CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FORMER SECOND SECTION

CASE OF AKPINAR AND ALTUN v. TURKEY

(Application no. 56760/00)

JUDGMENT

This version was rectified on 1 March 2007
under Rule 81 of the Rules of the Court

STRASBOURG

27 February 2007

FINAL

27/05/2007

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

In the case of Akpınar and Altun v. Turkey,

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

Mr J.-P. COSTA, *President*,
Mr A.B. BAKA,
Mr I. CABRAL BARRETO,
Mr R. TÜRMEN,
Mr M. UGREKHELIDZE,
Mrs E. FURA-SANDSTRÖM,
Mr D. POPOVIĆ, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 4 and 30 January 2007,

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

PROCEDURE

1. The case originated in an application (no. 56760/00) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Turkish nationals, Ms Tamiş Akpınar and Mr Fevzi[1] Altun ("the applicants"), on 28 March 2000.

2. The applicants, who had been granted legal aid, were represented by Mr Z. Polat, a lawyer practising in Istanbul. The Turkish Government ("the Government") did not designate an Agent for the purposes of the proceedings before the Court.

3. On 14 March 2005 the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicants were born in 1957 and 1949 and live in Aydın (Turkey) and Australia respectively. The application concerns the killing of the first applicant's brother, Seyit Külekçi, and the second applicant's son,

[1]Rectified on 1 March 2007: The applicant's name read "Rıza Altun" in the former version of the judgment.

Doğan Altun, the alleged mutilation of their corpses by security forces and the alleged failure to conduct an effective investigation into the applicants' allegations.

5. On 14 April 1999 Seyit Külekçi, and Doğan Altun were killed by security forces in the course of an armed clash which occurred in the village of Yeşilalan, Turhal district (province of Tokat).

6. According to the scene-of-incident report (*olay yeri tespit tutanağı*) drawn up and signed by four gendarmerie officers from the Turhal district gendarmerie command, security forces had set up an ambush in Yeşilalan in order to capture members of the TKP-ML/TIKKO (Communist Party of Turkey / Marxist-Leninist / Turkish Workers and Peasants' Liberation Army). Six members of the organisation arrived in the village and were ordered to surrender. A clash broke out after they opened fire. When the firing ceased the security forces found two corpses. They also found two automatic rifles, four chargers and fifty cartridges next to the bodies. The other four persons fled. It is stated in the report that the security forces used 10 hand grenades, 2,780 Bixi-type bullets, 1,420 G3-type bullets, 2,620 Kalashnikov-type bullets, and other ammunition used for illumination. The gendarmerie officers further drew a sketch-map of the scene of the incident.

7. On 15 April 1999 the rifles and the cartridges found after the clash were sent to the Tokat provincial gendarmerie command for a ballistic examination.

8. On 14 May 1999, upon the request of the Tokat gendarmerie command, three ballistic experts at the gendarmerie general command conducted a ballistic examination of two rifles and 44 of the cartridges found at the scene.

9. Following the incident, officers from the Turhal gendarmerie command took the corpses to their command's yard. The bodies had been identified as those of Seyit Külekçi and Doğan Altun.

10. On 15 April 1999 post-mortem examinations were carried out on the deceased in the Turhal gendarmerie command's yard by a medical expert, in the presence of the Turhal public prosecutor. According to the expert's report, Doğan Altun had received nine bullets to his head, shoulders, chest and legs. It was also noted that half of his left ear had been cut off. The medical expert observed that Seyit Külekçi had received eight bullets to his head, shoulders, arms, chest, abdomen and lumbar region. He further observed that both of Seyit Külekçi's ears had been cut off. The expert noted numerous other wounds on the bodies. He concluded that the cause of their deaths was haemorrhaging and damage to the cerebral tissue as a result of wounds caused by firearms. He considered that there was no need to carry out a full autopsy as the cause of death was clear from the findings of the examination. During the post-mortem examination, photographs of the deceased were taken. After the examination the corpses were placed in the Turhal State Hospital morgue.

11. On the same day, the gendarmerie officers took the statement of Z.U., an inhabitant of Yeşilalan who was wounded during the armed clash on 14 April 1999. Z.U. maintained, *inter alia*, that at 9 p.m. terrorists had arrived at the village and asked him to take them to the house of the village headman (*muhtar*). On their way, shots were fired. He hid in a ditch and, subsequently, in the garden of a house. Z.U. contended that he had remained hidden until the following morning, whereupon, having dressed his wound, soldiers had taken him to Turhal hospital.

12. On 16 April 1999 the corpses of Doğan Altun and Seyit Külekçi were returned, respectively, to the second applicant, Fevzi Altun, and to Seyit Külekçi's brother, Ali Külekçi.

13. On an unspecified date, the Turhal public prosecutor initiated an investigation (no. 1999/624) against the deceased and four others, who were all suspected of belonging to the terrorist organisation TKP-ML/TIKKO.

14. On 15 June 1999 the applicants filed a complaint with the Turhal public prosecutor's office. In their complaint they maintained that Doğan Altun's left arm had been cut. They further contended that the ears of Seyit Külekçi and Doğan Altun had been cut off and that there were various injuries on their bodies which could not have been caused by firearms. The applicants alleged that their relatives had been tortured before they died or, alternatively, that the security forces had ill-treated the corpses. The applicants requested the public prosecutor to initiate an investigation against those members of the security forces who were responsible for the mutilation of their relatives' bodies.

15. On an unspecified date the Turhal public prosecutor opened an investigation into the applicants' allegations (no. 1999/1117).

16. On 11 October 1999 the Turhal public prosecutor decided to join investigations nos. 1999/624 and 1999/1117, since they concerned the same incident.

17. On 15 February 2000 S.Ş., a gendarmerie private who had participated in the military operation in Turhal on 14 April 1999, gave statements to the Turhal public prosecutor. He contended that there had been an armed clash between terrorists and the security forces on the day in question and that, at the end of the clash, two terrorists had been found dead. S.Ş. further maintained that these two persons had been killed by special teams. He stated that the ears of the deceased had already been cut off when he saw them, and that he had signed the scene-of-incident report without having read it.

18. On 17 February 2000 the Turhal public prosecutor took statements from K.K., the deputy gendarmerie station commander in the Turhal gendarmerie command. He maintained that in April 1999 there had been a military operation conducted by gendarmerie commando teams together with a special team, and that he had participated in this operation as a guide. He stated that, following the armed clash between the terrorists and the

security forces, he and his team had taken the corpses to the town centre. He did not realise that the terrorists' ears had been cut off since the corpses were covered with mud. He opined that the inhabitants of Yeşilalan village could have cut off the terrorists' ears out of fear because the armed clash had occurred in their village.

19. On 30 March 2000 M.Ç., another gendarmerie private who was performing his military service in Turhal in 1999, gave statements to the Kurşunlu public prosecutor in Çankırı. He maintained that Seyit Külekçi and Doğan Altun had been killed by special teams. He contended that he had not approached the corpses. He saw that hand grenades had exploded on the bodies. He denied the allegation that he had ill-treated them.

20. On 18 April 2000 S.Y., a sergeant who had served in Turhal between 1996 and 1999, gave statements to the Elazığ public prosecutor. The sergeant contended that he had neither seen nor ill-treated the corpses. He maintained that the damage to the corpses could have been caused by firearms.

21. On 3 September 2000 the Turhal public prosecutor decided to separate the investigation against the officers who had participated in the operation conducted on 14 April 1999 from the investigation against the deceased and the four other suspects who had fled on the same day. In his decision, he noted that these matters fell within the jurisdiction of different courts. The public prosecutor identified the charge against the security forces as that of "insulting corpses".

22. On 10 October 2000 the Turhal public prosecutor filed a bill of indictment charging the gendarmerie officers M.Ç., K.K., S.Ş. and S.Y. with "insulting" the corpses of Seyit Külekçi and Doğan Altun, contrary to Article 178 § 1 of the Criminal Code.

23. On the same day the Turhal Criminal Court of First Instance placed those officers on trial.

24. On 31 October 2000 M.Ç. made statements before the Kurşunlu Criminal Court of First Instance, denying the allegation that he had cut the ears off the corpses. He maintained that he had neither seen nor ill-treated them.

25. On 20 December 2000 the Turhal Criminal Court of First Instance held a hearing.

26. On 5 January 2001 the first-instance court decided to defer the imposition of a final sentence upon the accused, pursuant to section 1 of Law no. 4616. The court held that the criminal proceedings against the accused would be suspended and a final sentence imposed should they be convicted of a further intentional offence within five years of this decision.

27. The judgment of 5 January 2001 became final, as neither the public prosecutor nor the accused officers appealed against it.

II. RELEVANT DOMESTIC LAW

28. A description of the domestic law at the material time can be found in *Ergi v. Turkey* (judgment of 28 July 1998, *Reports of Judgments and Decisions* 1998-IV, §§ 48 and 51), *İlhan v. Turkey* ([GC], no. 22277/93, §§ 36, 41 and 42, ECHR 2000-VII) and *Şahmo v. Turkey* ((dec.), no. 37415/97, 1 April 2003).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

29. The applicants complained under Article 2 of the Convention that the use of force employed by the security forces against Seyit Külekçi and Doğan Altun had been disproportionate in the circumstances of the case and had resulted in their unlawful killing. Article 2 of the Convention reads 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. Admissibility

1. Submissions of the parties

30. The Government argued that the applicants had failed to exhaust the domestic remedies available to them, within the meaning of Article 35 § 1 of the Convention.

31. The Government maintained that the applicants had failed to raise their complaint about the killing of their relatives by the security forces before the national authorities. In this connection, they contended that the applicants had referred only to the mutilation of their relatives' bodies in their petition of 15 June 1999 to the public prosecutor (see paragraph 14 above).

32. The applicants contended that they had complied with the domestic remedies rule.

2. The Court's assessment

33. The Court reiterates that the rule on exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges applicants first to use the remedies which are normally available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged (see *Hugh Jordan v. the United Kingdom* (dec.), no. 24746/94, 4 April 2000).

34. Nevertheless, the application of the remedies rule must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights which the Contracting States have agreed to set up. The Court has recognised that Article 35 § 1 must be applied with some degree of flexibility and without excessive formalism. It has further recognised that the remedies rule is neither absolute nor capable of being applied automatically; for the purposes of reviewing whether it has been observed, it is essential to have regard to the circumstances of the individual case. This means, in particular, that the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting State concerned, but also of the general context in which they operate, as well as the personal circumstances of the applicant. It must then examine whether, in all the circumstances of the case, the applicant did everything that could reasonably be expected to exhaust domestic remedies (see *İlhan*, cited above, § 59).

35. The Court further 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 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. The essential purpose of such an investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures (see *McKerr v. the United Kingdom*, no. 28883/95, § 111, ECHR 2001-III).

36. Moreover, for an investigation into an alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events (see *McKerr*, cited above,

§ 112; *Güleç v. Turkey*, judgment of 27 July 1998, *Reports* 1998-IV, p. 1733, §§ 81-82; *Oğur v. Turkey* [GC], no. 21594/93, §§ 91-92, ECHR 1999-III; and *Öneryıldız v. Turkey* [GC], no. 48939/99, § 94, ECHR 2004-XII).

37. The Court will examine the issues that arise in the light of the documentary evidence adduced in the present case, in particular the documents lodged by the Government with respect to the investigations conducted at the domestic level, as well as the parties' written observations.

38. In this regard, the Court notes that, following the death of the applicants' relatives, the gendarmerie officers who had participated in the operation drafted a scene-of-incident report and drew a sketch plan. The day after the incident, post-mortem examinations were carried out on the deceased in the Turhal gendarmerie command by a medical expert, in the presence of the Turhal public prosecutor. On the same day, the Turhal gendarmerie command sent the firearms and bullets found next to the corpses of Seyit Külekçi and Doğan Altun to the Tokat gendarmerie command for a ballistic examination (see paragraphs 6-10 above).

39. The Court observes, however, that there is nothing in the case file to indicate that the aforementioned steps taken by the gendarmerie authorities following the incident were part of an administrative investigation supervised by an independent authority and initiated for the purpose of ascertaining whether the force used during the armed clash which took place on 14 April 1999 had been necessary, and whether the mutilation of the bodies of Seyit Külekçi and Doğan Altun had occurred before their death.

40. The Court further observes that the Turhal public prosecutor did not take any investigative step in respect of the killing of Seyit Külekçi and Doğan Altun, although it had been brought to his attention. The investigation which he initiated of his own motion after the incident was only against the deceased and the four people who had fled after the clash. Within the context of that investigation, the public prosecutor charged the accused with belonging to a terrorist organisation. The second investigation, which was initiated following receipt of the applicants' petition, focused solely on the allegation that the bodies of Seyit Külekçi and Doğan Altun had been mutilated (see paragraphs 13-15 above). At no stage did the public prosecutor investigate whether the force used by the security forces was justified in the circumstances of the case. Yet, the post-mortem examination revealed that the deceased had received several bullets in various parts of their bodies and had sustained numerous wounds (see paragraph 10 above). Moreover, the public prosecutor was under a duty, imposed by Article 153 of the Code of Criminal Procedure, to investigate whether an offence had been committed (see *İlhan*, cited above, §§ 36 and 63).

41. The Court observes that the applicants are the relatives of two persons who were killed during an armed clash with the security forces at a time when there were serious problems in the fight against terrorism in

Turkey. In that context, the applicants could have felt vulnerable and apprehensive of State representatives. It is therefore understandable if they were unable to request the authorities to investigate whether the security forces had killed their relatives' unlawfully. The Court considers that the applicants could legitimately have expected that the necessary investigation would have been conducted without a specific complaint from them (see *Aksoy v. Turkey*, judgment of 18 December 1996, *Reports* 1996-VI, § 56, and *İlhan*, cited above, § 63).

42. The applicants nevertheless submitted a petition to the Turhal public prosecutor's office, complaining about the mutilation of their relatives' bodies. The Court considers that the applicants took steps in respect of their relatives' death as far as their knowledge of the surrounding circumstances would allow. In any case, in the absence of an independent and impartial official investigation instigated by the judicial authorities of their own motion into the circumstances of the death of Seyit Külekçi and Doğan Altun, the applicants did not possess the necessary knowledge which would have enabled them to challenge the lawfulness of the killings.

43. The Court accordingly rejects the Government's argument that the applicants failed to exhaust the domestic remedies available to them.

44. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Submissions of the parties

45. The applicants alleged that the security forces had used excessive force, as they could have captured Seyit Külekçi and Doğan Altun alive. They submitted that the security forces had failed to fulfil their obligation to protect their relatives' right to life.

46. The Government did not accept the applicants' claim that their relatives had been killed by an excessive or unjustified use of force. They submitted that Seyit Külekçi and Doğan Altun had been armed terrorists. The Government contended that the deceased had taken part in an armed clash with the security forces and that, therefore, the use of force had been unavoidable and absolutely necessary. The Government further maintained that, following receipt of the applicants' petition to the public prosecutor, an investigation had been initiated and criminal proceedings opened under Article 178 of the Criminal Code.

2. The Court's assessment

(a) As to the responsibility of the respondent State for the deaths in the light of the substantive aspect of Article 2 of the Convention

(i) General principles

47. Article 2, which safeguards the right to life and sets out the circumstances in which 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, §§ 146-147).

48. 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 paragraphs 2 of Articles 8 to 11 of the Convention. Consequently, the force used must be strictly proportionate to the achievement of the permitted aims (see *McCann and Others*, cited above, §§ 148-49, and *McKerr*, cited above, § 110).

49. The first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps within its internal legal order to safeguard the lives of those within its jurisdiction (see *Kılıç v. Turkey*, no. 22492/93, § 62, ECHR 2000-III). This involves a primary duty of the State to secure the right to life by putting in place an appropriate legal and administrative framework to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions (see *Makaratzis v. Greece* [GC], no. 50385/99, § 57, ECHR 2004-XI).

50. As the text of Article 2 itself indicates, the use of lethal force by security forces may be justified in certain circumstances. Nonetheless, Article 2 does not grant a *carte blanche*. Unregulated and arbitrary action by State agents is incompatible with effective respect for human rights. This

means that, as well as being authorised under national law, policing operations must be sufficiently regulated within the framework of a system of adequate and effective safeguards against arbitrariness and abuse of force (see *Hilda Hafsteinsdóttir v. Iceland*, no. 40905/98, § 56, 8 June 2004, and *Makaratzis*, cited above, § 58).

51. In view of the foregoing, the Court subjects allegations of a breach of Article 2 to the most careful scrutiny, taking into consideration not only the actions of the agents of the State who actually administered the force but also all the surrounding circumstances, including such matters as the planning and control of the actions under examination (see *McCann and Others*, cited above, § 150). In the latter connection, security forces should not be left in a vacuum when performing their duties, whether in the context of a prepared operation or a spontaneous chase of a person perceived to be dangerous: a legal and administrative framework should define the limited circumstances in which law-enforcement officials may use force and firearms, in the light of established international standards (see *Makaratzis*, cited above, § 59).

52. Thus, in cases involving questions concerning the use of force by security forces, the Court examines not only whether the force employed was legitimate, but also whether the operation was regulated and organised in such a way as to minimise, to the greatest extent possible, any risk to individual life (see, for example, *Makaratzis*, cited above, § 60).

(ii) Application of the general principles to the circumstances of the present case

53. The Court observes, at the outset, that it is not disputed between the parties that the applicants' relatives, Seyit Külekçi and Doğan Altun, were killed by the security forces on 14 April 1999 during an armed clash between members of an armed organisation (which apparently included the deceased) and security forces (see paragraph 5 above). The Court however notes that, in the absence of an investigation initiated for the purpose of ascertaining whether the force used during the armed clash had been necessary (see paragraphs 38-42 above), it is unable to establish a complete picture of the circumstances surrounding the deaths.

54. In this connection, the Court recalls that, in assessing evidence, it adopts the standard of proof "beyond reasonable doubt" (see *Orhan v. Turkey*, no. 25656/94, § 264, 18 June 2002). Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see, among many others, *Şimşek and Others v. Turkey*, nos. 35072/97 and 37194/97, § 100, 26 July 2005).

55. Given the unclear circumstances of the present case, the Court is unable to establish "beyond reasonable doubt" that Seyit Külekçi and Doğan Altun were deprived of their lives by the security forces as a result of a use

of force which was more than absolutely necessary, within the meaning of Article 2 § 2 of the Convention (see, *mutatis mutandis*, *Gömi and Others v. Turkey*, no. 35962/97, § 60, 21 December 2006; and *Ağdaş v. Turkey*, no. 34592/97, § 96, 27 July 2004).

56. The Court is therefore led to conclude that there has been no violation of Article 2 of the Convention under its substantive limb.

(b) As to the responsibility of the respondent State for the deaths in the light of the procedural aspect of Article 2 of the Convention

57. As indicated above, there should be some form of effective official investigation when individuals have been killed as a result of the use of force by State agents (see paragraphs 35-36 above). The purpose of such an investigation is not only to ensure the accountability of particular State agents or the authorities for deaths occurring under their responsibility, but also to secure the effective implementation of the domestic laws which protect the right to life.

58. In this connection, the Court reiterates that a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential to ensure public confidence in their maintenance of the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts (see *Avşar v. Turkey*, no. 25657/94, § 395, ECHR 2001-VII (extracts)).

59. The Court further reiterates that it is mindful of the context of terrorism in Turkey at the material time. However, neither the prevalence of armed clashes nor the high incidence of fatalities can displace the obligation under Article 2 to ensure that an independent and impartial official investigation is conducted into deaths arising out of clashes involving the security forces (see *Kaya v. Turkey*, judgment of 19 February 1998, *Reports* 1998-I, § 91).

60. In the present case, the Court has already found that the authorities failed to conduct an independent and impartial official investigation into the circumstances surrounding the death of the applicants' relatives (see paragraphs 38-41 above). Furthermore, it repeats that it is unable to establish a complete picture of the circumstances of the case owing to the lack of an effective investigation (see paragraph 53 above).

61. The Court therefore concludes that there has been a violation of Article 2 of the Convention, under its procedural limb, because of the failure to conduct an effective investigation into the circumstances surrounding the killing of the applicants' relatives.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

62. The applicants alleged that there had been a violation of Article 3 of the Convention on account of the infliction of “torture” on their relatives'

bodies, either before or after their deaths. They further complained under the same head about the emotional distress which they had suffered when they had seen the state of the corpses. The applicants lastly contended that the investigation initiated into their complaints had been ineffective.

63. Article 3 of the Convention provides insofar as relevant as follows:

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

A. Admissibility

1. Submissions of the parties

64. The Government argued that the applicants had failed to exhaust the remedies available to them under domestic law in respect of their allegations under Article 3 of the Convention.

65. In this connection, the Government submitted that it would have been possible for the applicants to seek redress from the administrative authorities and, subsequently, the administrative courts for the alleged ill-treatment inflicted upon their relatives. The Government further maintained that the applicants had not complained to the domestic authorities of their alleged emotional distress on seeing the corpses.

66. The applicants contended, in reply, that the administrative remedies referred to by the Government were not effective in their case. They submitted that, at first, they had preferred to wait for the outcome of the investigation initiated by the Turhal public prosecutor and for the judicial authorities to identify the persons who had committed the acts of which they complained. The applicants maintained that they would have brought a case before the civil courts against the identified perpetrators following the criminal proceedings. However, both the investigation initiated by the public prosecutor and subsequent proceedings had proved to be ineffective.

2. The Court's assessment

67. The Court notes that Turkish law provides administrative remedies against illegal and criminal acts attributable to the State or its agents (see *İlhan,* cited above, §§ 41 and 42). However, as the Court has already noted in other cases, an administrative action under Turkish law is a remedy based on the strict liability of the State, in particular for the illegal acts of its agents, whose identification is not, by definition, a prerequisite to pursuing such proceedings (see, for example, *Yaşa v. Turkey*, judgment of 2 September 1998, *Reports* 1998-VI, § 74). However, the investigations which the Contracting States are obliged by Article 3 of the Convention to conduct must be able to lead to the identification and punishment of those responsible (see, among many other authorities, *Assenov and Others v. Bulgaria*, judgment of 28 October 1998, *Reports* 1998-VIII, § 102). As the

Court has previously held, this obligation cannot be satisfied merely by awarding damages (see *Yaşa*, cited above, § 74; *Kaya*, cited above, § 105).

68. In the instant case, the applicants filed a petition with the Turhal public prosecutor's office, complaining about the mutilation of their relatives' bodies by the security forces. However, the proceedings brought against four officials were suspended pursuant to section 1 of Law no. 4616. In these circumstances, the Court considers that the applicants were not required to embark on another attempt to obtain redress by bringing an administrative-law action for damages (see *Assenov and Others*, cited above, § 86).

69. Furthermore, as to the Government's allegation that the applicants had not mentioned their suffering on account of the state of their relatives' corpses in their petition to the public prosecutor, the Court does not consider that this is an issue to be raised separately before a prosecutor. The applicants could have subsequently brought a case before the civil courts against those responsible, had the latter been identified and punished.

70. The Court accordingly rejects the Government's argument that the applicants failed to exhaust the domestic remedies available to them in respect of their allegations under Article 3.

71. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Submissions of the parties

72. The applicants maintained that the mutilation of their relatives' bodies, before or after their death, had been in violation of Article 3 of the Convention. They further contended that their own suffering as a result of that disfigurement amounted to a breach of this provision. The applicants lastly alleged that the investigation initiated into their allegations by the Turhal public prosecutor had been inadequate.

73. The Government maintained that, following the receipt of the applicants' complaint, the Turhal public prosecutor had promptly opened an investigation, as a result of which criminal proceedings had been initiated against four gendarmerie officers.

2. The Court's assessment

(a) Responsibility of the respondent State under the substantive head of Article 3 of the Convention

(i) General principles

74. The Court reiterates at the outset that Article 3 of the Convention enshrines one of the most fundamental values of a democratic society. It prohibits in absolute terms inhuman or degrading treatment or punishment, irrespective of the circumstances or the victim's behaviour (see, for example, *Labita v. Italy* [GC], no 26772/95, § 119, ECHR 2000-IV).

75. In order for a punishment or treatment associated with it to be "inhuman" or "degrading", the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment (see *V. v. the United Kingdom* [GC], no. 24888/94, § 71, ECHR 1999-IX). The question whether the purpose of the treatment was to humiliate or debase the victim is a further factor to be taken into account (see, for example, *Peers v. Greece*, no. 28524/95, § 74, ECHR 2001-III, and *Kalashnikov v. Russia*, no. 47095/99, § 101, ECHR 2002-VI).

(ii) Application of the general principles to the present case

(α) Alleged violation of Article 3 in respect of Seyit Külekçi and Doğan Altun

76. As regards the first limb of the applicants' complaint under this head, namely the allegation of a violation of Article 3 on account of the act of mutilation itself, the Court notes that it is undisputed that the ears of Seyit Külekçi and Doğan Altun had been cut off, in whole or in part, by the time their bodies were returned to the applicants.

77. Moreover, it can be observed from the photographs submitted to the Court that half of Doğan Altun's left ear and both of Seyit Külekçi's ears had been cut off by the time of the post-mortem examination (see paragraph 10 above). The Court notes in this connection that, prior to that examination, the corpses had been under the exclusive control of the security forces.

78. The Court therefore finds it established that the mutilation of the bodies occurred while they were in the hands of the State security forces.

79. The Court is unable to find that the mutilation occurred before death, since the prosecutor's investigation focused on the charge of "insulting corpses", and the domestic courts did not establish the facts of the case (see paragraphs 22, 26 and 27 above).

80. Furthermore, the Court has already had occasion to consider two cases in which members of the security forces deployed in the fight against terrorism in Turkey were accused of mutilating corpses after the death of the victims (see, in this regard, *Akkum*, cited above, and *Kanlıbaş v. Turkey*, no. 32444/96, 8 December 2005).

81. In the light of the above, the Court is led to conclude that the ears of Seyit Külekçi and Doğan Altun were cut off after their deaths.

82. Nevertheless, the Court has never applied Article 3 of the Convention in the context of disrespect for a dead body. The present Chamber concurs with this approach, finding that the human quality is extinguished on death and, therefore, the prohibition on ill-treatment is no longer applicable to corpses, like those of Seyit Külekçi and Doğan Altun, despite the cruelty of the acts concerned.

83. It follows that there has been no violation of Article 3 on this account.

(β) Alleged violation of Article 3 in relation to the applicants' suffering

84. As to the second limb of the applicants' complaint, the Court previously held, in the *Akkum and Others v. Turkey* judgment (no. 21894/93, § 259, 24 March 2005), that one of the applicants, a father who was presented with the mutilated body of his son, could claim to be a victim, within the meaning of Article 34 of the Convention, of a violation of Article 3. Referring to its jurisprudence concerning the anguish suffered by family members of disappeared persons (*Çakıcı v. Turkey,* [GC], no. 23657/94, § 98, ECHR 1999-IV, and *Timurtaş v. Turkey* no. 23531/94, § 96-98, ECHR 2000-VI), the Court concluded that the anguish caused to that applicant in such circumstances amounted to degrading treatment, contrary to Article 3.

85. The Court observes, in the present case, that the applicants were indeed presented with the mutilated bodies of Seyit Külekçi and Doğan Altun.

86. In the light of the aforementioned *Akkum* judgment, the Court confirms that the applicants, who are the sister and father of the deceased, can claim to be victims within the meaning of Article 34 of the Convention. Furthermore, the Court has no doubt that the suffering caused to them as a result of this mutilation amounted to degrading treatment contrary to Article 3 of the Convention.

87. It follows that there has been a violation of Article 3 of the Convention in respect of the applicants themselves.

(b) As to the responsibility of the respondent State in the light of its procedural obligations under Article 3

88. The Court does not deem it necessary to make a separate finding under Article 3 of the Convention in respect of the alleged deficiencies in the investigation into the mutilation of the bodies of Seyit Külekçi and Doğan Altun, in view of its finding under Article 2 that the State authorities failed to provide an effective investigation into the circumstances surrounding the death of the applicants' relatives (see paragraphs 60-61 above).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

89. 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

90. The applicants claimed 2,180 euros (EUR) in respect of pecuniary damage.

91. The Government contested these claims.

92. The Court notes that the applicants failed to submit any documentary evidence proving that they had suffered pecuniary damage. The Court therefore dismisses the claim under this head.

B. Non-pecuniary damage

93. The applicants each claimed EUR 20,000 in respect of non-pecuniary damage.

94. The Government contended that the amounts claimed were excessive.

95. The Court recalls that it has found that the circumstances of the present case involved grave breaches of the Convention. Accordingly, and deciding on an equitable basis, the Court awards the applicants the full sum claimed in respect of non-pecuniary damage.

C. Costs and expenses

96. The applicants also claimed EUR 3,930 for the fees, costs and expenses incurred before the Court.

97. The Government submitted that the claims were excessive and unsubstantiated. They argued that no receipt or any other document had been produced by the applicants to prove their claims.

98. According to the Court's case-law, an applicant is entitled to reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award the applicants, jointly, the full sum claimed, less the EUR 715 which they received in legal aid from the Council of Europe.

D. Default interest

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

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the application admissible;

2. *Holds* unanimously that there has been no substantive violation of Article 2 of the Convention in respect of the killing of Seyit Külekçi and Doğan Altun;

3. *Holds* unanimously that there has been a violation of Article 2 of the Convention in respect of the respondent State's failure to conduct an effective investigation into the circumstances of the incident which led to the death of Seyit Külekçi and Doğan Altun;

4. *Holds* by six votes to one that there has been no violation of Article 3 of the Convention in respect of Seyit Külekçi and Doğan Altun;

5. *Holds* unanimously that there has been a substantive violation of Article 3 in respect of the applicants themselves;

6. *Holds* unanimously that it is not necessary to examine separately whether there has been a procedural violation of Article 3 of the Convention;

7. *Holds* unanimously
   (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts plus any tax that may be chargeable, to be converted into new Turkish liras at the rate applicable at the date of settlement:
      (i) EUR 20,000 (twenty thousand euros) each in respect of non-pecuniary damage;
      (ii) EUR 3,930 (three thousand nine hundred and thirty euros), jointly, in respect of costs and expenses, less the EUR 715 (seven hundred and fifteen euros) granted by way of legal aid;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

8. *Dismisses* unanimously the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 27 February 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ	J.-P. COSTA
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following partly dissenting opinion of Mrs Fura-Sandström is annexed to this judgment.

J.-P.C.
S.D.

PARTLY DISSENTING OPINION OF JUDGE FURA-SANDSTRÖM

1. The Court found that there had been no violation of Article 3 of the Convention in respect of Seyit Külekçi and Doğan Altun, but I voted in favour of finding a violation. My reasons for doing so are as follows.

2. In the light of the preparatory work on Article 3 (Council of Europe, DH (56) 5), it is to be noted that the purpose of this provision is to protect bodily integrity and human dignity. The Court has already held that the very essence of the Convention is respect for human dignity (see *Pretty v. the United Kingdom*, no. 2346/02, § 65, ECHR 2002-III).

3. It is true that the Court has never applied Article 3 of the Convention in the context of disrespect for a dead body (see paragraph 82 of the judgment), although it has excluded the notion of interference with respect for private life in relation to the exhumation of corpses for DNA testing (see *Estate of Kresten Filtenborg Mortensen v. Denmark* (dec.), no. 1338/03, 15 May 2006, and *Jäggi v. Switzerland*, no. 58757/00, § 42, ECHR 2006-...). However, for the reasons outlined below, I consider that the gratuitous desecration of a corpse, as distinct from scientific tests authorised by a court in the reasonable interests of a third party, is a clear affront to human dignity in breach of Article 3 of the Convention.

4. It is my conviction that the duty imposed on the State authorities to respect an individual's human dignity, and to protect bodily integrity, cannot be deemed to end with the death of the individual in question where a person is killed by the security forces and the corpse immediately subjected to deliberate and cruel acts, as in the present case.

5. Human dignity extends not only to the living but also to the dead. As was stated by the German Constitutional Court in the *Mephisto* case of 1971 (30 BVerfGE 173), the dead – particularly those in living memory – remain in communion with the living, and we, the living, owe them continuing honour and respect.[1]

6. The German Constitution (the Basic Law) puts human dignity at the centre of all rights. Article 1(1) of the Basic Law reads: "The dignity of man is inviolable. To respect and protect it is the duty of all State authority". In the second paragraph, the inseparability of human dignity and basic rights is

[1] Briefly, the facts of the cases were as follows: Klaus Mann published *Mephisto* in the 1930s. It is a satirical novel about his brother-in-law, Gustaf Grundgens, picturing Grundgens as someone who, abandoning his liberal views, prostitutes his talent for the sake of fame and popularity with the Nazi leaders. The German courts found that the novel dishonoured the good name and memory of the then deceased Grundgens. The Constitutional Court had to find a balance between freedom of speech and human dignity.

underlined: "The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and justice in the world".

7. The German Constitutional Court further held in *Mephisto* that human beings must always be treated as ends, never as means. I find that to be a compelling ethical principle applicable to Article 3 and to the case at hand.

8. Article 3 provides that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment". In this Article there are no qualifications or exceptions, and no restrictions on the rights guaranteed. The prohibition is absolute and fundamental in character. In this respect the Convention bears a strong resemblance to the Basic Law, putting human dignity at the centre. This is why the German Basic Law and the case-law of the German Constitutional Court are in my view relevant to our case. For further examples on how the concept of human dignity prevails throughout the Convention and in other international treaties and texts, I refer to the joint dissenting opinion of Judges Spielmann and Jebens in *Vereinigung Bildener Kunstler v. Austria*, judgment of 25 January 2007 (§ 8 with footnotes).

9. I acknowledge that there is no common European standard in the philosophical/ethical/religious approach to death. We also have different ways of looking at human remains after death. This is reflected in our languages and in our cultures in general and our funeral traditions in particular. Maybe this is why the Court in its case-law has not extended the protection under Article 3 beyond those living now. In my opinion the case at hand provided the Court with an opportunity to take a step further in the protection of human dignity. I regret that I was unable to convince my esteemed colleagues to take this opportunity and state clearly that the obligation to respect an individual's human dignity and bodily integrity continues after death.

10. My conclusion is that the mutilation of the bodies of Seyit Külekçi and Doğan Altun constitutes a failure on the part of the State authorities to protect the right to respect for their human dignity and, therefore, amounts to degrading treatment in breach of Article 3. In all other respects I concur with the majority.