to hear the screams of other detainees who were being tortured. The police officers began questioning her on the third day of her detention. She was beaten up, subjected to electrical shocks, hung from her arms and threatened with rape.

83. On 29 March 1994 she was brought before a doctor, together with approximately 20 other detainees, for a medical examination. The police officers who accompanied the detainees to the hospital threatened them and told them not to mention to the doctor any of the torture. Similarly, the doctor advised the detainees not to mention anything that might have been done to them if they wanted to avoid more. The detainees all said that they were fine. The witness was then brought before Osman Yetkin (see paragraph 12 above), a Prosecutor at the Diyarbakır Court, who ordered her release.

84. After Necati's disappearance, when a number of family members were making enquiries into his fate, the witness was unable to join them as she was being treated by doctors because she had fallen seriously ill after the torture inflicted on her during her detention.

85. On 7 April 1994, i.e. subsequent to the disappearance of Necati Aydın and Mehmet Ay but prior to the discovery of their bodies, the Prosecutor Osman Yetkin asked Yasemin to come and see him in the court building. On 8 April 1994 she and Hamit Ay, the elder brother of Mehmet Ay, went to meet with Mr Yetkin. However, on their arrival, Hamit Ay was not allowed in to see the Prosecutor. In the room where she met Osman Yetkin there were also another prosecutor as well as two judges present, one

of whom was the President of the Third Chamber of the Diyarbakır Court. Bekir Selçuk, the Chief Public Prosecutor of the Diyarbakır Court, joined the meeting at a later stage. A conversation ensued during which they all discussed what might have happened to Necati Aydın and Mehmet Ay. At one stage one of the judges said "I wonder if it was those with the walkie-talkies?". Some of those present in the room commented that some "dirty games" were being played in Diyarbakır which they were unable to solve. They also discussed the killing of Vedat Aydın, another member of Necati's family, who had been killed in similar circumstances (see *Şükran Aydın v. Turkey*, no. 46231/99). They then promised Yasemin that they would continue their investigation to find the two men.

86. Three days after the bodies were found Yasemin was asked to meet with the Mr Yetkin and the Chief Public Prosecutor once again. During this meeting she was asked how the family was coping with their loss. They then apologised for having failed to do more to find the men alive.

3. Şemsettin Aydın

87. The witness is the father of Necati Aydın. His son and a number of others were arrested in March 1994 and detained. All those detained, with the exception of his son and Mehmet Ay, were subsequently released. After the arrest of his son, the witness began waiting for him outside the Diyarbakır Court building. He would sit under the trees in the court's garden, approximately 20 metres across from the entrance to the building. He would start waiting there as of 8.30 a.m. every day and would only be absent from the vicinity of the court during prayer times at midday and in the afternoon. Had his son been released during such an absence, he would have been informed by other persons who were waiting there for their relatives and whom the witness had befriended. On a number of occasions, the witness also went to the local hospital where, he was told, detainees would be brought for a check-up prior to their release. He unsuccessfully tried to obtain information about his son at the hospital.

88. On 4 April 1994 the applicant learned that his son's release had been ordered by the court. However, his son did not emerge from the court building. The witness then went back to his village and did not return to Diyarbakır until he was informed that his son's body had been taken to the morgue at the hospital.

89. During the time he spent waiting outside the court building, he had not seen any detainees being released; detainees whose release had been ordered by the court would be taken back to the detention places and be released after midnight. He never expected that his son would be released from the court but he continued to wait in the hope that he would get some news about him.

90. According to the witness, his son was killed because of his leftist views and also because of his involvement in trade union activities. A

number of his son's friends and in particular a relative, Vedat Aydın, had also been murdered in similar circumstances.

4. Sezgin Tanrıkulu

91. The witness is an advocate practising in Diyarbakır. He has appeared before the Diyarbakır Court on many occasions to represent clients and knows the court's procedure and the court building well.

92. At the time of the events giving rise to the present application, the court building was located in a courtyard which was surrounded by a wall. There were two gates opening into the courtyard. One of these gates was used by personnel working at the court and also by officials when transporting defendants who were detained on remand and suspects who were detained in police custody. The other gate was used by lawyers and the general public. The court building had three doors, two of which were for official use and the third door was used by lawyers and the general public. Lawyers were not allowed to speak with their clients who were brought to the court from police custody and the detainees did not have access to a lawyer.

93. A person taken to the court from police custody could be released by a prosecutor or judge. In that event, the suspect would be escorted by police officers to the door of the building, the one used by the general public, and released there. In 1994 it was not the practice of the court to draw up a release document; such a practice was not introduced until 1995. Personal belongings such as belts, money, watches, rings, etc., were returned to the detainees before they were brought before the judge at the court building.

94. On 4 April 1994 the witness went to the Diyarbakır Court building for unrelated business. After completing that business, and as he was about to leave around 2 or 2.30 p.m., he saw Necati Aydın and Mehmet Ay being brought into the court by two or three policemen. He and Necati saw each other and exchanged looks in greeting. When the witness left the building he saw Hafif Ay, the elder brother of Mehmet Ay, who was waiting outside the gate, and he told him that he had just seen his brother and Necati being taken into the court building.

95. Family members waiting for detainees were a familiar sight outside the Diyarbakır Court building. Family members would start waiting there for the release of their relatives as soon as they had been detained, because once a person was detained it was not possible to know when he or she would be released; the maximum period of detention before a suspect had to be brought before a judge was 30 days at that time.

96. In the evening of 4 April 1994, Hafif Ay telephoned the witness and told him that neither his brother nor Necati Aydın had emerged from the court building. Mr Ay asked the witness if he had any information as to whether the two detainees had been released or been taken back to the police station. The following morning the witness spoke to the Chief Public

Prosecutor Selçuk. Mr Selçuk confirmed that the judge had ordered the release of the two detainees. When informed that the two detainees had never made it to the court's door, the Prosecutor told the witness that they had perhaps joined the PKK.

97. The Registry office of the Third Chamber of the Diyarbakır Court was located in the basement of the court building, next to the exit door used by police officers to bring detainees in and out. At a later date, officials working at the registry told the witness that Necati Aydın and Mehmet Ay had been led away through that door. The witness did not convey this information to anyone else because he feared for the lives of the sources of this information.

5. Arif Altınkalem

98. This witness is also an advocate practising in Diyarbakır. He was acting for Necati Aydın at the time of the events giving rise to the present application. When his client was taken into detention in March 1994, the witness was not allowed to see him. This was because the legislation in force at the time prevented detainees, who were arrested for an offence falling within the jurisdiction of State Security Courts, to have access to their lawyers. The witness would also not be informed as to when Necati would be brought before a judge, although he knew that this would happen within 30 days, the maximum period of detention at the time.

99. On 4 April 1994 the witness was in the Diyarbakır Court building to represent a number of other clients at their trials. He did not come across Necati Aydın in the building but was told at a later stage by a court official that Necati had been there on that day.

100. The witness was informed on 5 April 1994 that Necati had been brought before a judge who had ordered his release but he had not been seen leaving the building. The witness then went to speak to Chief Public Prosecutor Selçuk. Mr Selçuk told him that Necati had been released and that he had probably joined the PKK.

6. Bekir Selçuk

101. The witness was the Chief Public Prosecutor of the Diyarbakır Court at the time of the events. He remembered that Necati Aydın was being investigated for membership of the PKK.

102. It was not the practice at the time of the events to draw up release documents. Sometimes a detainee, whose release was ordered by a prosecutor or judge, was escorted by police officers to a safe place and released from there. Otherwise a detainee was simply released outside the court building. In any event, detainees were not allowed to wander around freely inside the court building.

103. It would have been possible for him, as a Public Prosecutor, to find out the identities of the police officers who had accompanied Necati Aydın to the court building on 4 April 1994. However, he could not remember whether or not he had done this and whether he had subsequently questioned these police officers. He thought that he might have done so. In any event, he would not have recorded the identities of these police officers or what they had said to him in a document, in order not to jeopardise the police officers' safety. Furthermore, the account of the police officers who had escorted Necati Aydın to the court building would not have been important to the investigation.

104. The opinions expressed in the document which he had drawn up on 3 May 1995 (see paragraph 60 above) had been based on the investigations. They were not based on subjective opinion. The witness believed that Necati Aydın and Mehmet Ay had been PKK members. Necati was probably killed by PKK members because he had left the organisation. Perhaps he was killed because he had the same surname as Vedat Aydın, who had also been killed in similar circumstances.

105. Neither the fact that the release of Necati Aydın and his wife had been ordered by the judge for lack of evidence, nor the fact that neither Necati nor Süheyla had ever been convicted of an offence involving the PKK, had a bearing on the witness' opinion that Necati and his wife were PKK members. The acquittal of Süheyla Aydın on charges of aiding and abetting PKK members was the personal opinion of the trial court judge. That acquittal did not mean that she was not involved in PKK activities.

106. The witness denied having been approached by family members of the deceased men (see paragraphs 85-86 above) and he did not remember whether he had met with advocates Sezgin Tanrıkulu and Arif Altınkalem and discussed the disappearance of Necati Aydın (see paragraphs 96 and 100 above).

107. His office would sometimes receive intelligence indicating that certain civil servants had been in contact with members of the PKK. In such circumstances, and when he was unable to obtain any evidence to indict such civil servants, he would ensure their transfer to other cities.

108. The witness still held the opinion that Necati Aydın had been killed by members of the PKK so that a complaint could be lodged against Turkey to the European Court of Human Rights (see paragraph 60 above).

7. Rıdvan Yıldırım

109. The witness was the Public Prosecutor of the town of Bismil at the time of the events. The bodies were found in an area under his jurisdiction and he participated in the examination of the bodies on 9 April 1994 (see paragraph 53 above).

110. He did not deem it necessary to carry out a full autopsy in order to establish the circumstances leading up to the killings; the cause of death was

established and that was sufficient. The way the killings had been carried out – in particular, the single gun shot to the head and the bodies being dumped at a roadside – led the witness to form the opinion that the perpetrators of the killings were members of the PKK.

111. Prosecutors would investigate a killing regardless of whether or not there had been an official request by a relative of the deceased person. During his time in Bismil there had been a significant number of killings in the area and each of these killings had been investigated by the authorities.

8. Sami Güngör

112. The witness is a Public Prosecutor and was appointed to the Diyarbakır Court in October 1996. From that date onwards he carried out the investigation into the killing of the applicant's husband and the other two persons. He inherited approximately one thousand similar cases from his predecessor.

113. In a document which he signed on 20 November 1997 (see paragraph 62 above), the witness recorded that Necati Aydın had been killed by members of the PKK. He explained that, in an investigation into a killing which had taken place in that area at that time, the starting point would be that the perpetrators were members of the PKK. Other possibilities would also be investigated if any evidence came to light which suggested otherwise. On 22 May 1998 the witness decided that there was no evidence suggesting that the killings had been carried out by members of the PKK, and he sent the investigation file to the local prosecutor (see paragraph 66 above).

9. Ramazan Sürücü

114. The witness was the chief of the anti-terrorist branch of the Diyarbakır Police Headquarters where the applicant, Necati Aydın, Mehmet Ay, Ramazan Keskin and the others had been detained at the time of the events (see paragraph 48 above).

115. When a person was detained, his or her personal belongings would be taken away from that person and he or she would be asked to sign a document to that effect. When the detainee is about to be brought before a judge, the belongings would be returned and the person would be asked to sign the same document. This was what had happened in the case of Necati Aydın (see paragraph 47 above).

116. Two or three police officers would have accompanied Necati Aydın and Mehmet Ay to the Diyarbakır Court on 4 April 1994. These police officers would not be the same as those who had questioned the detainees while in custody.

117. The witness had never been questioned by the authorities investigating the disappearance and the subsequent killing of Necati Aydın.

10. Yusuf Ercan

118. The witness is a police officer and was responsible for the detainees at the Diyarbakır Police Headquarters at the time of the events. He signed the document showing that personal belongings of Necati Aydın were taken away and had then been returned to him (see paragraph 47 above).

119. He did not remember who had accompanied Necati Aydın and Mehmet Ay to the Diyarbakır Court on 4 April 1994 but it would be possible, by examining the documents at the place of detention, to determine the identities of these police officers.

11. Ali Uslu

120. The witness is a gendarme officer and was the deputy commander of the Kağıtlı Gendarmerie Station at the time of the events.

121. On the day in question a villager came to the station and explained that he had found three bodies in the fields. He and his superior, together with a number of soldiers under their command, went to the scene, which was situated approximately five kilometres away from the station and 100 metres from the main road. They checked the pulses of the three men and established that they were dead.

122. When the witness reached the area where the bodies were found, he formed the opinion that it was the PKK who had killed the three men, possibly because the PKK members had suspected that the three men were working for the State authorities.

123. It would not have been possible to reach the spot where the bodies were buried by car; only a tractor could have reached it. However, there were no tyre marks or foot prints near the scene. Similarly, there were no blood stains in the vicinity. The witness did not have any idea whether the three men had been killed on the spot where their bodies were found. If the men had been shot there, the shooting would not have been heard from the station because it was too far away.

124. The only road to reach the site was the one that ran between the town of Silvan and the city of Diyarbakır. This road was under constant surveillance by soldiers from his station. All vehicles and persons travelling on this road were searched.

125. His superior searched the bodies for any identification documents but, other than two wedding rings, he did not find anything to identify the deceased men. They also asked for support teams, approximately 40-50 soldiers, to search the area for any evidence. None was found. They then informed the local prosecutor and handed the investigation over to him. His station continued to inform the investigating prosecutor every three months about any developments. He could not remember whether any inhabitants of villages in the vicinity had been questioned to establish

whether they had seen or heard anything. If there had been any valuable information, it would have been mentioned.

12. Cemil Çelik

126. The witness is a gendarme officer and was commander of the Kağıtlı Gendarmerie Station at the time of the events. The witness confirmed the sequence of events as described by his deputy Ali Uslu above.

127. The witness was asked by the Bismil Public Prosecutor to establish whether the killings had political connotations (see paragraph 58 above). He was not informed that the deceased men had disappeared after a judge had ordered their release. In the course of his investigation in the weeks and months after the discovery of the bodies, the witness visited the scene where the bodies had been found and also spoke to the local people who might have been able to provide crucial information. The names of those he questioned were recorded in his three-monthly reports. He continued this investigation until he left his post later in 1994, but the investigation was continued by his successor.

128. The ropes used to tie the hands of the deceased men were cut from the bodies by the witness and the soldiers under his command and left at the scene. As, in the opinion of the witness, the ropes had no evidential value, he did not deem it crucial to take them and examine them. Similarly, there was no need to record in his report that he had asked for an additional 40-50 soldiers to help search the site.

129. A car leaving Diyarbakır and going in the direction of the place where the bodies were found would have gone through at least two check points; one was the check point just outside Diyarbakır and manned by police officers from the Diyarbakır Police and the second was outside the Kağıtlı gendarme station, manned by the soldiers under his command. As there were not very many cars passing along the road outside the station, each car and its passengers were searched thoroughly. Even police cars or ambulances were checked.

II. RELEVANT DOMESTIC LAW AND PRACTICE

130. A description of the relevant domestic law may be found in *Akkoç v. Turkey* (nos. 22947/93 and 22948/93, §§ 42-58, ECHR 2000-X).

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

131. In their post-admissibility observations the Government insisted that domestic remedies had not been exhausted. They submitted that the Commission had only addressed this issue in relation to the applicant's Article 2 complaint, and had omitted to examine whether she had availed herself of available domestic remedies in respect of her other complaints. In addition, the Government rejected the argument that the applicant would have been fearful of pursuing her complaints more vigorously at the domestic level, bearing in mind that she had not been afraid to contact the press or the Diyarbakır branch of the Human Rights Association.

132. The Court, considering that this matter has been adequately dealt with by the Commission in its decision on admissibility, does not deem it necessary to re-examine it. It therefore rejects the Government's preliminary objection.

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

A. Arguments of the parties

1. The applicant

133. The applicant submitted that her husband Necati had last been seen alive when he was accompanied by police officers in the Diyarbakır Court building. She pointed out that there was no record of his actual release after the judge had ordered it. At this point, her husband was still in the hands of the police officers. Had her husband been released, he would have been escorted to the exit of the building. As pointed out by the Chief Public Prosecutor of the Diyarbakır Court, for security reasons, detainees would not be allowed simply to move around the court building unescorted (see paragraph 102 above). In any event, if her husband had been released, the family members waiting outside the court building would have seen him. In the opinion of the applicant, her husband had been taken away from the court building by police officers through the back door of the building reserved for police officers. She submitted that the respondent Government had provided no evidence to refute the conclusions to which all the facts pointed. In particular, they had failed to identify the police officers who had accompanied her husband to the court building on 4 April 1994. These police officers would have been the only persons in a position to provide further testimony on the matter.

134. The applicant further submitted that it would have been impossible for anyone other than agents of the State to kill her husband. It was difficult to see how the three men – still alive or already dead – could have been transported to the spot where their bodies were found, unless they had been taken there by persons who were acting with the permission of the authorities and who were allowed to pass through the checkpoints. The applicant also drew attention to the fact that, according to the autopsy report of 9 April 1994, rigor mortis had not yet set in. This indicated that the three men had been killed less than 24 hours before; the men had thus been in the hands of their captors for four days before they had been killed. The authorities had taken no action during those days to trace the men's whereabouts. According to the applicant, this inaction reflected the fact that the authorities had known at that time that her husband had been taken somewhere with the acquiescence of the State.

135. As regards the context of the killing of her husband, the applicant submitted that he fell into a category of persons who were targeted by the State. Necati, like Vedat Aydın – a relative who was the president of the People's Labour Party and who had also been killed in similar circumstances – was a high profile political activist in so far as he was president of the health workers' union. Finally, the applicant referred to the Susurluk report (see *Ülkü Ekinci*, cited above, §§ 92-110) in which a reference was made to an incident in which bodies, which had been handed over from one State official to another, had been found under a bridge. This was widely understood to have been a reference to the killing of Necati Aydın and the other two men.

2. The Government

136. In their post-admissibility observations submitted on 5 May 1998, i.e. before the Commission heard the witnesses in Strasbourg and Ankara, the Government maintained that the applicant's allegations had no basis in fact. There was no evidence to suggest that either the applicant or her husband had been ill-treated in detention. Her husband had been released on 4 April 1994, and his death four days later – responsibility for which could not be attributed to agents of the State – continued to be investigated.

B. Article 38 § 1 (a) and consequent inferences drawn by the Court

137. Before proceeding to assess the evidence, the Court would stress, as it has done previously, that it is of the utmost importance for the effective operation of the system of individual petition, instituted under Article 34 of the Convention, that States should furnish all necessary facilities to make possible a proper and effective examination of applications (see *Tanrıkulu v. Turkey* [GC], no. 23763/94, § 70, ECHR 1999-IV). It is inherent in proceedings relating to cases of this nature, where an individual applicant

accuses State agents of violating his rights under the Convention, that in certain instances solely the respondent Government have access to information capable of corroborating or refuting these allegations. A failure on a Government's part to submit such information which is in their hands without a satisfactory explanation may not only give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations, but may also reflect negatively on the level of compliance by a respondent State with its obligations under Article 38 § 1 (a) of the Convention (see *Timurtaş v. Turkey*, no. 23531/94, §§ 66 and 70, ECHR 2000-VI). The same applies to delays by the State in submitting information which prejudices the establishment of the facts in a case.

138. In this context, the Court has noted with concern a number of matters regarding the Government's response to the Commission's requests for documents and information. Apart from individual requests for specific documents, the Government were also requested on a number of occasions to submit to the Commission all the documents pertaining to the investigation into the killing of the applicant's husband.

139. As regards these documents, the Court observes that the existence of a number of them only came to light during the examination of witnesses by the Commission's delegates in Ankara in September 1999. Some of them were produced at that time by the representatives of the Government, whereas others were not made available until after the fact-finding mission. These documents included the following:

(a) a document of 4 April 1994, ordering the transfer of Necati Aydın, Mehmet Ay and Ramazan Keskin to the Diyarbakır Court (see paragraph 48 above);
(b) a statement taken from Mehmet Naili Aydın on 18 April 1994 (see paragraph 56 above);
(c) a statement taken from Mehmet Nuri Ay on 26 April 1994 (see paragraph 57 above);
(d) a letter of 26 April 1994 from the Bismil Public Prosecutor (see paragraph 58 above);
(e) the decision of non-jurisdiction taken on 30 May 1994 (see paragraph 59 above);
(f) a letter of 3 May 1995 from the Chief Public Prosecutor Bekir Selçuk (see paragraph 60 above);
(g) a letter of 27 March 1998 from the Public Prosecutor at the Diyarbakır Court (see paragraph 63 above);
(h) a letter of 15 April 1998 from the Diyarbakır Police Headquarters (see paragraph 64 above);
(i) a statement taken from Hüseyin Karaca on 12 May 1998 (see paragraph 65 above); and finally
(j) the decision of non-jurisdiction taken on 22 May 1998 (see paragraph 66 above).

140. Had these important documents been made available prior to the taking of evidence from witnesses in Ankara – as had been requested – this would have allowed the Commission to identify and summon other relevant witnesses.

141. Furthermore, the Court notes with concern that neither Prosecutor Osman Yetkin, who had contacted Yasemin Aydın on two occasions (see paragraphs 85-86 above), nor Judge Raif Kalkıcı, who had ordered the release of Necati Aydın (see paragraph 50 above), appeared before the Commission's delegates to give evidence. As regards the failure of Osman Yetkin to appear, the Government explained that they had been unable to contact him as he had resigned his post and had left for an unknown destination. No explanation has been given by the Government as to what actual steps were taken by them to locate Mr Yetkin. As regards the failure of Raif Kalkıcı to appear before the Commission delegates, the Court observes that the lawyer who represented the Government during the hearings in Ankara submitted that an official explanation, in writing, would be forthcoming for this witness' absence. However, no such explanation has been received from the Government. Given that Mr Kalkıcı was the judge who ordered the release of Necati Aydın and he was, therefore, one of the last persons to have seen Necati alive, the Court particularly regrets the Government's failure to summon Mr Kalkıcı.

142. Finally, and more importantly, the Court observes the Government's failure to identify and summon the police officers who accompanied Necati Aydın to the Diyarbakır Court on 4 April 1994 (see paragraph 13 above). As regards the Government's questioning of the Commission's decision to hear these police officers in person (see paragraph 13 above), the Court would reiterate that it was for the Commission, as it is now for this Court, to decide whether and to what extent a witness is relevant for its assessment of the facts (see *Orhan v. Turkey*, no. 25656/94, § 271, 18 June 2002) and in what manner evidence should be obtained from such witnesses.

143. The Court concludes that the Government have not advanced any, or any convincing, explanation for their delays and omissions in response to the Commission's requests for relevant documents, information and witnesses. Accordingly, it finds that it can draw inferences from the Government's conduct in this respect. Furthermore, the Court, referring to the importance of a respondent Government's co-operation in Convention proceedings (see paragraph 137 above) and mindful of the difficulties inevitably arising from an evidence-taking exercise of this nature (see *Timurtaş*, cited above, § 70), finds that the Government fell short of their obligations under Article 38 § 1 (a) of the Convention to furnish all necessary facilities to the Commission and the Court in their task of establishing the facts.

C. The Court's evaluation of the facts

144. According to the applicant, her husband Necati Aydın was never physically released after the judge's order on 4 April 1994. He was later shot and killed by agents of the State. The Government deny this.

145. The Court reiterates at the outset that persons in custody are in a vulnerable position and the authorities are under a duty to protect them. It has previously held that, where an individual is taken into police custody in good health and is found to be injured on release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused (see, among other authorities, *Selmouni v. France* [GC], no. 25803/94, § 87, ECHR 1999-V). The obligation on the authorities to account for the treatment of an individual in custody is particularly stringent where that individual dies (see *Salman v. Turkey* [GC], no. 21986/93, § 99, ECHR 2000-VII). It follows from this that the authorities are responsible for the well-being of detainees until their release and it is for the respondent State to prove that a detainee has been released.

146. The Court notes that it is not in dispute between the parties that the applicant's husband was detained by the police on 18 March 1994 and was subsequently brought before the judge at the Diyarbakır Court on 4 April 1994 who ordered his release. What is disputed is whether Necati Aydın was physically released on this latter date, as maintained by the Government.

147. In assessing evidence, the Court has generally applied the standard of proof "beyond reasonable doubt" (see *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, pp. 64-65, § 161). Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during such detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (see *Salman*, cited above, § 100).

148. It is appropriate, therefore, that in cases such as the present – where it is the non-disclosure by the Government of crucial documents in their exclusive possession until the advanced stages of the examination of the application, coupled with their failure to identify the two police officers (see paragraph 13 above), as well as their failure to summon other crucial witnesses (see paragraph 12 above), which is putting obstacles in the way of the Court's establishment of the facts –, it is for the Government to argue conclusively why the documents and the witnesses in question cannot serve to corroborate the allegation made by the applicant (see *Akkum and Others v. Turkey*, no. 21894/93, § 211, 24 March 2005).

149. The Government have failed to adduce any argument from which it could be deduced that the witnesses whom they failed to identify and to summon had no relevant testimonies to offer which might have had a bearing on the applicant's claims.

150. More crucially, the Court observes that at the time of the events giving rise to the present application it was not the practice, at least not at the Diyarbakır Court, to draw up release documents when a detainee was released by order of a prosecutor or judge (see paragraphs 93 and 102 above). Detainees would simply be escorted to the door of the court building (see paragraph 93 above) or to a safe location outside the court building (see paragraph 102 above) and released there.

151. The Court further observes that, at the time of the events, a suspect who was detained in police custody on suspicion of having committed an offence falling within the jurisdiction of the State Security Courts, was prevented from benefiting from a number of essential safeguards. In particular, such detainees did not have access to their lawyers until they were charged. Moreover, they could be detained up to a period of 30 days before they had to be brought before a judge. Family members or legal representatives would not be informed of the date and time when suspects were brought before a judge.

152. The importance of effective safeguards which should be afforded to detainees cannot be overemphasised. When examining complaints under Article 5 of the Convention, the Court has stressed in a number of cases the fundamental importance of the guarantees contained in that provision for securing the rights of individuals in a democracy to be free from arbitrary detention at the hands of the authorities (see, amongst others, *Timurtaş*, cited above, § 103, and the cases cited there). It held that what was at stake was both the protection of the physical liberty of individuals as well as their personal security in a context which, in the absence of safeguards, could result in a subversion of the rule of law and place detainees beyond the reach of the most rudimentary forms of legal protection (see *Kurt v. Turkey*, judgment of 25 May 1998, *Reports of Judgments and Decisions* 1998-III, § 123).

153. Regard may also be had to Article 11 of the Declaration on the Protection of all Persons from Enforced Disappearance (United Nations General Assembly resolution 47/133 of 18 December 1992). This Article provides that "[a]ll persons deprived of liberty must be released in a manner permitting reliable verification that they have actually been released and, further, have been released in conditions in which their physical integrity and ability fully to exercise their rights are assured".

154. In the light of the above mentioned failure of the Government to identify and summon the police officers who accompanied Necati Aydın to the Diyarbakır Court on 4 April 1994, coupled with the absence of a release document, the Court concludes that the Government have failed to

discharge their burden of proving that Necati Aydın was indeed released from the Diyarbakır Court building on 4 April 1994. The Court finds it established that Necati Aydın remained in the custody of the State. It follows that the Government's obligation is engaged to explain how Necati Aydın was killed while still in the hands of State agents. Given that no such explanation has been put forward by the Government, the Court concludes that the Government have failed to account for the killing of Necati Aydın.

III. ALLEGED VIOLATIONS OF ARTICLE 2 OF THE CONVENTION

155. Article 2 of the Convention provides as follows:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

A. The killing of Necati Aydın

1. Submissions of the parties

156. The applicant submitted that her husband had been killed by agents of the State, in violation of Article 2 of the Convention.

157. The Government denied that the applicant's husband was so killed. They contended that the applicant's husband had left the court building immediately after the judge had ordered his release and his personal belongings had been returned to him. The lapse of time of four to five days between Necati Aydın's release and his killing was too long to be capable of implicating the authorities in his death. The Government contended that no evidence was submitted by the applicant in support of her allegations.

2. The Court's assessment

158. Article 2, which safeguards the right to life and sets out the circumstances when deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention, to which no derogation is permitted. Together with Article 3, it also enshrines one of the basic values of the democratic societies making up the Council of Europe. The circumstances in which deprivation of life may be justified must therefore

be strictly construed. The object and purpose of the Convention as an instrument for the protection of individual human beings also requires that Article 2 be interpreted and applied so as to make its safeguards practical and effective (see *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, Series A no. 324, pp. 45-46, §§ 146-47).

159. The text of Article 2, read as a whole, demonstrates that it covers not only intentional killing but also situations where it is permitted to "use force" which may result, as an unintended outcome, in the deprivation of life. The deliberate or intended use of lethal force is only one factor, however, to be taken into account in assessing its necessity. Any use of force must be no more than "absolutely necessary" for the achievement of one or more of the purposes set out in sub-paragraphs (a) to (c). This term indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is "necessary in a democratic society" under paragraph 2 of Articles 8 to 11 of the Convention. Consequently, the force used must be strictly proportionate to the achievement of the permitted aims (*ibid*., p. 46, §§ 148-49).

160. In the light of the importance of the protection afforded by Article 2, the Court must subject deprivations of life to the most careful scrutiny, taking into consideration not only the actions of State agents but also all the surrounding circumstances. Use of force by State agents in pursuit of one of the aims specified in paragraph 2 of Article 2 may be justified where it is based on an honest belief which is perceived for good reasons to be valid at the time but which subsequently turns out to be mistaken (*ibid*., pp.58-59, § 200).

161. The Court has already established that the Government have failed to account for the death of Necati Aydın (see paragraph 154 above) who was last seen alive in the hands of State agents and subsequently met with a violent death. It follows that there has been a violation of Article 2 of the Convention in respect of the killing of Necati Aydın.

B. Alleged inadequacy of the investigation

1. Submissions of the parties

(a) The applicant

162. The applicant asked the Court to find a violation of Article 2 of the Convention on the ground that the investigation into the disappearance and the subsequent killing of her husband had been so fundamentally flawed as to amount to a failure to comply with the procedural requirements of that provision. The applicant identified, in particular, the following shortcomings in the investigation into the killing of her husband:

(a) during the five crucial days of his unacknowledged detention, i.e. between 4 April 1994 and 9 April 1994, the authorities took no action to try and find Necati Aydın; in particular, the police officers who accompanied Necati Aydın to the court building were not questioned;
(b) no forensic examinations whatsoever were carried out at the place where the bodies were found;
(c) no full autopsy was carried out on the body of Necati Aydın;
(d) no attempts were made to establish the type of weapon that had been used, or to find out whether the deceased had been killed on the spot;
(e) the rope used to tie her husband's hands behind his back was simply left at the site and not taken for any forensic testing.
(f) no photographs were taken for forensic purposes;
(g) the authorities failed to take statements about the killing of Necati Aydın from any of his relatives who might have been able to provide some information;
(h) each of the prosecutors and investigating officers involved in the investigation made the assumption that the men had been killed by terrorists;
(i) the investigation file consisted mainly of three-monthly replies from the gendarmes to the effect that there was no information on the perpetrators. However, there was no evidence whatsoever of any pro-active steps having been taken in order to find the perpetrators.

(b) The Government

163. The Government submitted that, despite the fact that the conditions of the fight against terrorism made it difficult to identify the perpetrators, the investigation into the killing of the applicant's husband had not suffered any interruptions and was still continuing. They emphasised that the present case did not concern deliberate action undertaken by State agents against a person, but a criminal investigation into events that had occurred between individuals. The Convention contained no specific rights as to the duration and modalities of such an inquiry.

2. The Court's assessment

164. The Court reiterates that the obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see, *mutatis mutandis*, *McCann and Others*, cited above, p. 49, § 161, *Kaya v. Turkey*, judgment of 19 February 1998, *Reports* 1998-I, p. 329, § 105). In that connection, the Court points out that, contrary

to what was suggested by the Government, this obligation is not confined to cases where it is apparent that the killing was caused by an agent of the State (see *Salman*, cited above, § 105).

165. As to the question whether the investigating authorities were informed of the disappearance of Necati Aydın, the Court observes in the first place that the lawyers Sezgin Tanrıkulu and Arif Altınkalem went to the Diyarbakır Court building on 5 April 1994 in order to obtain information about him (see paragraphs 96 and 100 above). There they met with the Chief Public Prosecutor Bekir Selçuk who told them that Necati might have gone to join the PKK. Having regard to the credible and consistent testimonies given by these two lawyers to the Commission's delegates (see paragraphs 91-97 and 98-100 above), the Court sees no reason to doubt the veracity of their statements. The Court notes, however, that Mr Selçuk told the delegates that he did not remember meeting with the lawyers (see paragraph 106 above). The Court has serious doubts as to the reliability of this witness, whose statement to the delegates was evasive. The Court is, moreover, disconcerted by the nature of some of the opinions expressed by him. In this context the Court would in particular point to his comments concerning acquittals by a court of law merely reflecting the personal opinion of judges (see paragraph 105 above) and his remark that civil servants who were suspected of having links with the PKK, but against whom there was no evidence, would be relocated (see paragraph 107 above). The Court finds that these disturbing comments from a senior public prosecutor reflect an abject disregard for the principle of the rule of law.

166. Furthermore, after the disappearance of Necati Aydın but prior to his body having been found, Yasemin Aydın met with Prosecutor Osman Yetkin at the latter's request. Yasemin told the delegates that Mr Selçuk and a number of other judges and prosecutors were also present in the room. According to Mr Selçuk, this meeting did not take place. The Government, however, have not explicitly denied that the meeting was held, and, by failing to summon Mr Yetkin and the two judges (see paragraph 12 above), not only frustrated the possibility of the Convention bodies to establish the facts, but also forfeited the opportunity to refute Yasemin Aydın's statement.

167. The Court finds it established, therefore, that the competent judicial authorities had been promptly and adequately informed of the disappearance of Necati Aydın. It follows that, from that moment onwards, these authorities had a duty to carry out an effective investigation into the disappearance of Necati Aydın.

168. No documents have been submitted by the Government indicating that any steps were taken by these authorities in the crucial days following the disappearance. In particular, and as the applicant pointed out, there are no documents indicating that the police officers who accompanied Necati Aydın to the court building were identified and questioned. It is possible

that the reason for this failure was, as Mr Selçuk put it, that questioning them was not regarded as important by the authorities (see paragraph 103 above). In any event, even if these police officers had been identified and questioned by the Mr Selçuk, their testimonies would not have been recorded, as Mr Selçuk made it clear that he would not keep records of the names or statements of such officers (see paragraph 103 above).

169. Furthermore, the Court observes that Ramazan Sürücü, as the Chief of Police responsible for the anti-terrorist branch who detained Necati Aydın, and also as the officer who ordered Necati Aydın's transfer to the Diyarbakır Court (see paragraph 48 above), was never questioned by the authorities despite the fact that obtaining information from him would have been an obvious step to take at that time. Similarly, no information or documents have been submitted by the respondent Government to indicate that Ertan Uzundağ, the police commissioner who oversaw Necati Aydın's transfer to the Diyarbakır Court (see paragraph 64 above), was ever questioned.

170. The Court concludes that the prosecutors have remained inactive during these crucial days at a time when many people were being killed in the south-east region.

171. As regards the investigation into the killing of the applicant's husband, the Court finds that the discovery of Necati Aydın's body gave rise *ipso facto* to an obligation under Article 2 to carry out an effective investigation into the circumstances surrounding the death (see, *mutatis mutandis*, *Ergi v. Turkey*, judgment of 28 July 1998, *Reports* 1998-IV, p. 1778, § 82, and *Yaşa v. Turkey*, judgment of 2 September 1998, *Reports* 1998-VI, p. 2438, § 100). Furthermore, pursuant to Article 153 of the Turkish Code of Criminal Procedure, a public prosecutor, who has been informed of a crime that has been committed within his or her jurisdiction, is under an obligation to carry out the necessary investigations into the incident.

172. The obligation to carry out effective investigations involves, where appropriate, an autopsy which provides a complete and accurate record of possible signs of ill-treatment and injury and an objective analysis of clinical findings, including the cause of death (see *Salman*, cited above, § 105).

173. It appears from the report drawn up by the gendarmes on 9 April 1994 (see paragraph 52 above) and also from the evidence given by these gendarme officers to the Commission's delegates (see paragraphs 120-25 and 126-29 above), that there was no meaningful examination of the scene where the body was found. In this regard, the Court would refer to the defects set out by the applicant (see paragraph 162 above) and it would further highlight the importance of a full autopsy.

174. The Court notes that the report drawn up on 9 April 1994 by Prosecutor Rıdvan Yıldırım and Dr. Feyzi Kaymak merely consists of a

record of the number of bullet entry and exit holes found on the three bodies. Dr Kaymak, who performed the examination, apparently did not consider the possibility that traces of bullet or other evidence might still be lodged in the body. No attempts were made to establish either the distance from which the bullet had been fired or the type of weapon that had been used. The finding that the death had been caused by a gunshot wound was sufficient for Dr Kaymak and the Public Prosecutor Rıdvan Yıldırım to conclude that a full autopsy was not necessary (see paragraph 53 above).

175. Finally, although a number of ecchymoses were observed on the body of Necati Aydın, no details were given and no attempts were made to establish how they had been caused. This report, therefore, was not capable of disclosing any leads that could have assisted in the establishment of the author(s) of the killing or indeed the cause of death.

176. The Court cannot but remark critically on the investigation carried out by the Bismil Public Prosecutor, Rıdvan Yıldırım. For example, Mr Yıldırım concluded at the very beginning of his investigation that Necati Aydın and the two other deceased men had been killed by terrorists and that he therefore lacked jurisdiction to investigate the killing and sent the file to the Prosecutor at the Diyarbakır Court (see paragraph 59 above).

177. No documents have been submitted by the Government indicating that any serious steps were taken by Mr Yıldırım prior to his conclusion that the deceased men were indeed killed by members of the PKK.

178. Although Mr Yıldırım must have been informed as early as 10 April 1994 of the identity of Necati Aydın and the fact that he had been missing since his release was ordered by the Diyarbakır Court on 4 April 1994, he took no steps to ascertain the identities of the police officers who had escorted Necati Aydın to the Diyarbakır Court on 4 April 1994. Nor did he question personnel at the court building who might have heard or seen Necati Aydın. In addition, the fact that every vehicle travelling from Diyarbakır in the direction of the place where the bodies were found would have been searched at least twice (see paragraphs 124 and 129 above) ought to have made Mr Yıldırım realise that the three men could not have been taken to the place of their burial unnoticed by one or both of the two check points. Nevertheless, no documents were submitted to either the Commission or the Court to suggest that Mr Yıldırım questioned the personnel at these checkpoints.

179. It appears, therefore, that no meaningful preliminary investigation was undertaken by Mr Yıldırım, notwithstanding his obligation to that effect under Turkish criminal law, before he concluded on 30 April 1994 that the three men had been killed by terrorists and that, consequently, he lacked jurisdiction and had to send the file to the Diyarbakır Court (see paragraph 59 above).

180. The Court observes that the attribution of responsibility for incidents to the PKK had particular significance as regards the investigation

and judicial procedures which ensued, since jurisdiction for terrorist crimes has been given to the State Security Courts (see *Akkoç*, cited above, § 90).

181. The Court agrees with the conclusion reached by the Prosecutor at the Diyarbakır Court on 22 May 1998, namely that the decision of non-jurisdiction of 30 May 1994 taken by Mr Yıldırım (see paragraph 66 above) was based on presumptions. However, it regrets the fact that it took the prosecutors four years to come to this obvious conclusion.

182. The Court observes that no meaningful steps were taken during these four years (see paragraphs 59 to 66 above), and that any steps that were taken followed the receipt by the investigating authorities of the letters sent to them by the Directorate, in which they were informed of the progress of the Convention institutions' examination of the application.

183. One of the steps taken during this four-year period was the letter sent to the Directorate on 5 May 1995 by Mr Selçuk (see paragraph 60 above), who was of the opinion that the killings had been perpetrated by the PKK in order to be able to lodge an application with the Convention organs. In the view of the Court, Mr Selçuk's opinion sums up the approach taken by prosecutors in their investigations of similar killings in the area at the time. As was explicitly said by Prosecutor Güngör, "In an investigation into a killing incident which had taken place in that area at that time, the starting point would be that the perpetrators were members of the PKK. Other possibilities would also be investigated if any evidence came to light which suggested that the perpetrators were not PKK members" (see paragraph 113 above). However, although no such evidence – so far as the Court is aware – has come to light in the present case, the Prosecutor at the Diyarbakır Court decided at the end of the four years that there was no evidence of any PKK involvement in the killing (see paragraph 66 above) and sent the file back to the Bismil Prosecutor's Office in 1998.

184. As regards the investigation carried out by the Bismil Prosecutor after he re-acquired the investigation file in 1998, the Court observes once more that no meaningful steps were taken in so far as can be ascertained from the documents submitted. The only action taken by the Bismil Prosecutor was the sending of the letters of 7 May 1999 and 23 June 1999 (see paragraphs 71 and 73 above) to the Directorate, in which he stated that there were no bullets in the area where the bodies had been found, that the investigation was continuing and that his office was being kept informed about the progress of the investigation every three months. As regards these three-monthly, pro-forma reports drawn up by the gendarmes, the Court finds that they cannot be taken as proof of any investigation. The Court cannot see how, after many years have passed, repeated visits to the site where the bodies were found are capable of revealing any clues as to the identity of the perpetrators (see paragraph 72 above).

185. In the light of the very serious shortcomings identified in its above-mentioned examination, the Court concludes that the domestic authorities

failed to carry out any meaningful investigation, let alone an adequate and effective one, into the killing of the applicant's husband as required by Article 2 of the Convention.

186. The Court finds, therefore, that there has been a violation of Article 2 of the Convention under its procedural limb.

IV. ALLEGED VIOLATIONS OF ARTICLE 3 OF THE CONVENTION

187. The applicant submitted that she was blindfolded whilst in detention. She argued that the use of blindfolds deliberately disorientates the detainee and places the detainee in a vulnerable position *vis à vis* those detaining and questioning her. The applicant also submitted that she was made to listen to the screams of her husband as he was being tortured. She was slapped; police officers threatened to strip her naked in order to put pressure on her husband, and told her that her husband could end up being killed like Yusuf Ekinci (see paragraph 78 above). Furthermore, while all that was being done to her, she was six months pregnant.

188. As regards the treatment to which her husband was subjected whilst in the custody of police officers, the applicant submitted that she witnessed him being interrogated naked and wet, and that she heard his screams while he was being tortured. She also drew the Court's attention to the autopsy report of 9 April 1994 which showed that Necati's body had been covered in bruises.

189. The applicant argued that the medical reports drawn up on her release, as well as that of her husband's, according to which neither of their bodies bore any bruises, were of little value since those reports had not been drawn up pursuant to a proper medical examination; the doctor had merely asked her, in the presence of police officers, whether she had any complaints.

190. Article 3 of the Convention provides as follows:

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

191. The Government denied that either the applicant or her husband had been subjected to ill-treatment or torture during their detention. They argued that these allegations had no basis in fact.

192. The Court reiterates that where an individual is taken into police custody in good health and is found to be injured on release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused (see, among other authorities, *Selmouni*, cited above, § 87).

193. The Court has already found that the applicant's husband was in the hands of State agents until his death (see paragraph 154 above). It observes that the respondent Government have not argued that the marks on the body of the applicant's husband predated his detention. In any event, according to

the medical report of 4 April 1994, the applicant's husband bore no marks of ill-treatment on his body (see paragraph 46 above). It follows, therefore, that these injuries must have been inflicted on the applicant's husband between 4 and 9 April 1994. No explanation, let alone a plausible one, for the marks and injuries found on Necati Aydın's body have been provided by the Government.

194. As regards the nature of these injuries, the Court observes that they were extensive and, according to the medical report of 9 April 1994, had been caused by blows (see paragraph 54 above). They are not likely, therefore, to have been caused accidentally. These injuries, unaccounted for by the Government, must therefore be considered attributable to a form of ill-treatment for which the authorities were responsible.

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

196. Although it cannot be excluded that Necati Aydın was subjected to such treatment in order to extract information from him or to punish him for his trade union activities, the Court considers that there is insufficient evidence to reach that conclusion.

197. However, having regard to the nature and degree of the ill-treatment, the Court finds that it amounted to at least inhuman treatment within the meaning of Article 3 of the Convention.

198. The Court concludes, therefore, that there has been a breach of Article 3 of the Convention on account of the treatment to which the applicant's husband was subjected prior to his death.

199. As regards the treatment to which the applicant alleged she was subjected during her detention, the Court observes that, other than her own allegations, there is no evidence to support her complaint. The Court is unable, therefore, to reach to a conclusion in this respect.

V. ALLEGED VIOLATION OF ARTICLE 11 OF THE CONVENTION

200. The applicant submitted that her husband was killed on account of his trade union activities. Both she and her husband had been tried and acquitted for offences relating to membership of the PKK. Following their acquittal the authorities had then tried to have the two of them transferred out of the region. These transfers disrupted the work of Necati as leader of the Health Trade Union.

201. The applicant argued that, where a person falls into a category of people who are at risk from unlawful violence from State officials on account of trade union activities, the issues under Article 2 and Article 11 need to be considered separately. She asked the Court to find a violation of Article 11 of the Convention which provides as follows:

> "1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

202. The Government submitted that the trade union activities in which the applicant and her husband were involved were of no interest to the authorities and that they were only investigated in relation to their alleged links with the PKK.

203. The Court notes that these complaints arise out of the same facts as those considered under Article 2. In the light of its conclusions with respect to Article 2 (see paragraphs 161 and 186 above), the Court does not consider it necessary to examine these complaints separately.

VI. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

204. The applicant submitted that the fundamental flaws in the investigation into the murder of her husband also gave rise to a violation 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."

205. The Government reaffirmed that effective domestic remedies were available to the applicant but that she had chosen not to avail herself of them. Moreover, the investigation into the abduction and killing of her husband was still continuing.

206. 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 *Aksoy v. Turkey*, judgment of 18 December 1996, *Reports* 1996-VI, p. 2286, § 95, *Aydın v. Turkey*, judgment of 25 September 1997, *Reports* 1997-VI, pp. 1895-96, § 103, and *Kaya*, cited above, pp. 329-30, § 106).

207. 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 effective access for the complainant to the investigation procedure (see *Kaya*, cited above, pp. 330-31, § 107).

208. On the basis of the evidence adduced in the present case, the Court has found that the respondent State is responsible under Articles 2 and 3 of the Convention for the death of the applicant's husband and also for the inhuman treatment suffered by him prior to his death. The applicant's complaint in this regard is therefore "arguable" for the purposes of Article 13 (see *Salman*, cited above, § 122, and the authorities cited therein).

209. The authorities thus had an obligation to carry out an effective investigation into the circumstances of the death of the applicant's husband and the inhuman treatment inflicted on him. For the reasons set out above (see paragraphs 164 to 186 above), no effective criminal investigation can be considered to have been conducted in accordance with Article 13, the requirements of which may be broader than the obligation to investigate imposed by Article 2 (see *Kaya*, cited above, pp. 330-31, § 107). The Court finds, therefore, that the applicant has been denied an effective remedy in respect of the inhuman treatment and death of her husband, and has thereby been denied access to any other available remedies at her disposal, including a claim for compensation.

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

VII. ALLEGED PRACTICE BY THE AUTHORITIES OF INFRINGING ARTICLES 2, 3 AND 13 OF THE CONVENTION

211. Relying on Article 2 of the Convention, the applicant maintained that there existed substantial, cumulative evidence to establish that the failure to investigate violations of the right to life, in particular where suspicion fell upon the security forces and law enforcement officers, was both systemic and systematic in Turkey. This was evidenced, in particular, by the large number of cases in which the Commission and the Court had held that the domestic authorities in Turkey had failed to carry out effective investigations.

212. Invoking Article 3 of the Convention, the applicant further argued that torture existed as a matter of practice in Turkey and that there was also a continuing failure of the Turkish authorities to conduct effective investigations and to take serious action to combat torture through the bringing to justice of its perpetrators. In support of her arguments, the applicant referred to the findings by the Commission and the Court, as well as by a number of other international bodies, including the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment.

213. Finally, invoking Article 13 of the Convention, the applicant complained that there existed a practice of ineffective remedies, in her case in particular, relating to the killings by security forces.

214. Having regard to its findings under Articles 2, 3 and 13 above, the Court does not find it necessary to determine whether the failings identified in this case were part of a practice adopted by the authorities.

VIII. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION IN CONJUNCTION WITH ARTICLES 2 AND 13

215. The applicant claimed that the rights of her husband under Articles 2 and 13 of the Convention were violated in conjunction with Article 14 on the grounds of ethnic origin. Article 14 provides as follows:

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

216. The applicant argued, in particular, that as a person of Kurdish origin, her husband enjoyed the guarantee to the right to life to a lesser extent than a person of non-Kurdish origin.

217. The Government categorically rejected any suggestion that Turkish citizens of Kurdish origin were treated differently. The equality of all citizens applied irrespective of origin, race, religion or conviction, both in legislation and in practice.

218. The Court notes its findings of a violation of Articles 2 and 13 of the Convention and does not consider that it is necessary also to consider these complaints in conjunction with Article 14 of the Convention.

IX. APPLICATION OF ARTICLE 41 OF THE CONVENTION

219. 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

220. The applicant claimed the sum of 65,408.80 pounds sterling (GBP) in respect of the estimated loss of earnings of her husband. Taking into account the average life expectancy in Turkey at the time, the calculations according to actuarial tables resulted in the capitalised sum quoted above.

221. The Government did not make any comment on the sum claimed by the applicant.

222. As regards the applicant's claim for loss of earnings, the Court's case-law has established that there must be a clear causal connection between the damage claimed by the applicant and the violation of the Convention and that this may, in appropriate cases, include compensation in respect of loss of earnings (see, among other authorities, *Barberà, Messegué and Jabardo v. Spain* (Article 50), judgment of 13 June 1994, Series A no. 285-C, pp. 57-58, §§ 16-20, and *Çakıcı v. Turkey* [GC], no. 23657/94, § 127, ECHR 1999-IV). The Court has found (see paragraph 161 above) that the authorities were liable under Article 2 of the Convention for the death of the applicant's husband. In these circumstances, there was a direct causal link between the violation of Article 2 and the applicant's loss of the financial support provided by her husband.

223. In the light of the foregoing the Court, deciding on an equitable basis, awards the applicant the sum of EUR 30,000.

B. Non-pecuniary damage

224. The applicant claimed the sum of GBP 80,000, in relation to all the violations suffered by her deceased husband, to be held for the benefit of herself, as his widow, as well as their child. The applicant also claimed the sum of GBP 25,000 in relation to the alleged ill-treatment to which she was subjected while in custody and the inadequate investigation and lack of domestic remedies.

225. The Government did not make any comment on these claims.

226. The Court observes that it has found that the authorities were accountable for the death of the applicant's husband and also for the inhuman treatment to which he was subjected prior to his death. In addition to the violation of Articles 2 and 3 in those respects, it has further found that the authorities failed to undertake an effective investigation or to provide a remedy in respect of those violations, contrary to the procedural obligation under Article 2 of the Convention and in breach of Article 13 of the Convention. In these circumstances, and having regard to the awards made in comparable cases, the Court, on an equitable basis, awards the applicant the sum of EUR 21,000 for non-pecuniary damage, to be held by her for the heirs of her deceased husband.

227. It also awards the applicant the sum of EUR 3,500 for non-pecuniary damage sustained by her in her personal capacity in relation to the violation of Article 13 of the Convention. As regards the applicant's allegation that she was ill-treated while in custody, the Court notes that no violation of Article 3 of the Convention was found in this respect (see paragraph 199 above). No award can therefore be made under this head.

228. Finally the Court determines that the above sums are to be converted into Swiss francs at the rate applicable at the date of payment.

C. Costs and expenses

229. The applicant claimed a total of GBP 17,926.25 for the fees and costs incurred in bringing the application. This included fees and costs incurred in attending the hearings in Strasbourg and Ankara. Her claim comprised:

(a) GBP 4,830 for the fees of her United Kingdom-based lawyers;
(b) GBP 7,380 for the fees of her lawyers based in Turkey;
(c) GBP 940.50 for administrative costs incurred by the United Kingdom-based lawyers;
(d) GBP 704 for administrative costs incurred by the lawyers based in Turkey; and
(e) GBP 4,071.75 for administrative and translation costs incurred by the Kurdish Human Rights Project (KHRP).

230. The Government did not make any comment on these claims.

231. Making its own estimate based on the information available, the Court awards the applicant EUR 20,000 in respect of costs and expenses, plus any tax that may be chargeable, to be paid in pounds sterling into the bank account of the applicant's representatives in the United Kingdom, as identified by the applicant.

D. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Dismisses* the Government's preliminary objection;

2. *Holds* that the respondent State has failed to fulfil its obligation under Article 38 of the Convention to furnish all necessary facilities to the Commission and Court in their task of establishing the facts;

3. *Holds* that the Government are liable for the death of the applicant's husband in violation of Article 2 of the Convention;

4. *Holds* 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 killing of the applicant's husband;

5. *Holds* that there has been a violation of Article 3 of the Convention in respect of the treatment to which the applicant's husband was subjected prior to his death;

6. *Holds* that there has been no violation of Article 3 of the Convention in respect of the treatment to which the applicant was allegedly subjected while in detention;

7. *Holds* that it is unnecessary to determine whether there has been a violation of Article 11 of the Convention;

8. *Holds* that there has been a violation of Article 13 of the Convention;

9. *Holds* that it is unnecessary to determine whether there has been a practice by the authorities of infringing Articles 2, 3 and 13 of the Convention;

10. *Holds* that it is unnecessary to determine whether there has been a violation of Article 14 of the Convention in conjunction with Articles 2 and 13 of the Convention;

11. *Holds*

(a) that the respondent State is to pay the applicant for pecuniary damage, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the sum of EUR 30,000 (thirty thousand euros) and any tax that may be chargeable on this amount, to be converted into Swiss francs at the rate applicable at the date of settlement;

(b) that the respondent State is to pay the applicant in respect of non-pecuniary damage, within the same three-month period, the following sums, to be converted into Swiss francs at the rate applicable at the date of settlement:

(i) EUR 21,000 (twenty one thousand euros) to be held for the heirs of her deceased husband;

(ii) EUR 3,500 (three thousand five hundred euros) in her personal capacity; and

(iii) any tax that may be chargeable on the above amounts;

(c) that the respondent State is to pay the applicant, within the same three-month period, into the bank account identified by her in the United Kingdom, EUR 20,000 (twenty thousand euros) in respect of costs and expenses, together with any value-added tax that may be chargeable, to be converted into pounds sterling at the rate applicable at the date of settlement;

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

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

Done in English, and notified in writing on 24 May 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President