

EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 21987/93

Zeki Aksoy

against

Turkey

REPORT OF THE COMMISSION

(adopted on 23 October 1995)

TABLE OF CONTENTS

	Page
I. INTRODUCTION (paras. 1-26) . . . . .	.1
A. The application (paras. 2-4) . . . . .	.1
B. The proceedings (paras. 5-21) . . . . .	.1
C. The present Report (paras. 22-26) . . . . .	.3
II. ESTABLISHMENT OF THE FACTS (paras. 27 - 133) . . . . .	.4
A. The particular circumstances of the case (paras. 27 - 51) . . . . .	.4
B. The evidence before the Commission (paras. 52 - 116) . . . . .	.6
a) Documentary evidence (paras. 52 - 72) . . . . .	.6
b) Oral evidence (paras. 73 - 116) . . . . .	.9
C. Relevant domestic law and practice (paras. 117 - 133) . . . . .	.15
III. OPINION OF THE COMMISSION (paras. 134 - 202) . . . . .	.18
A. Complaints declared admissible (para. 134) . . . . .	.18
B. Points at issue (para. 135) . . . . .	.18
C. As regards Article 3 of the Convention (paras. 136 - 169) . . . . .	.18
a) General considerations (paras. 144 - 145) . . . . .	.19

b) The evaluation of the evidence (paras. 146 - 168)	19
Conclusion (para. 169)	23

TABLE OF CONTENTS

	Page
D. As regards Article 5 para. 3 of the Convention (paras. 170 - 184)	23
Conclusion (para. 184)	25
E. As regards Articles 6 para. 1 and 13 of the Convention (paras. 185 - 192)	25
Conclusions (paras. 191 - 192)	26
F. As regards Article 25 of the Convention (paras. 193 - 197)	26
Conclusion (para. 197)	27
G. Recapitulation (paras. 198 - 202)	27
PARTLY DISSENTING OPINION OF MR. A. S. GÖZÜBÜYÜK.	28
PARTLY DISSENTING OPINION OF MR. N. BRATZA.	30
JOINED BY MR. H.G. SCHERMERS	
APPENDIX: DECISION OF THE COMMISSION AS TO THE ADMISSIBILITY OF THE APPLICATION.	31

I. INTRODUCTION

1. The following is an outline of the case as submitted to the European Commission of Human Rights, and of the procedure before the Commission.

A. The application

2. The applicant was a Turkish citizen, born in 1963. He died on 16 April 1994. He was represented before the Commission by Professor K. Boyle and Ms. F. Hampson, both teachers at the University of Essex.

3. The application is directed against Turkey. The respondent Government were represented by their Agent, Mr. B. Çağlar.

4. The application concerns the applicant's treatment and conditions during his detention in police custody in November-December 1992 and the failure to bring him before a judge or to provide him with an effective legal remedy. The applicant invoked Articles 3, 5 para. 3, 6 and 13 of the Convention.

B. The proceedings

5. The application was introduced on 20 May 1993 and registered on 7 June 1993.

6. On 30 August 1993 the Commission decided, pursuant to Rule 48 para. 2 (b) of the Rules of Procedure, to give notice of the application to the respondent Government and to invite the parties to submit written observations on admissibility and merits. The Government's observations were submitted on 21 February 1994, after an extension of the time-limit fixed for that purpose. The applicant replied on 15 April 1994.

7. On 20 April 1994 the applicant's representatives informed the Commission that the applicant had been shot and killed on 16 April 1994. It was alleged that the killing was a direct result of the application to the Commission. It was further indicated that the applicant's father wished to continue the case before the Commission. This information was transmitted to the Government with a request for comment as to the allegation. The Government failed to respond within the time-limit.

8. On 27 June 1994 the Commission decided to invite the parties to make oral submissions on the admissibility of the application at a hearing. For the purposes of the hearing the application was joined to two others: No. 21893/93, Akdivar and Others v. Turkey, and No. 21894/93, Akkum and Others v. Turkey. The hearing was fixed for 18 October 1994. Prior to the hearing the parties submitted additional material: for the applicant on 15 August, 20 September and 4 October 1994, and for the Government on 4 and 7 October 1994.

9. The Government commented on the circumstances of the applicant's death by letter of 20 September 1994, in which the allegations of the applicant's representatives were denied. The Government stated that a member of the PKK terrorist organisation was suspected of having murdered the applicant and had been taken into custody for this and other possible offences.

10. At the hearing on 18 October 1994, the Government were represented by Mr. B. Çağlar, Agent, Mr. S. Alpaslan, Mr. M. Özmen, Ms. D. Akçay and Mr. H. Golsong, all counsel, and Ms. i. Boivin, Mr. i. Kovar, Mr. A. Kurudal, Mr. F. Erdogan, Mr. Y. Kizilkaya, Mr. C. Duatepe and Ms. S.B. Ersöz, all experts. The applicant was represented by Professor K. Boyle and Ms. F. Hampson, both counsel, Mr. S. Aslantas, legal adviser from the Diyarbakir Bar, and Mr. M. Yildiz, assistant.

11. On 19 October 1994 the Commission declared the application admissible.

12. On 7 December 1994 the Commission decided to take oral evidence in respect of the applicant's allegations. It appointed three delegates for this purpose: Mr. H. Danelius, Mr. I. Cabral Barreto and Mr. N. Bratza.

13. The text of the Commission's decision on admissibility was sent to the parties on 14 December 1994 and they were invited to submit such further information or observations on the merits as they wished. They were also invited to indicate the oral evidence they wished to put before the delegates. The Government submitted observations on 9 February 1995, after an extension of the time-limit. In those observations, the Government invited the Commission to declare the application inadmissible pursuant to Article 29 of the Convention.

14. The parties indicated the names of possible witnesses: the applicant on 1 January and 13 February 1995, the Government on 16, 20 and 21 February, 2 March and 5 April 1995.

15. Protests about alleged governmental intimidation of witnesses and local lawyers involved in the case, in violation of Article 25 of the Convention, were lodged with the Commission by the applicant's representatives on 1 January 1995.

16. Evidence was heard by the delegation of the Commission in Diyarbakir on 13-14 March 1995, and in Ankara from 12 to 14 April 1995. Before the delegates the Government were represented by Mr. B. Çağlar, Agent, assisted by Mr. T. Özkarol, Mr. N. Akinci, Mr. A. Someren, Ms. B. Pekgöz, Mr. i. Kovar, Mr. A. Kurudal, Mr. F. Erdogan, Mr. Y. Kizilkaya and Mr. A. Kaya. The applicant was represented by Professor K. Boyle and Ms. F. Hampson, counsel, assisted by Ms. A. Reidy and Ms. J. Cunnison.

17. On 20 May 1995 the Commission decided to invite the parties to present their conclusions on the merits of the case at a hearing to be held in Strasbourg. A pre-hearing memorial on the merits was submitted by the applicant's representatives on 23 June 1995.

18. The hearing of conclusions was held on 3 July 1995, the case having been disjoined at this stage from those mentioned above (para. 8). The Government were represented by Mr. B. Çağlar, Agent, advised by Ms. D. Akçay, Mr. T. Özkarol, Mr. Y. Kizilkaya and Ms. i. Boivin. The applicant was represented by Professor K. Boyle and Ms. F. Hampson, counsel, assisted by Ms. A. Reidy.

19. Further documentary evidence was submitted by the applicant's representatives on 14 June 1995 and by the Government on 10 July 1995.

20. On 23 October 1995 the Commission decided that there was no basis on which to apply Article 29 of the Convention in the present case.

21. After declaring the case admissible, the Commission, acting in accordance with Article 28 para. 1 (b) of the Convention, also placed itself at the disposal of the parties with a view to securing a friendly settlement. In the light of the parties' reaction, the Commission now finds that there is no basis on which such a settlement can be effected.

C. The present Report

22. The present Report has been drawn up by the Commission in pursuance of Article 31 of the Convention and after deliberations and votes, the following members being present:

MM. S. TRECHSEL, President
 H. DANELIUS
 C.L. ROZAKIS
 A.S. GÖZÜBÜYÜK
 J.-C. SOYER
 H.G. SCHERMERS
 Mrs. J. LIDDY
 MM. M.P. PELLONPÄÄ
 M.A. NOWICKI
 I. CABRAL BARRETO
 B. CONFORTI
 N. BRATZA
 I. BÉKÉS
 J. MUCHA
 D. SVÁBY
 G. RESS

23. The text of this Report was adopted on 23 October 1995 by the Commission and is now transmitted to the Committee of Ministers of the

Council of Europe, in accordance with Article 31 para. 2 of the Convention.

24. The purpose of the Report, pursuant to Article 31 of the Convention, is:

- (i) to establish the facts, and
- (ii) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.

25. The Commission's decision on the admissibility of the application is attached hereto as an Appendix.

26. The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the Commission.

II. ESTABLISHMENT OF THE FACTS

A. The particular circumstances of the case

27. The facts of the present case are in dispute.

28. It is claimed on behalf of the applicant that the following events occurred:

29. On 24 November 1992, the applicant was at home with his family. At around 23.00 to 24.00 hours, about twenty policemen arrived, some in uniform and some in plain clothes. They searched the house and scattered belongings. They were accompanied by a detainee who had shown them the house. The applicant told the police that he did not know this person. The applicant's father, mother and five brothers were also at home that night.

30. The applicant was taken, together with one of his brothers, to Kiziltepe Security Headquarters. His brother was released after 11 days after having been beaten up. The applicant's house was raided throughout the week following his incarceration. On the ninth day of his detention, his father was taken into custody at Kiziltepe Security Headquarters for three days and then transferred to Mardin Political Branch Headquarters for four days before being released. He was tortured.

31. The applicant spent the first night in Kiziltepe Security Headquarters and was then transferred to Mardin Political Branch Headquarters. He was asked whether he knew someone called Metin, to which was added, "If you don't know him, you will know him under torture".

32. On the second day the applicant was taken to the interrogation room where the blindfold which had been over his eyes was removed. He was shown a person called Metin who had accompanied the police when the applicant was arrested. The applicant did not know him.

33. The applicant was then stripped naked and his hands were tied behind his back. He was strung up by his arms. This kind of torture is known as "Palestinian hanging". While he was strung up, the police connected electrodes to his genitals. He was kicked, slapped and verbally abused in every imaginable way. As they electrocuted him, the police threw water over him. He was again blindfolded during this torture. As far as he could tell, it continued for about 35 minutes.

34. During the next two days, he was repeatedly beaten at intervals of two hours or half an hour, without being suspended. The torture continued for four days, the first two being very intensive. He lost the movement of his arms and hands as a result. His interrogators ordered him to make movements to restore the control of his hands.

35. The applicant asked to see a doctor, but was refused. Before people were released they were seen by a prison doctor. When the applicant knew that the doctor was in the building, he unsuccessfully banged on his door to get attention.

36. The applicant was kept in a cell with two others. The cell measured approximately 1.5 x 3 metres, with one bed and a blanket, but no pillow. Two meals a day were provided.

37. Two days before his release, the police took the applicant to see an official forensic doctor, but the doctor gave him no medicine and wrote no report or prescription. When the doctor asked how the applicant's arms had been injured, the accompanying police officers intervened and said that the applicant had had an accident. The doctor commented, mockingly, that everyone who went there suffered an accident.

38. On 10 December 1992, the applicant was released, 16 days after his arrest. Prior to his release he had been photographed with other people next to firearms. Apparently the photograph was shown on television.

39. Before his release the applicant was brought before a public prosecutor in the presence of a special task force team. He was shown a statement for signature, but said that its contents were untrue. The prosecutor insisted he sign it. When he told the prosecutor that he could not sign because he could not move his hands, the prosecutor bowed his head and said, "You are free to go". The prosecutor did not ask any questions about the applicant's condition or its causes. Rather his energies were directed at determining whether the applicant should be prosecuted.

40. As he went out, one of the special force team said to him, "We know you are innocent; we shall come and visit you from time to time." This person told the applicant to return home directly and that there was no need to consult a doctor as the injury would heal itself.

41. The applicant was released on a Thursday and saw a doctor on the Friday. The following Tuesday, he had completed the hospital paperwork and was admitted to Dicle University Medical Faculty Hospital.

42. The applicant's account of his treatment in custody is consistent with medical reports from this hospital. The applicant remained in hospital until 31 December 1992.

43. On 21 December 1992, the public prosecutor decided that there were no grounds to institute criminal proceedings against the applicant.

44. By telefax of 20 April 1994, the applicant's representatives informed the Commission that the applicant had been murdered four days before. It was alleged that he had been killed as a direct result of his application to the Commission. He had been threatened with death in order to make him withdraw his application, the last threat being made by telephone on 14 April 1994. Two days later, on the evening of 16 April 1994, he was shot by two people as he was on his way home.

45. The person who was charged with the applicant's murder in September 1994 had originally been charged in May 1994 with unlawful possession of weapons.

46. The Government submit the following different account of events:

47. On 26 November 1992 at around 8.30 hours, the applicant was arrested at his home and placed in police custody at the Mardin Security Directorate, along with thirteen other people, on suspicion of aiding and abetting the terrorist wing of the PKK, of being a member of the Kiziltepe PKK branch and of distributing PKK tracts.

48. On 8 December 1992, after questioning, he was brought before the Mardin public prosecutor and was released on 10 December 1992. The applicant did not complain of torture or ill-treatment, which is why no ex officio investigation was made. (If he made any mention of such treatment the prosecutor would have been obliged to open a judicial inquiry under Articles 243 and 245 of the Criminal Code.) He was able voluntarily to sign his statement denying all charges concerning involvement with the PKK. That same day the applicant was examined by a doctor in the medical service of the sub-prefecture. He found no evidence of injury to the applicant.

49. On 21 December 1992, the principal public prosecutor at the Diyarbakir State Security Court ordered that no proceedings be brought against the applicant and two other people. Proceedings were instituted, however, against eleven other people who had been detained with the applicant.

50. In the meantime, on 15 December 1992 the applicant was admitted to the Diyarbakir State Hospital as a first examination had diagnosed bilateral radial paralysis. He left the hospital without discharging himself properly on 31 December 1992, taking his medical file with him. He was formally discharged on 8 January 1993.

51. As regards the circumstances of the applicant's death, the Government stated that a person had been arrested and charged with the applicant's murder, and was remanded in custody awaiting trial. According to the Government, this person was a member of the PKK and was suspected of another murder and bombing. He had been found in possession of a pistol which had used the ammunition found at the scene of the applicant's murder and at that of another murder. The applicant's murder was apparently a settlement of scores between quarrelling PKK factions.

B. The evidence before the Commission

a) Documentary evidence

52. The parties submitted various documents to the Commission, including reports about Turkey, its judicial system and certain case-law, statistics concerning, inter alia, prosecutions of officials for allegedly unlawful acts, and affidavits of the applicant and some witnesses concerning their version of the events in the case. Considerable reliance has been placed by the applicant's representatives on the "Public Statement on Turkey" adopted on 15 December 1992 by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

53. Medical reports as to the applicant's physical condition shortly after his release from detention in December 1992 were also submitted, as well as photographs of the applicant at this time which show him with braces on both his lower arms and hands. The latter were apparently designed to keep his hands at an upward angle and prevent

them moving.

54. The Commission has had particular regard to the following documents:

aa) Documents relating to the suspicion against the applicant

- (1) Signed and thumbprinted statement of the applicant dated 8 December 1992 and witnessed by officers of the Security Headquarters

55. The applicant stated that neither he nor any of his relatives were members of the PKK or had aided or harboured any member of that organisation. He further asserted that the statement of a certain Metin Abak concerning their purported discussion about a couple of guns was untrue. He did not know Metin Abak and he did not own a gun. He denied any involvement in a heavy weapon attack on 15 November 1992 on the central police station and the residential area of the Kiziltepe Security Headquarters. In making this statement voluntarily, he had not been subjected to any coercion or violence.

- (2) Signed statement dated 10 December 1992 of the applicant to the Public Prosecutor

56. The applicant denied the offence of which he was accused, denied being involved with members of an illegal organisation, denied knowing such a member called Metin Abak and asserted that he was not guilty.

- (3) Decision dated 21 or 31 December 1992 (date unclear) of Tanju Güvendiren, Public Prosecutor at the Diyarbakir State Security Court

57. The prosecutor decided to close the investigation in the applicant's case as there was no adequately convincing evidence against him to justify a prosecution for having assisted the PKK.

bb) Documents having a bearing on the applicant's complaint of ill-treatment during detention

- (4) Statement of 10 December 1992 on the occasion of the applicant's discharge from custody

58. In one sentence, an unidentified doctor noted that the applicant bore no traces of blows or violence. (The Government were unable to identify correctly or produce as a witness the doctor who had signed this statement, para. 94 below.)

- (5) Thumbprinted statement of the applicant, witnessed by Sevtap Yolus, while the applicant was still in hospital (undated but written sometime between 15 and 31 December 1992)

59. The statement contains the information summarised in paras. 29-41 above.

- (6) Transcript of questions and answers dated 6 June 1993 between the applicant and Sedat Aslantas

60. The applicant said that he had told the public prosecutor that a statement had been taken from him under torture, but the prosecutor had seemed indifferent. He had not filed a formal complaint because he was under threat, but the fact that he had told the prosecutor verbally was sufficient announcement of a crime.

61. He had been in hospital from 15 to 31 December 1992 and still suffered from the effects of torture by "Palestinian hanging", his right hand being unusable. His shoulders had recovered but his arms were still disabled. His treatment was continuing.

62. The conditions in his cell, measuring 1 x 2 metres and shared with three others, made it impossible to move. There was no furnishing to lie on. There was an old filthy flea-ridden blanket about 80 cm. in size. He was mocked when he asked if he could massage his tortured hand and see a doctor.

- (7) Report (undated and unsigned but apparently written upon admission to the hospital on 15 December 1992 and recognised by Dr. Birsal Korkmaz as having been written by her)

63. The report states that the applicant complained of weakness in both hands having been taken into custody three weeks before and hung up with his hands tied behind his back. At first he could not move his arms at all, but since then he had recovered movement in his arms from the shoulder, although he could not move them backwards. Bilateral radial paralysis was diagnosed.

- (8) Report (undated, but apparently written between 15 and 23 December 1992) of Dr. Sadrettin Haksol

64. The report describes the results of an electromyography on the applicant's nerves which found brachial plexus lesions.

- (9) Document, entitled "Epikriz" (undated but probably written in January 1993), signed by Dr. Birsal Korkmaz

65. This document notes that the applicant had been admitted to the hospital on 15 December 1992 with the diagnosis of bilateral radial paralysis and describes the treatment given to him. Both hands had been placed in extension splints and the physiotherapy of the patient, who had been discharged on 7 January 1993, had continued. After the treatment, improvement had been secured almost completely in the left arm and partially in the right arm. The patient had been taught exercises and discharged.

- (10) Discharge form (undated but probably written on or around 8 January 1993), signed by two doctors at the hospital

66. On this form it is stated that the applicant had indicated, as his medical history, that he had been ill-treated two months earlier. The diagnosis of bilateral radial paralysis was again indicated.

- (11) Certificate (undated) of Dr. Bridget Hughes

67. This certificate by a British doctor, who had never seen the applicant, was based on an examination of a photograph of the applicant with his arms and hands in splints and on documents from the Turkish hospital. It recalls that an electromyography report from the Dicle University Medical Faculty demonstrates bilateral radial nerve paralysis. A clinical examination had noted bilateral atrophy of the triceps muscle, which is supplied by the radial nerve, and an inability to elicit the triceps reflexes. Examination had also shown that the applicant was unable to extend either wrist actively which is also consistent with radial nerve injury. Dr. Hughes points out that the photograph shows the applicant with both hands in splints, the purpose

of which is to keep the wrists in extension and to counteract the wrist drop which results after radial nerve injury. The electromyography report also stated that transmission in both ulnar nerves was slow which indicated injury to the ulnar nerves. There was also a suggestion of ulnar palsy in the photograph, demonstrated by the slight bilateral clawing of the fifth fingers. This type of bilateral injury to the radial and ulnar nerves was wholly consistent with brachial plexus injury which, according to Dr. Hughes, commonly results after so-called "Palestinian hanging".

cc) Document relating to the applicant's treatment and to the circumstances of his death

(12) Statement dated 29 April 1994 of the applicant's father, witnessed by Mahmut Sakar of the Diyarbakir Human Rights Association

68. The father stated that his son had been detained on 24 November 1993 and tortured, rendering his arms useless, as confirmed by doctors' reports.

69. His son had petitioned the Commission. On 14 April 1994 he had spoken over the telephone with Mahmut Sakar about being threatened and being in fear for his life. Calls were then made to his son's workplace telling him to give up the application to the Commission otherwise he would be killed. Unidentified people called at his son's work while he was absent, wanting to know his whereabouts.

70. On 16 April 1994, his son left work around 16.00 hours. The father thought his son was detained before being shot. The family was notified at 16.30 hours that the applicant had been injured and had been taken to hospital. The father identified his son's lifeless body, with bullets in the chest and head.

71. The father gave a statement to the police that his son had no enemies and no organisational connections. He did not know who had killed his son.

72. The family is under constant persecution and fearful. The father did not want his name revealed to the State for fear for his life. He did, however, wish his son's case before the Commission to continue.

b) Oral evidence

73. The Commission's delegates summoned a considerable number of persons to be heard during the hearings in Diyarbakir and Ankara. It did not prove possible to ensure the appearance of all of them. In particular, one of the police officers who had interrogated the applicant during his detention, Tuncer Avci, did not appear. The Government explained that he was performing his military service and could not obtain leave in order to appear before the delegates. However, eleven witnesses were heard, and their evidence can be summarised as follows:

(1) Mahmut Sakar

74. Mahmut Sakar stated that he was born in 1966. He is a barrister and branch Secretary of the Diyarbakir Human Rights Association (HRA). He is in custody awaiting trial for having published reports on the systematic and widespread infringements of human rights in his region. To this has apparently been added an accusation that he is a member of the PKK, and about which he has not been questioned.

75. He said that he had not been involved in the applicant's case to

start with but, when the Commission sought answers to certain questions after the communication of the case, he had spoken to the applicant over the telephone on 14 April 1994. During that conversation, the applicant had said that he was still affected by the torture, with continuing partial paralysis. He had also claimed that his life was in danger and that he was under threat. He said he was being followed. Two days later, on 16 April 1994, he was shot.

76. Mahmut Sakar had been very upset at this news and had called the family to offer his condolences. He arranged to meet the applicant's father in Diyarbakir. When they met, the father had said that he was afraid himself but, for the sake of his son's memory, wished to maintain the application before the Commission. This meeting was recorded in a memorandum (paras. 68-72 above).

77. He affirmed that such arrests, torture and deaths are commonplace in the region, although he thought that the applicant's death was related to his application to the Commission. He was sceptical that the person charged with the murder of the applicant was the culprit, as he had denied it categorically and had denied owning the kind of weapon that had killed the applicant.

78. In Mahmut Sakar's opinion, domestic remedies do not work effectively in the emergency region for cases like the applicant's. People are threatened and persuaded not to prosecute or pursue their claims. Allegations of torture are difficult for the victim to prove. During his imprisonment Mahmut Sakar had been beaten up, as had others, but it was impossible to get a doctor's report or any other document certifying such experiences. The public prosecutor cannot prosecute a civil servant directly, but has to refer the matter to administrative authorities. The procedure is difficult, long and unlikely to result in significant compensation. Lawyers are hindered, if not intimidated, in pursuing such cases. The HRA has been virtually closed down by arrests and intimidation.

79. As a member of the HRA he acted as an agent for Professor Boyle and Ms. Hampson in assisting the applicant and his father conduct this case before the Commission.

(2) Dr. Birsal Korkmaz (telephoned testimony)

80. Dr. Korkmaz is a specialist student in the Physiotherapy Science Branch of the Medical Faculty at Dicle University, where she was working in December 1992. She could not recall the applicant but confirmed that she had written a medical report on him.

81. On the basis of the documents she had seen, she confirmed the case-history provided by the applicant. He had told her that he had been in custody and strung up with his hands tied behind his back. Afterwards he could not move his arms and there was still a problem. She had diagnosed bilateral radial paralysis. She could not conclude, with her limited experience, that his condition was compatible with his story.

82. His treatment had consisted of both his lower arms and hands being placed in extension splints (as shown in the photographs submitted to the Commission). She had not had another patient to whom she had applied this treatment. With his limp arm and hand, only the diagnosis of radial paralysis would come to mind. It is created by pressure on the peripheric nerve. There could be various causes of such damage, such as a tumour, stretching, and pressure by tumoral pulling or external trauma. She could not say which had been the cause, her speciality being the patients' rehabilitation by physiotherapy.

(3) Dr. Sadrettin Haksol

83. Dr. Haksol is a specialist in neurology and had been working at the Dicle Medical Faculty in December 1992. He did not remember the applicant but confirmed the electromyography report he had made then.

84. This was a purely technical examination, after the patient had been referred to him, of whether there was any nerve paralysis. Damage was diagnosed in this case on the upper extremity nerve, the causes for which could be numerous, such as injury during delivery at birth, the stretching of the extremity, a collision, a trauma or fall from a height. This kind of damage to the nerves starts from the neck and travels through the limbs.

85. He confirmed Dr. Korkmaz's report diagnosing bilateral radial paralysis, i.e. nerve lesions to both upper extremities. However, this would not mean that the patient's arms were necessarily paralysed, there being other nerves in the arms. The photographs of the applicant's lower arms and hands in splints did not assist him in reaching any conclusions as to the possible cause of the applicant's condition. He had not seen many cases like this.

86. He could not comment on the conclusions of Dr. Bridget Hughes, who had read the medical reports and seen the photographs of the applicant, and considered that this type of bilateral injury to the radial and ulnar nerves is wholly consistent with brachial plexus injury commonly resulting from "Palestinian hanging". He could not reach such a conclusion himself, but suggested that Dr. Hughes may have had more clinical experience in such matters.

(4) Dr. Mahmut Duyan

87. Dr. Duyan is a specialist in urology and head of the Mardin State County Hospital. He was in this post in December 1992. He did not remember the applicant.

88. He confirmed the report he had made on the applicant in which hemiplegia had been diagnosed. As his hospital had no specialist in the matter, the patient was referred to the Diyarbakir Medical Faculty. Hemiplegia signifies paralysis on one side of the body, in this case the right side, the right arm. He did not think that a person in such a condition could work.

89. He had never dealt with a patient complaining of "Palestinian hanging", given his speciality.

(5) Dr. Sedat Nacitarhan

90. Dr. Nacitarhan is a specialist in physiotherapy at the Medical Faculty at Dicle University, where he was already a trainee in 1992. He did not recall the applicant as a patient, but confirmed his signature on the admission document.

91. He noted Dr. Korkmaz's report on the applicant and commented, after looking at the photographs of the applicant with his lower arms and hands in splints, that her diagnosis of bilateral radial paralysis could have been the reason for the braces.

92. The brachial plexus injury which was diagnosed could have been caused by arthritis or a trauma to both arms and the head, even a post-operative trauma. There was no evidence of arthritis or other systemic disease in the various medical reports in the case.

93. This was the first time he had seen such a case. He had never

heard a patient complain of "Palestinian hanging", as described to him by the applicant's representative. He confirmed that if such hanging were inflicted for a long time and if the patient's pathology lent itself to such injury, bilateral radial paralysis could result.

(6) Dr. Metin Polat

94. Dr. Polat is a dentist and was called because he had been identified by the Government as having examined the applicant in prison prior to his discharge by the Public Prosecutor. However, Dr. Polat was not the doctor in question and had never performed work of this kind.

(7) Metin Abak

95. Metin Abak was serving a sentence of life imprisonment for having participated in the activities and been a member of the PKK. He recalled being in detention at Mardin at the same time as the applicant, although they were not in the same cell. They were not friends. They had only met once before.

96. They had seen each other at the Public Prosecutor's office when the applicant apparently had injured arms because he needed security staff to help him go to the toilet. He apparently could not use his arms to hold things. They were paralysed or stiff, hanging limply by his sides.

97. Metin Abak had been detained in a cell approximately 2 x 2 metres with two or sometimes three other people. There was only one mattress and a soiled blanket to share between them. There was neither light nor heating. He received two meals a day.

98. He had been blindfolded during his interrogations and tortured by hanging, cold water and electricity. He had been stripped naked. He had suffered pain but no disability. He had told the prosecutor of the torture when rejecting the statement he was supposed to have made. The prison doctor who saw him did not ask any questions. Before seeing the prosecutor he had been threatened by officers of the Rapid Response Squad to accept the PKK charges against him or suffer a miserable life in prison.

(8) Sedat Aslantas

99. Sedat Aslantas stated that he was a lawyer by profession and, inter alia, vice-president of the Diyarbakir Human Rights Association (HRA). The task of the HRA is to promote human rights and democracy without violence. He was serving a three year prison sentence (currently under appeal) for his involvement in this work. His imprisonment prevented him refreshing his memory concerning the circumstances of the case.

100. He confirmed that he had met the applicant and consigned their conversation to a document dated 6 June 1993 in which the applicant claimed to have been arrested in Mardin and tortured (paras. 60-62 above). The HRA assessed the case and applied to the Commission.

101. He could not recall the applicant's physical state when he saw him. He did, however, recall very well that the applicant had said that he had verbally told the prosecutor that he had been tortured.

102. He considered domestic remedies, as regards unlawful acts by State officials in an emergency area, to be ineffective. Many such acts are immune from challenge and others would take too long with little prospects of success in such areas, unlike in Ankara. Human rights

violations are an "administrative practice" in those regions.

(9) Bekir Selçuk

103. Bekir Selçuk stressed that he had not been an eye witness to the events of this case. His role had been that of a Chief Public Prosecutor at the Diyarbakir State Security Court, responsible for investigations in eleven counties of crimes against the unity of the State, and offences involving arms, ammunition, drugs and the like. Ten of the counties within his jurisdiction are emergency areas. Human rights should be seen in a different context in such areas.

104. The investigation into the murder of the applicant was carried out by the Mardin Public Prosecutor and then transferred to his Office. A person who revealed the whereabouts of the murder weapon had been charged.

(10) Mustafa Yazgan

105. Mustafa Yazgan is a policeman who was working at the Mardin Security Directorship in December 1992.

106. He could not recall the applicant's person, but on the basis of documents he confirmed having interrogated the applicant with two colleagues, Tuncer Avci and a duty officer, although he could not remember completely as it was long ago during a busy period with many arrests. He had taken notes of the interrogation and written the report.

107. The interrogation took place in a calm, comfortable atmosphere, with no pressure having been put on the applicant, such a thing being absolutely impossible. The applicant's statement was made voluntarily.

108. As regards the applicant's allegation of ill-treatment and damage to his arms, the witness said that after release, "contributors to terrorist activities under provocation of some separatist elements do make such allegations in their applications", their purpose being to humiliate Turkey before Europe. He denied any inhuman treatment of the applicant. No one could have ill-treated the applicant, who was under the supervision of the duty officer. Such a thing was also absolutely impossible.

109. He could not comment on the subsequent hospital reports about the applicant's condition. When the applicant was transferred to the legal authorities, the doctor's report at the time indicated that no ill-treatment had been inflicted. He also had no comment on the applicant's release without charge. Others had been charged, including Metin Abak with whose testimony the applicant had been confronted.

110. Ten days elapsed between the applicant's interrogation and release while many others were being questioned in connection with the same matter. The applicant could not have been released earlier as he was suspected of a serious offence concerning the supply of a weapon to the PKK.

111. Mustafa Yazgan affirmed that there was definitely no room in the Mardin Security Headquarters called the "hanging room". Nor was there any room with ropes or machinery for administering electric shocks. He denied the fact reported by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, at para. 19 of its Public Statement on Turkey, of cases consistent with allegations of "Palestinian hanging". There was definitely no such thing. Police are trained that no one may be ill-treated during interrogations. The police do not have such thoughts; none of his

colleagues would treat suspects or criminals badly. It just does not happen. In his four years at Mardin he had never seen any of his colleagues ill-treating criminals.

(11) Riza Cingi

112. Mr. Cingi was the Mardin County Prosecutor at the material time. He did not remember the applicant.

113. He said that if the applicant had complained to him of ill-treatment in custody he would have investigated it. Since there was no investigation, no such complaint had been made. This complaint was not noted in the applicant's signed statement, as it would have been if he had made it.

114. In his 20 years of professional life, no one had ever complained to him of ill-treatment or torture in custody. He could not comment on the conclusion of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (para. 21 of its Public Statement) that the practice of such severe ill-treatment in police custody is widespread in Turkey. He was unaware of any prosecution of officials for acts of that kind. If such a complaint had been brought to his attention he would not have hesitated in his duty to investigate it.

115. When shown the photographs of the applicant with his lower arms and hands in splints, he could not recall him. If the witness had seen anyone in such a state, he would have remembered. If someone had appeared before him, injured, he would have asked questions about the causes, out of both duty and humanity. He did not think that someone who purportedly needed assistance going to the toilet, as recounted by Metin Abak, would have been able to sign a statement as the applicant did.

116. Any crime by an official would be prosecuted under the Civil Servants Prosecution Act, and compensation could be awarded for an individual's unjustified losses, despite Decrees Nos. 285 and 430 and their operation in an emergency region like Mardin.

C. Relevant domestic law and practice

117. The Government have submitted that the following domestic law is relevant to the case:

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

(translation)

"All acts or decisions of the Administration are subject to judicial review ...

The Administration shall be liable for damage caused by its own acts and measures."

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

120. The principle of administrative liability is reflected in the additional Article 1 of Law 2935 of 25 October 1983 on the State of Emergency, which provides:

(translation)

"... actions for compensation in relation to the exercise of the powers conferred by this law are to be brought against the Administration before the administrative courts."

121. The Turkish Criminal Code makes it a criminal offence to subject someone to torture or ill-treatment (Article 243 in respect of torture, and Article 245 in respect of ill-treatment, inflicted by civil servants).

122. Complaints may be lodged, pursuant to Articles 151 and 153 of the Code of Criminal Procedure, with the public prosecutor or the local administrative authorities. The public prosecutor and the police have a duty to investigate criminal offences reported to them, the former deciding whether a prosecution should be initiated, pursuant to Article 148 of the Code of Criminal Procedure. A complainant may appeal against the decision of the public prosecutor not to institute criminal proceedings.

123. If the alleged author of a criminal offence is a State official or civil servant, permission to prosecute must be obtained from local administrative councils (the Executive Committee of the Provincial Assembly). The local council decisions may be appealed to the Council of State; a refusal to prosecute is subject to an automatic appeal of this kind. There is case-law showing the overturn by the Council of State of decisions of the Executive Committee not to prosecute cases of torture and ill-treatment of people in the custody of security officials.

124. Pursuant to Article 1 of Law 466, a person who has been unjustly held in police custody may apply to the local assize court for compensation within three months of the decision not to prosecute.

125. Furthermore, any illegal act by civil servants, be it a criminal offence or a tort, which causes material or moral damage may be the subject of a claim for compensation before the ordinary civil courts.

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

127. Pursuant to Article 128 to the Code of Criminal Procedure, a person arrested and detained shall be brought before a justice of peace within twenty-four hours, or, in the case of collective offences, within four days. In the proceedings before the State Security Courts, these periods are extended, pursuant to Article 30 of Law 3842 of 1 December 1992, to forty-eight hours in the case of individual offences, and to fifteen days in the case of collective offences. Pursuant to the same Article, in cases involving a state of emergency, the custody periods in the proceedings before the State Security Courts are doubled: four days in the case of individual offences, thirty days in the case of collective offences.

128. The applicant pointed to certain legal provisions which in themselves weaken the protection of the individual which might otherwise have been afforded by the above general scheme (paras. 129-133 below):

129. Articles 13 to 15 of the Constitution provide for fundamental limitations on constitutional safeguards.

130. Provisional Article 15 of the Constitution provides that there can be no allegation of unconstitutionality in respect of measures taken under laws or decrees having the force of law and enacted between 12 September 1980 and 25 October 1983. That includes Law 2935 on the State of Emergency of 25 October 1983, under which decrees have been issued which are immune from judicial challenge. Extensive powers have been granted to the Regional Governor of the State of Emergency by such decrees.

131. Decree 285 modifies the application of Law 3713, the Anti-Terror Law (1981), in those areas which are subject to the state of emergency, with the effect that the decision to prosecute members of the security forces is removed from the public prosecutor and conferred on local administrative councils. These councils are made up of civil servants and have been criticised for their lack of legal knowledge, as well as for being easily influenced by the Regional Governor or Provincial Governors, who also head the security forces.

132. Article 8 of Decree 430 of 16 December 1990 provides as follows:

(translation)

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

133. According to the applicant, this Article grants impunity to the Governors.

III. OPINION OF THE COMMISSION

A. Complaints declared admissible

134. The Commission has declared admissible the applicant's complaints regarding his treatment during and the conditions of his detention in police custody in November-December 1992, and the failure to bring him promptly before a judge. It also declared admissible the applicant's complaints that he had had inadequate remedies for his claims against the police. A further element of the case is the allegation that the applicant was killed because of his application to the Commission.

B. Points at issue

135. The points at issue in the present case are as follows:

- whether there has been a violation of Article 3 (Article 3) of the Convention;
- whether there has been a violation of Article 5 para. 3 (Art. 5-3) of the Convention;
- whether there has been a violation of Article 6 para. 1 (Art. 6-1) and/or Article 13 (Art. 13) of the Convention; and
- whether there has been a violation of Article 25 (Art. 25) of the Convention.

C. As regards Article 3 (Art. 3) of the Convention

136. Article 3 (Art. 3) of the Convention provides as follows:

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

137. The applicant alleged that he had been tortured by the police while in their custody between 24 November and 10 December 1992. This torture consisted of "Palestinian hanging", beatings, electric shocks to the genitals and verbal abuse.

138. He stated that, as a result of the hanging, he lost the use of his arms and hands and received medical treatment in hospital after his release, which included the application of splints to his lower arms and hands for bilateral radial paralysis.

139. The applicant also claimed to have been detained in inhuman and degrading conditions in a small cell, shared with two or three other people. The cell had no furnishing, light or heat. There was only one filthy blanket between the cell inmates. The applicant had been blindfolded during interrogation and denied medical attention.

140. He pointed out that his incommunicado detention led to an increased likelihood of torture. Blindfolding made it difficult to identify the perpetrators of the ill-treatment. The denial of access to doctors impeded his ability to produce the medical evidence of torture. Moreover, the absence of assistance by a lawyer makes it difficult to bring proceedings, which indirectly may enable officials to torture with impunity. The increased likelihood of torture increases the detainee's fear of it. So the fear of torture is added to the physical agonies suffered by the victim.

141. The Government deny the applicant's claims and submit that they are wholly unsubstantiated. The applicant did not allege before the prosecutor that he had been tortured. He was able to sign his statement, voluntarily made before the prosecutor, that he had no PKK involvements. There was no need for the prosecutor to ask further questions because there was no confession statement extracted from the applicant under torture.

142. If the applicant had been so ill when discharged from custody, it has not been explained, in the Government's opinion, why it took him five or six days to be admitted to hospital. What the applicant had said to Dr. Korkmaz (para. 81 above) was merely his story and not the doctor's conclusions. None of the doctors heard by the Commission's delegates in this case had been able to draw conclusions concerning the cause of the applicant's physical condition.

143. The Government confirmed that the applicant had been blindfolded during interrogation for periods of up to an hour and a half, but this must be seen in the context of the fight against terrorism and the need to protect the security of the people who conduct interrogations.

a) General considerations

144. The Commission recalls that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 (Art. 3) of the Convention. The assessment of this minimum is, in the nature of things, relative. It depends on all the circumstances of the case, such as the nature and context of the treatment, its duration and its physical or mental effects (cf. Eur. Court H.R., Ireland v. the

United Kingdom judgment of 18 January 1978, Series A no. 25, p. 65, para. 162; the Tyrer judgment of 25 April 1978, Series A no. 26, pp. 14-15, paras. 29-30). The Commission further notes that "the Convention, with its distinction between 'torture' and 'inhuman or degrading treatment', should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering" (Ireland v. the United Kingdom judgment, loc. cit. p. 66, para. 167).

145. The Commission also considers that in the case of someone who on arrest is in good health but on discharge is injured, the Government are required to provide a plausible explanation as to the causes of the injury, failing which a clear issue arises under Article 3 (Art. 3) of the Convention (Eur. Court H.R., Tomasi judgment of 27 August 1992, Series A no. 241, pp. 39-42, paras. 104-116).

b) The evaluation of the evidence

146. The Commission has examined the documentary and oral evidence in the present case with a view to establishing the facts, pursuant to Article 28 para. 1 (a) (Art. 28-1-a) of the Convention.

147. It is undisputed that the applicant was arrested towards the end of November 1992. The applicant stated that the arrest occurred on 24 November, whereas the Government indicated 26 November as the correct date of arrest. No document or other evidence has been submitted which would allow the Commission to make a clear finding on this point. However, it does not find it essential for the case to investigate the point any further, but is satisfied that the arrest took place not later than 26 November 1992.

148. The applicant's detention ended on 10 December 1992 when he was released after he had been brought before the public prosecutor. His detention therefore lasted at least 14 days.

149. On 15 December 1992 the applicant was admitted to the Dicle University Medical Faculty Hospital in Diyarbakir. He remained there until 31 December 1992 when he left the hospital at his own initiative and without having been discharged. The formal discharge took place on 8 January 1993.

150. When the applicant was admitted to the hospital, he suffered from a physical disability affecting both his arms which was diagnosed as bilateral radial paralysis. This diagnosis appears in several medical documents (see paras. 63, 65 and 66). As part of the treatment, the applicant's hands and lower arms were placed in splints, as clearly illustrated by the photographs of the applicant submitted to the Commission (para. 53 above).

151. The applicant stated that this disability was the result of the treatment to which he had been subjected during his detention, which included "Palestinian hanging". Therefore, the question which the Commission has to consider is whether this allegation is supported by the evidence of the case or whether his physical condition could have had a different cause.

aa) The time of injury

152. The Commission will first examine when the applicant's injuries could have occurred. In this respect, the Commission notes that there is no indication whatsoever that the applicant suffered from any infirmity in his arms or his hands when he was arrested in November 1992. The Commission is therefore able to conclude that the disability occurred after his arrest.

153. A question which requires consideration is whether the applicant's condition could have had its origin in something which happened during the five days which elapsed between the applicant's release on 10 December 1992 and his admission to hospital on 15 December 1992. However, there is no evidence of any untoward incident at that time. Accordingly, the Commission finds no reason to believe - and indeed considers it highly unlikely - that during this short period the applicant was exposed to any violence which could have given rise to his condition affecting both his arms. It can only be deduced from this that the injuries to the applicant were caused during his detention in police custody.

bb) The nature and possible causes of the applicant's injuries

(1) The applicant's claim

154. The Commission will now examine the nature and possible causes of the applicant's injuries. In this respect, Commission notes that the applicant described the torture to which he was allegedly exposed whilst in detention. He further stated that he had told the public prosecutor whom he saw prior to his release about the torture.

155. There is the statement by another prisoner, Metin Abak, to be assessed in this connection. Metin Abak declared that he had seen the applicant, before the latter's release on 10 December 1992, with limp arms and unable to go to the toilet by himself. The Commission considers that this statement must be cautiously evaluated in view of the fact that Metin Abak could be suspected of having special motives for exaggerating what he saw or interpreting it in a partisan manner. Nevertheless, insofar as the statement is consistent with other evidence, it cannot be discounted.

(2) The official response

156. One of the policemen who interrogated the applicant during his detention, Mustafa Yazgan, was heard as a witness by the Commission's delegates. He said that he did not remember the applicant's person, but assured the delegates that the applicant had not been ill-treated. In his submission, any ill-treatment was inconceivable: it just did not happen that he or his colleagues would treat arrested persons badly (paras. 108 and 111 above).

157. The public prosecutor who saw the applicant prior to his release, Riza Cingi, also stated that he did not remember the applicant but found it unthinkable that any ill-treatment had taken place. He declared that in his twenty years of professional experience no one had ever complained to him of ill-treatment in custody and that he was also unaware of any case-law concerning officials being prosecuted for such acts (para. 114 above).

158. The Commission notes that the delegates were unable to hear the other police officer who, together with Mustafa Yazgan, had interrogated the applicant, the reason given being that he could not be granted leave for this purpose from his military service (para. 73 above).

159. The Commission finds the statements of Mustafa Yazgan and Riza Cingi unconvincing. The impression gained from these statements was rather that these two public officers were not prepared to consider the possibility of ill-treatment occurring at the hands of the police. Mustafa Yazgan's flat denial of any knowledge of such events and Riza Cingi's declaration that in his 20 years of professional life no one had ever complained to him about ill-treatment in custody astonished

the Commission and would seem to indicate that these two persons were anxious in all circumstances to deny that ill-treatment had occurred within their area of responsibility.

(3) The medical evidence

160. The Commission has further examined the medical evidence which has been presented in writing (paras. 58, 63, 64, 65 and 66 above) and further explained by the doctors who were heard as witnesses (paras. 80-93 above). It has also had regard to the certificate of Dr. Bridget Hughes which, however, must be evaluated in the light of the fact that Dr. Hughes had no direct contact with the applicant but based herself only on the available documentation.

161. The Commission notes that on the applicant's release from detention a doctor reported in a single sentence that the applicant bore no traces of blows or violence (para. 58 above). However, this doctor has not been identified in the proceedings before the Commission, and the person who was summonsed, on the Government's proposal, to testify in this regard was a dentist who had never performed prison work. His testimony was therefore without relevance to the case (para. 94 above). In these circumstances, the Commission cannot attach any substantial weight to the cryptic report made on the applicant's release.

162. As regards the evidence of those doctors involved in the applicant's treatment, it is significant that they refused to draw conclusions as to the possible causes of the applicant's condition, although all agreed that the infliction of external pressure, stretching or trauma could lead to the kind of injury suffered by the applicant.

163. On the basis of this evidence, the Commission finds that, while radial paralysis which was diagnosed in the applicant's case at the Dicle hospital may have various causes, one of these causes could certainly be trauma suffered by a person who has been strung up by his arms. Moreover, radial paralysis affecting both arms, as in the present case, is apparently not a common condition. However, it is a condition consistent with a special kind of ill-treatment known as "Palestinian hanging".

164. The Commission notes that the Government have offered no explanation as to how the applicant could have been injured so seriously while he was in custody.

165. The Commission therefore, having regard to the case-law developed in the Tomasi case (cf. para. 145 above), finds it established that the applicant, during his detention, was subjected to ill-treatment which consisted of his being strung up by the arms. This caused injury for which he subsequently received medical treatment. The ill-treatment of the applicant was of such a serious nature that it should be deemed torture within the meaning of Article 3 (Art. 3) of the Convention.

cc) Other allegations of ill-treatment

166. The Commission also finds that there is insufficient evidence to be able to draw any conclusion as to the applicant's other allegations of ill-treatment involving electric shocks to his genitals and beatings.

dd) Conditions of detention

167. As regards the applicant's conditions of detention in general, there has been little argument from the parties. The applicant alleged

that he was kept in a small cell with three other people. Between them they only had one bed, a blanket and no pillow. He pointed out that he was blindfolded during interrogation and also referred to the lack of medical care. The Government only commented to a very limited extent on this aspect of the case, but have admitted that the applicant was blindfolded when being interrogated. Moreover, the allegations relating to the conditions during detention find some support in the testimony given by Metin Abak (para. 97 above).

168. In the absence of precise information from the Government, the Commission accepts that the conditions of detention were unsatisfactory and finds this to be a further element to be taken into account when evaluating the extent of the violation of Article 3 (Art. 3) of the Convention in the present case.

Conclusion

169. The Commission concludes, by 15 votes to 1, that there has been a violation of Article 3 (Art. 3) of the Convention.

D. As regards Article 5 para. 3 (Art. 5-3) of the Convention

170. Article 5 para. 3 (Art. 5-3) of the Convention reads as follows:

"3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

171. The applicant was detained for not less than 14 days in police custody and was not brought before a judge or other authorised officer.

172. The Government contend that such a measure must be seen in the context of the state of emergency existing in the region in question and caused by the internationally recognised threat posed to Turkey by the PKK and its affiliations. Such is the extent of this threat that Turkey has had to derogate under Article 15 (Art. 15) of the Convention from the guarantees provided by Article 5 para. 3 (Art. 5-3). This derogation was notified to the Secretary General of the Council of Europe on 5 May 1992.

173. According to the case-law of the European Court of Human Rights, the State is afforded a wide margin of appreciation in assessing the existence and scale of an emergency and the measures needed to deal with it (Eur. Court H.R., *Ireland v. the United Kingdom* judgment of 18 January 1978, Series A no. 25, pp. 78-79, para. 207; *Brannigan and McBride* judgment of 26 May 1993, Series A no. 258-B, p. 49, para. 43).

174. The measures concerning police custody balance the gravity of the terrorist threat against individual rights. Moreover, it is recognised that the investigation of terrorist crime is particularly difficult (*Brannigan and McBride* judgment, loc. cit., p. 54, para. 58). The Government, therefore, submit that in the circumstances the formal and material validity of the derogation is irrefutable and, consequently, no examination of the issue under Article 5 para. 3 (Art. 5-3) of the Convention is required.

175. It is contended on behalf of the applicant that it is essentially for the Convention organs to determine the validity of the Turkish derogation. However, a measure permitting detention in police custody without being brought before a judge for as long as 30 days is not strictly required by the exigencies of the situation, within the

meaning of Article 15 para. 1 (Art. 15-1) of the Convention. This is particularly so as the measure is not accompanied by any of the basic safeguards against abuse which are deemed to be essential by the Convention organs (Brannigan and McBride judgment, loc. cit., pp. 55-56, paras. 62-66) and this contributes to the violation of the non-derogable rights under Article 3 (Art. 3) of the Convention. Thus the length of the applicant's detention was excessive even by derogation standards. Accordingly, the applicant considered that there had been a violation of Article 5 para. 3 (Art. 5-3) of the Convention.

176. The Commission recalls the Brogan and others case where a period of detention of a little over four days was found to violate the requirement of promptness under Article 5 para. 3 (Art. 5-3) of the Convention, even taking into account the special circumstances prevailing at the time in Northern Ireland (Eur. Court H.R., Brogan and others judgment of 29 November 1988, Series A no. 145, pp. 30-34, paras. 55-62). Detention for 14 days or more without being brought before a judge, as in the present case, does not therefore comply with the notion of promptness.

177. The Commission must now turn to the question whether this potential breach of Article 5 para. 3 (Art. 5-3) of the Convention has been met by the Turkish derogation of 5 May 1992 under Article 15 (Art. 15) of the Convention.

178. Article 15 (Art. 15) of the Convention provides as follows:

- "1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
2. No derogation from Article 2 (Art. 2), except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) (Art. 3-1, (Art. 4-1) and 7 (Art. 7) shall be made under this provision.
3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed."

179. There is no serious dispute between the parties as to the existence of a public emergency in South-East Turkey threatening the life of the nation. In view of the grave threat posed by terrorism in this region, the Commission can only conclude that there is indeed a state of emergency in South-East Turkey which threatens the life of the nation. However, the question remains whether the exigencies of the situation strictly required a measure of detention in police custody without judicial control which may last up to 30 days, and which in this case lasted at least 14 days.

180. The Commission recalls that in the case of Brannigan and McBride the Court held that detention for up to seven days under a state of emergency in Northern Ireland, for which there had been an Article 15 (Art. 15) derogation, did not exceed the margin of appreciation

afforded to States in assessing the strict requirements of the exigencies of the situation (Brannigan and McBride judgment, loc. cit. p. 56, para. 66). However, in the present application the Commission is faced with a period of detention of at least 14 days, i.e. with a considerably longer period than that in the Brannigan and McBride case.

181. Moreover, an important element of the Brannigan and McBride case was the safeguards against abuse which existed in Northern Ireland (Brannigan and McBride judgment, loc. cit., p. 55-56, paras. 61-66). Such safeguards apparently do not exist in Turkey, or, if they do, have not been brought to the Commission's attention or relied on by the Government.

182. There would seem to be no speedy remedy of habeas corpus accessible to detainees and no legally enforceable right of access to lawyers, doctors, friends or family members. The individual may therefore, to a large extent, be cut off from the outside world for a period of time which can lend itself to abuse, as it did in the present case.

183. In these circumstances, the Commission is of the opinion that, despite the serious terrorist threat in Turkey, the measure which allowed the applicant to be detained for 14 days or more without being brought before a judge, or other officer exercising judicial functions, exceeded the Government's margin of appreciation and could not be said to be strictly required by the exigencies of the situation. As a result the applicant was justified in complaining of a violation of Article 5 para. 3 (Art. 5-3) of the Convention, given the failure to observe that provision's requirement of promptness in his case.

Conclusion

184. The Commission concludes, by 15 votes to 1, that there has been a violation of Article 5 para. 3 (Art. 5-3) of the Convention.

E. As regards Articles 6 para. 1 (Art. 6-1) and 13 (Art. 13) of the Convention

185. Articles 6 para. 1 (Art. 6-1) and 13 (Art. 13) of the Convention provide in relevant parts as follows:

Article 6 para. 1 (Art. 6-1)

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ...".

Article 13 (Art. 13)

"Everyone whose rights and freedoms as set forth in this 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."

186. The applicant alleged that there was a failure to institute court proceedings against those State officials who were responsible for torturing him, as a result of which he could not enforce his civil right to compensation. Under Turkish law such civil proceedings could not be contemplated, in his opinion, until the facts concerning the events had been established and the perpetrators had been identified in a prosecution. Without this, civil proceedings have no prospect of success. Even though the applicant could not sign his statement properly and was injured, the prosecutor made no inquiry and failed to

investigate the cause of the injury. In the absence of an investigation, the applicant was deprived of effective access to court in the determination of his civil rights, contrary to Article 6 para. 1 (Art. 6-1) of the Convention. The applicant also alleged a violation of Article 13 (Art. 13) of the Convention because of the lack of an independent authority before which a complaint can be brought with any prospect of success.

187. The Government contend that there was no evidence before the prosecutor warranting an investigation of the applicant's health. Moreover, there were several remedies available to the applicant, but he tried none of them. Prosecutions are brought against officials for unlawful acts. For example, in 1994 there were two cases against officials for ill-treatment of prisoners. The fact that the Mardin County Prosecutor, Riza Cingi, had not received any such complaints or heard of such prosecutions is not significant, given the fact that there are over 15 other prosecutors in Mardin who may have dealt with torture complaints.

188. The Commission refers to its decision on admissibility in the present case (appendix to this Report) where, in the context of Article 26 (Art. 26) of the Convention, it held that, in the circumstances of this case, there was no legal remedy which the applicant was required to exhaust.

189. The Commission recognises that allegations of torture in police custody are extremely difficult for the victim to prove when cut off from the outside world, without access to doctors, lawyers, family or friends, who could monitor any deterioration in the prisoner's condition, sound alarm bells or establish the evidence necessary for future litigation. These difficulties are reinforced when those responsible for public prosecution have a blinkered approach to allegations of torture made to them (cf. the testimony of Riza Cingi above, para. 114).

190. Consequently, on the same basis as its decision on admissibility, the Commission is of the opinion that the applicant did not have effective access to a tribunal that could have determined his civil right to compensation within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention.

191. In these circumstances, the Commission does not deem it necessary to examine the applicant's complaint also under Article 13 (Art. 13) of the Convention, which is superseded by the stronger protection afforded by Article 6 (Art. 6) to claims of a civil character, as in the present case.

Conclusions

192. The Commission concludes, by 13 votes to 3, that there has been a violation of Article 6 para. 1 (Art. 6-1) of the Convention.

193. The Commission concludes, by 13 votes to 3, that no separate issue arises under Article 13 (Art. 13) of the Convention.

F. As regards Article 25 (Art. 25) of the Convention

194. Article 25 (Art. 25) of the Convention envisages the right of individual petition to the Commission without hindrance by any State authority.

195. Since the introduction of the case, the applicant has been murdered. It is alleged by his representatives that this act was the

direct result of his application to the Commission. The Government deny any involvement in the matter and point out that a member of the PKK is currently awaiting trial charged with the applicant's murder. They contend that the applicant's death was part of a settlement of scores within the PKK.

196. The Commission is deeply concerned over the fact that the applicant has been killed after he introduced the application before the Commission and over the allegation that his death is not unconnected with the present proceedings.

197. Nevertheless, the Commission notes that it does not have any evidence which would allow it to take a view on the responsibility for the applicant's death. It notes that criminal proceedings are pending in relation to this tragic event and cannot find it established that there was in fact such a link with the present application or the applicant's right of individual petition under Article 25 (Art. 25) of the Convention.

Conclusion

198. The Commission concludes, by a unanimous vote, that no further action need be taken in respect of the alleged interference with the effective exercise of the right of individual petition under Article 25 (Art. 25) of the Convention.

G. Recapitulation

199. The Commission concludes, by 15 votes to 1, that there has been a violation of Article 3 (Art. 3) of the Convention (para. 169 above).

200. The Commission concludes, by 15 votes to 1, that there has been a violation of Article 5 para. 3 (Art. 5-3) of the Convention (para. 184 above).

201. The Commission concludes, by 13 votes to 3, that there has been a violation of Article 6 para. 1 (Art. 6-1) of the Convention (para. 192 above).

202. The Commission concludes, by 13 votes to 3, that no separate issue arises under Article 13 (Art. 13) of the Convention (para. 193 above).

203. The Commission concludes, by a unanimous vote, that no further action need be taken in respect of the alleged interference with the effective exercise of the right of individual petition under Article 25 (Art. 25) of the Convention (para. 198 above).

Secretary to the Commission

President of the Commission

(H.C. KRÜGER)

(S. TRECHSEL)

(Or. French)

PARTLY DISSENTING OPINION OF MR. GÖZÜBÜYÜK ON THE ISSUES UNDER ARTICLES 3, 6 AND 13 OF THE CONVENTION

On 19 October 1994 the Commission unanimously declared the present application admissible. As to whether domestic remedies have been exhausted, the Commission considered that the applicant had told the Mardin public prosecutor, on being brought before him in criminal proceedings, that he had been ill-treated while in police custody.

The respondent Government subsequently reiterated their argument

that domestic remedies had not been exhausted in this case and requested the application of Article 29 of the Convention.

I feel it important to specify from the outset that one of the complaints concerns the lack of an effective remedy and that the applicants rely on Articles 6 and 13 of the Convention in this respect.

Certain facts of the case have been elucidated by the Commission's investigation of the case.

In particular, the crucial juncture in this application was when the applicant made his statement to the public prosecutor. This statement, which the applicant signed unhesitatingly, contained no allegation of ill-treatment. Moreover, the very fact that a few days after the applicant's release the public prosecutor made an order that no proceedings be brought against him proves (a) that the applicant's statement to the public prosecutor confirmed his statement to the police and was not likely to constitute evidence to support a criminal charge and (b) that the police were carrying out a routine investigation against a background of terrorist violence. Thus, given the "anodyne" nature of the statement and the fact that there was nothing unusual about the applicant's appearance and that he had, moreover, signed the statement, the public prosecutor had no cause for concern regarding the treatment which the applicant claims to have suffered.

I note on this point that an applicant alleging that he has been tortured has a number of remedies under Turkish law. First, he can report the offence, thereby instituting criminal proceedings against the alleged perpetrators. Secondly, he can sue the State or the perpetrators of the ill-treatment for damages either before the administrative courts or before the ordinary courts. As regards the effectiveness of an action before the administrative courts, I refer, *inter alia*, to my comments set out in my separate opinion in Case No. 21893/93, *Akdivar and Others v/Turkey*. He can also bring a civil action (application to join the criminal proceedings as a civil party) against the alleged perpetrators (see, *mutatis mutandis*, Nos. 14116/89 and 14117/89, the aforementioned *Sargin and Yagci v/Turkey* case; Nos. 15202-5/89, *A. Gürdoğan, K. Müstak, B. Müstak and A. Müstak v/Turkey*, Dec. 12.01.93, unpublished; No. 17128/90, *Erdagöz v/Turkey*, Dec. 10.07.91, unpublished). Finally, the applicant can complain of the ill-treatment when he appears before the judicial authorities as a defendant in criminal proceedings (see Nos. 16311/90, 16312/90 and 16313/90, *N.H., G.H. and R.A. v/Turkey*, Dec. 11.10.91, unpublished).

The applicant did not take any such steps, however.

In view of these additional factors, which came to light when the Commission investigated the case, I conclude that the Government's application under Article 29 of the Convention should have been upheld.

I should stress that the rule of exhaustion of domestic remedies dispenses States from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system (Eur. Court H.R., *De Wilde, Ooms and Versyp* judgment of 18 June 1971, Series A no. 12, p. 29, para. 50) on condition, however, that such remedies appear effective and sufficient, i.e. are capable of providing redress for the complaints submitted before the international court. In this case, as has been borne out by the investigation of the merits, at least one of the above-mentioned remedies would in all likelihood have succeeded.

The evidence gathered by the Commission during its investigation of the merits of the application shows that the members of *Diyarbakir*

Human Rights Association failed to inform the applicants of all the remedies available under Turkish law. In any event, they advised this applicant to bring his case directly before the Commission.

For these reasons, I do not find that there has been a violation of Articles 6 and 13, in conjunction with Article 3, of the Convention.

As regards the complaints under Article 3 of the Convention, I am of the opinion that in the light of the additional factors which came to light when the case was investigated, the Commission cannot examine the merits of the application, as domestic remedies have not been exhausted.

PARTLY DISSENTING OPINION OF MR. N. BRATZA
JOINED BY MR. H.G. SCHERMERS

For substantially the same reasons as in my separate opinion in Application No. 21893/93, Akdivar and others v. Turkey, I found no violation of Article 6 in the present case but instead a violation of Article 13 of the Convention. As in that application, it seems to me that the real complaint concerns not the right of access to court but the effectiveness of the domestic remedies available under domestic law in the particular circumstances of the case. The circumstances of the present application involve allegations of torture and ill-treatment by State officials of persons in custody in South-East Turkey suspected of involvement in terrorist activities.

As in the case of Akdivar and others, it is not disputed by the applicant that he could in theory have brought civil proceedings for damages against the persons responsible for his ill-treatment, or against the State of which they were agents. It is instead his case that under Turkish law such civil proceedings could not be contemplated until the facts concerning the events had been established and the perpetrators had been identified in a prosecution and that in the absence of such a prosecution, or at least a proper investigation into the events, civil proceedings would have had no prospect of success. The failure to prosecute, or to carry out a proper criminal investigation into the applicant's allegations of ill-treatment, is relied on as making the remedy of civil proceedings ineffective and illusory.

This contention of the applicant is in substance accepted by the Commission in paragraphs 188 and 189 of its Report where recognition is given to the fact that allegations of torture in custody are extremely difficult for the victim to prove and that these difficulties are reinforced when those responsible for public prosecution have a blinkered approach to allegations of torture made to them.

I fully share the view but again see the issue as one not of a denial of access to court, in breach of Article 6, but of the absence of any adequate and effective remedy in the circumstances of the applicant's case, in breach of Article 13.