Kurdish Human Rights Project

KAYA v TURKEY

KURT v TURKEY

A CASE REPORT

January 1999

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JANUARY 1999

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FOREWORD

This report deals with *Kaya v. Turkey*, an unlawful killing case, and *Kurt v. Turkey*, a disappearance case, which were decided by the European Court of Human Rights in 1998.

The proceedings under the European Convention of Human Rights took over four years in the case of *Kaya* and four years in the case of *Kurt*, from lodgement of the application to delivery of judgment by the Court. When the applicants in *Kaya* and *Kurt* filed their complaints with the European Commission of Human Rights, the Turkish Government disputed the applicants' versions of events and denied that it had failed to observe its obligations under the Convention. The Commission therefore found it necessary to conduct investigation hearings to determine whether or not the alleged violations had occurred. Despite the Commission's findings, in favour of the applicants in respect of a number of their complaints, the Turkish Government maintained its denials.

Lengthy legal proceedings are immensely costly in terms of money and labour, and they can also be the source of protracted emotional and mental stress for the applicants and their families. Such hardship was particularly evident in *Kurt* as the applicant, the Court found, had been subjected to improper pressure by the Government to withdraw her complaints. The Court's ruling in favour of the applicants in respect of a number of their complaints was, therefore, a hard won victory for human rights.

The Kurdish Human Rights Project (KHRP) and human rights organisations and activists in Turkey[1] and the United Kingdom[2] have worked together in assisting individuals to bring their experiences of human rights violations to the Commission and the Court. *Kaya* and *Kurt* are two of a series of cases brought by Kurds against the State of Turkey in which the Court has handed down judgment in applications assisted by KHRP.[3] The first case was in 1996 in the matter of *Akdivar v. Turkey*,[4] a destruction of homes case. Shortly after came the judgments in *Aksoy v. Turkey*[5] and *Aydin v. Turkey*[6] both concerning the use of torture by the Turkish authorities. Later in 1997, judgment was delivered in another destruction of homes case,

[1] For example, KHRP has worked with the Human Rights Association of Turkey (IHD) in bringing a number of cases before the European Commission of Human Rights. The IHD was established in 1986 with the stated purpose of promoting human rights and civil liberties in Turkey. It is a non-government organisation with approximately 16,000 members and 58 branches throughout Turkey. One of the functions of the IHD's Diyarbakir branch was to assist individuals who have suffered a human rights violation to obtain a domestic remedy and, where this is not possible, to lodge applications under the European Convention of Human Rights. IHD staff have reportedly been arrested and intimidated for their human rights activities on a number occasions. In July 1997 the Diyarbakir branch of the IHD was closed down by the authorities. KHRP also works with the Bar Associations in Turkey as well as those in Europe.

[2] KHRP has worked extensively with Professor Kevin Boyle and Ms Francoise Hampson, human rights lawyers at the Human Rights Centre, University of Essex (England).

[3] To date, reports on KHRP assisted cases are: 'Akdivar v. Turkey: The Story of Kurdish Villagers Seeking Justice in Europe', October 1996; 'Aksoy v. Turkey; Aydin v. Turkey: A Case Report on the Practice of Torture in Turkey', December 1997; 'Mentes and Others v. Turkey: A KHRP Case Report on Village Destruction in Turkey', September 1998; 'Gundem v. Turkey; Selcuk and Asker v. Turkey: A Case Report', October 1998. These reports may be obtained by contacting the Kurdish Human Rights Project, Suite 319 Linen Hall, 162-168 Regent Street, London W1R 5TB. Telephone: (0171) 287 2772; facsimile: (0171) 734 4927. A publications list is also available on request.

[4] Judgment of 16 September 1996.

[5] Judgment of 18 December 1996.

[6] Judgment of 25 September 1997.

Pictured above is the KHRP legal team representing the applicant before the European Court. From left to right: Aisling Reidy; Francoise Hampson; Mrs Koceri Kurt (the applicant); Osman Baydemir; Kerim Yildiz; Andrew Collender QC; and the assigned interpreter.

Mentes v. Turkey[7]. Then followed the judgment in *Kaya* and the judgments in *Selcuk and Asker v. Turkey*[8] and *Gundem v. Turkey*,[9] further destruction of homes cases, after which the Court's decision in *Kurt* was handed down. In each of these cases the Court found that Turkey had violated a number of the human rights which it undertook to respect and protect when it became a party to the Convention. Indeed the wide range and serious nature of the human rights violations to which the Kurdish inhabitants of Turkey have been subjected (particularly in the emergency region in the southeast) is being revealed as more cases are decided.

We believe that respect for human rights will improve with increased awareness of the nature of human rights abuses, and education in human rights standards. To this end, it is hoped that this report will promote general access to the decisions in *Kaya* and *Kurt*. Part I deals with the former case and Part II with the latter. The Commission's decisions on admissibility and its Article 31 reports, as well as the Court's judgments, are contained in the appendices to the report.

Kerim Yildiz
Executive Director
Kurdish Human Rights Project

[7] Judgment of 27 November 1997.
[8] Judgment of 24 April 1998.
[9] Judgment of 25 May 1998.

INTRODUCTION

The case of *Kaya v. Turkey* arose with the killing of the applicant's brother by the security forces in southeast Turkey. In *Kurt v. Turkey* the disappearance of the applicant's son, after military operations in southeast Turkey, led to the complaint. In both cases the victims of the alleged human rights violations were Turkish nationals of Kurdish origin.

These cases have two notable features in common. First, the decision of the European Court of Human Rights (the Court) in each case emphasises the importance of national remedies. The European Convention on Human Rights (the Convention) sets out the mutual obligations of States and their citizens in relation to national remedies. Article 26 of the Convention obliges applicants to exhaust domestic remedies before bringing their complaints before the Convention organs. Article 6 provides that States must allow their citizens access to a civil court for a remedy in respect of a violation of their human rights and article 13 provides that States must ensure effective remedies for all the rights set forth in the Convention.

In both *Kaya* and *Kurt* the applicants complained that there was no effective domestic remedy, or system of remedies, available in Turkey which would establish the truth of the event in question. This raised for consideration the relation between articles 6 and 13 of the Convention. In assessing whether or not there had been a failure to provide access to a civil court for the purposes of article 6(1), the Court observed that the manner in which the investigating authorities treated the death of the applicant's brother had had an impact on the applicant's access to the courts. Given this situation, the Court reasoned that it was appropriate to deal with the article 6 complaint regarding the denial of access to a civil court under article 13, as the latter article imposes a more general obligation to provide an effective remedy. Thus, the Court found that Turkey's violation in relation to domestic remedies was much wider than a straightforward denial of access to civil courts.

In examining the complaint under article 13, the Court in *Kaya* held that the nature of the right allegedly violated will have a bearing on the nature of the remedy which must be made available by the State. Applying this principle to unlawful killings as in *Kaya,* the Court held that the State must provide a thorough and effective investigation capable of leading to the identification and punishment of the perpetrators and being accessible to the relatives. Applied to disappearances as in the later case of *Kurt*, the Court held that the effective remedy required by article 13 was a meaningful investigation of the incident in question. In both *Kaya* and *Kurt* the Court considered that the deficiencies in the investigations and the biased approach of the investigating authorities constituted evidence of a denial of an effective remedy in contravention of article 13.

In *Kaya* the Court was also prepared to hold that the State had a positive duty under article 2 to conduct an effective investigation into the killing, and the failure to do so amounted to a violation of the right to life. It arrived at this conclusion despite its view that there was no evidence to establish beyond reasonable doubt that a deliberate unlawful killing had occurred.

In *Kurt*, however, the Court rejected the argument that the failure to conduct an effective investigation into the incident in question amounted to a contravention of the right to life guaranteed under article 2 of the Convention. In doing so it distinguished its recent decision in *Kaya* where there existed concrete evidence of a killing. The Court did, however, take into account the failure of the authorities to conduct a meaningful investigation into the applicant's claim in finding that there had been a serious violation of article 5, the right to liberty and security of life.

The second important feature which the Court's decisions in *Kaya* and *Kurt* share is that each serve to highlight the heavy burden applicant's bear in establishing a practice of violation of the Convention. In *Kaya* the Court was prepared to hold that Turkey had denied an effective remedy to the applicants but it did not consider there was sufficient evidence of an officially tolerated practice of violation of the right to an effective domestic remedy. Neither was the Court prepared to hold, as was argued in *Kurt*, that there existed an administrative practice of violation of the Convention in relation to "disappearances" in southeast Turkey. To support this latter argument the applicant relied upon the reports of the United Nations Working Group on Enforced and Involuntary Disappearances[1] and the findings of the Commission in *Aydin v. Turkey*, Report of the Commission adopted on 7 March 1996, as to unreliable Turkish detention centre records.

Each case clearly raises the question of how an applicant is to prove beyond reasonable doubt the existence of a practice of violation of Convention rights. Does the Court's approach in the cases of *Kaya* and *Kurt* indicate that there is need for a greater number of similar reports from independent international bodies and/or a greater number of decisions in cases finding the same types of violations before it will rule that a pattern has been established? If neither of these methods of providing evidence is sufficient to establish such a pattern, then the Court requires the resources to engage in fact-finding missions itself to enable it to obtain evidence of the alleged practice, as individuals clearly do not have the necessary resources to do so. Without the resources to undertake its own fact-finding and evidence from independent bodies not being considered sufficient by the Court, then it seems that the Court is not presently in a position to draw conclusions as to the existence of practices of Convention violations under the individual petition procedure.[2]

However this difficulty may be resolved in the future, the current limitations of the individual petition procedure in addressing widespread violations of human rights are clearly demonstrated by the cases of *Kaya* and *Kurt*. This position therefore suggests a crucial role for the inter-State complaint procedure in addressing widespread violations of human rights. Indeed, as it is the duty of Convention member States to ensure respect for the Convention rights, the fact that an inter-State complaint has not been brought against Turkey since 1987 may be a matter worthy of consideration and review.

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[1]The 1996 Report of the Working Group on Enforced or Involuntary Disappearances states that in 1994 the Working Group transmitted 72 newly reported cases, while in 1995 it transmitted 17 and in 1996 12 newly reported cases: UN Doc.E/CN.4/1997/34, para 350.

[2]See generally: Kamminga, M. T. 'Is the European Convention on Human Rights Sufficiently Equipped to Cope with Gross and Systematic Violations?' (1994) Vol 12, No2, p.153. Kamminga, at p.164, argues that the Court should be vested with the power to consider situations of gross violations of its own motion.

PART I: KAYA V. TURKEY

SUMMARY OF THE CASE

The case of *Kaya v. Turkey* concerned the killing of the applicant's brother by security forces in southeast Turkey, and the adequacy of Turkey's investigation into the incident. The applicant complained that Turkey's conduct gave rise to violations of articles 2, 6(1) and 13 of the European Convention on Human Rights (the Convention) and article 14 in respect of each of those breaches.

On 17 February 1998, the European Court of Human Rights (the Court) handed down its judgment in the case and held that although it was unable to find that the applicant's brother was killed unlawfully by State agents, there was nevertheless a violation of article 2 on account of the inadequacy of the official investigation. Further, the Court held that the failure to conduct an effective and thorough investigation into the incident gave rise to a violation of article 13.

THE FACTS

The facts as presented by the applicant

On 25 March 1993, the applicant's brother, Abdulmenaf Kaya, was walking with Hikmet Aksoy to fields approximately 300 to 400 metres from the village of Ciftlibahce and four kilometres from his own village of Dolunay, in the district of Lice which is situated in the province of Diyarbakir in southeast Turkey. On that day a military operation was being conducted in the locality.

Hikmet Aksoy turned off the road to attend to his work and was detained by soldiers. Abdulmenaf saw his friend being stopped by the soldiers and took fright running towards Ciftlibahce village. Seeing him running the soldiers gave chase, opened fire and killed him. The soldiers then planted a weapon near his body and took photographs of the scene. Villagers insisted that the security forces hand the body over to them as the deceased was the uncle of one of the inhabitants of a neighbouring village and no terrorist. The soldiers eventually relented and handed over the body. Meanwhile, Hikmet Aksoy was taken into custody and detained for six days.

The facts as presented by the Government of Turkey

The Government maintained that security forces arrived in the area on 25 March 1993 acting upon information that terrorists were in the vicinity. While conducting a field search they came under gunfire directed at them from a rocky area, a creek and from the surrounding hills. The security forces took cover and returned fire. The firing range was 300 to 1,000 metres. The terrorists retreated after approximately 30 minutes and in the lull the security forces recovered a dead body next to a gun, ammunition and three spent cartridges.

The team commander secured the area and called the Public Prosecutor of Lice, who flew in and conducted an autopsy at the scene. An incident report was drawn up and signed by six members of the security forces confirming this account of events. The identity of the deceased was discovered some months after in the course of an official investigation into the surrounding circumstances.

The findings of fact of the European Commission of Human Rights (article 31 report)

The Commission's Delegates heard the oral testimony of five witnesses - Dr Arzu Dogru who conducted the field autopsy on the applicant's brother; First Lieutenant Alper Sir; Senior Sergeant Ahmet Gumus; Senior Sergeant Pasa Bulbul; and Sergeant Altan Berk.

Neither the applicant nor Hikmet Aksoy gave evidence. Prior to the hearing the applicant notified the Commission that he feared reprisals should he do so and Mr Aksoy notified the Commission that he would not be attending the hearing as he and his family had been subjected to pressure by the police in order to prevent him from testifying. Furthermore, despite being served with a summons, both the Lice Public Prosecutor, Ekrem Yildiz, due to other commitments, and the Public Prosecutor of the Diyarbakir State Security Court, being of the view that he could be of no assistance, failed to attend.

In analysing the evidence the Commission noted that it was disadvantaged in its investigation by the failure of these witnesses to attend. In particular, it stated that it would have derived benefit from observing the cross-examination of Mr Aksoy since he claimed to be an eyewitness to the incident and noted that its fact-finding task was made more difficult by the absence of any detailed investigation at the domestic level. Furthermore, the Commission considered that there were a number of factors which gave rise to doubts regarding the Government's account and which were difficult to reconcile with the undisputed facts. Nevertheless, the Commission concluded that the applicant had not established beyond reasonable doubt that Abdulmenaf was deliberately killed by soldiers in the circumstances alleged.

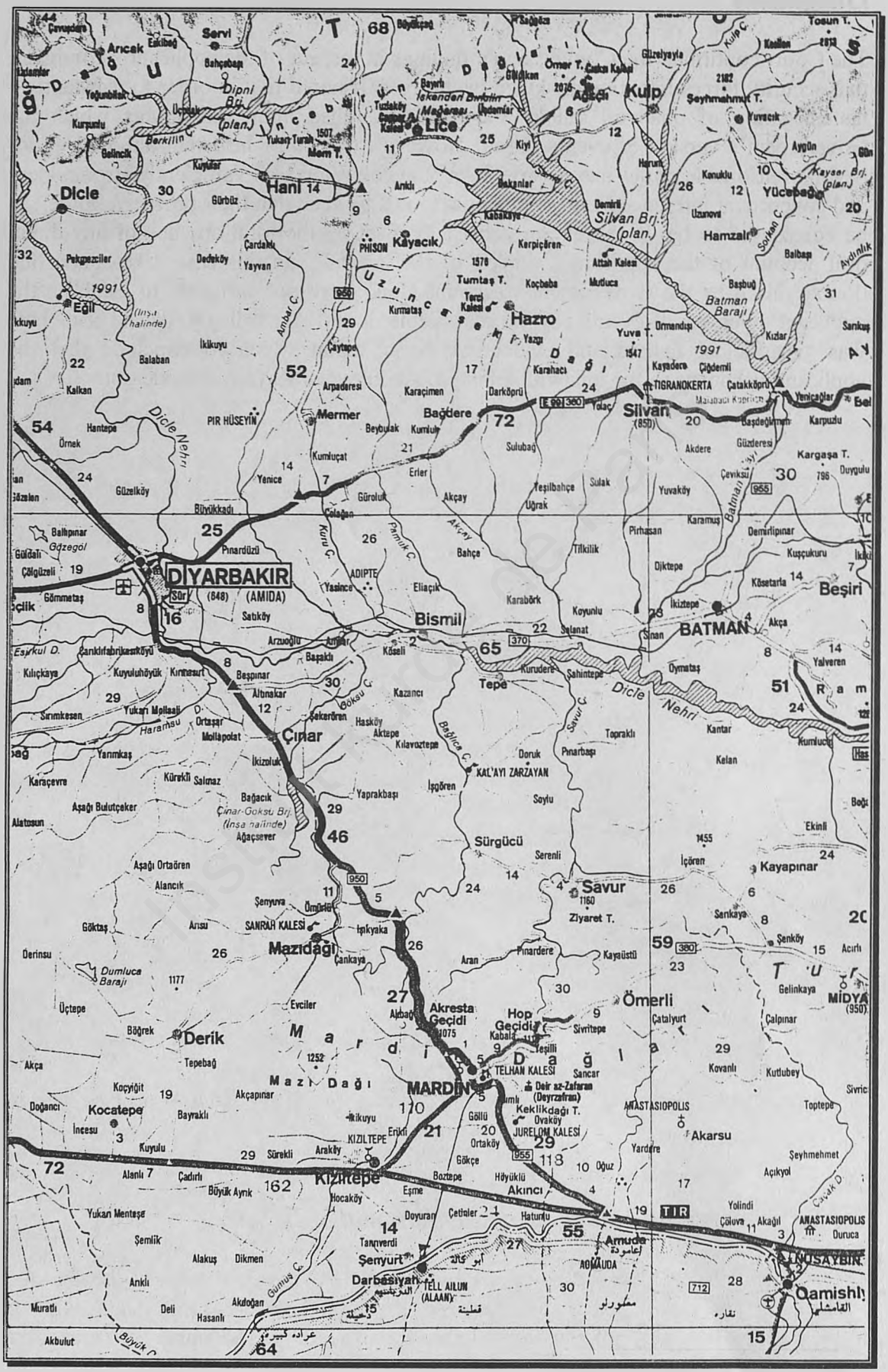
With respect to the investigation conducted by the authorities, the Commission found that the autopsy was "defective and incomplete". The inadequacies of the investigation were: (1) the autopsy report was deficient in that no attempt was made to record the number of bullets which struck the deceased or the distance from which the bullets had been fired and it was imprecise as to the location of the entry and exit wounds; (2) no tests for fingerprints or gunpowder traces were conducted at the scene; and (3) the authorities' approach to the incident was to assume that the deceased was a PKK terrorist, which was evident in the autopsy report (where it mentioned that the deceased was a PPK terrorist, in the wording of the non-jurisdiction decision and in the failure of the Public Prosecutor of the Diyarbarkir State Security Court to question Hikmet Aksoy as to possible involvement of the deceased with the PKK).

The findings of fact of the European Court of Human Rights (Judgment)

The Court confirmed the Commission's findings in respect of the applicant's complaint that security forces intentionally killed his brother. It noted that in order to substantiate his allegation of unlawful killing, the applicant relied upon the doubts which the Government's version of events raised. However, the Court held that although proof beyond reasonable doubt may follow from "the coexistence of sufficiently strong, clear and concordant inferences", these inferences must be such that their probative force can be considered to be, in the circumstances, "off-set by the total absence of any direct oral account of the applicant's version of the events".[3] In this case it reasoned that doubts raised by the Government's account alone were not sufficient to establish the applicant's version of events beyond reasonable doubt. Accordingly, it held that there was "insufficient factual and evidentiary basis" upon which to conclude that the applicant's claim as to the unlawful killing of Abdulmenaf Kaya was made out.

[3]See the Court's judgment at para 77.

MAP OF THE AREA WHERE THE ALLEGED INCIDENT OCCURRED



THE LEGAL PROCEEDINGS

Chronology of events and legal proceedings

25 March 1993	Abdulmenaf Kaya shot by security forces during a military operation.
5 May 1993	Report of investigation by gendarmes.
20 July 1993	Lice Public Prosecutor issues decision of non-prosecution and transfers file to Diyarbakir State Security Court.
23 September 1993	Application filed with the European Convention of Human Rights.
17 June 1994	Public Prosecutor takes statement from Hikmet Aksoy regarding Abdulmenaf Kaya's death.
20 February 1995	Commission declares application admissible.
1 November 1995	Applicant notifies the Commission that he is unable to attend the investigation hearing as he fears reprisals if he were to give evidence.
8 November 1995	Hikmet Aksoy informs Commission that he and his family have been subject to pressure by the police in order to deter them from giving evidence at the investigation hearing and that he therefore would not be attending.
9 November 1995	Commission holds investigation hearing at Diyarbakir, Turkey.
24 October 1996	Commission adopts Article 31 report.
21 October 1997	Public hearing before the European Court of Human Rights at Strasbourg.
17 February 1998	Court finds Turkey to be in breach of articles 2 and 13 of the Convention.

The proceedings before domestic authorities

On 25 March 1993, an autopsy was conducted on Abdulmenaf Kaya at the site of the incident. The report stated that there were a large number of entry and exit bullet wounds to the body, in the throat, above the heart, in the upper left area of the

abdomen, around the navel and the groin, in the left hip and in both femurs, which were broken as a result of the impact of the bullets. Photographs were taken of the deceased, although, despite several requests from the Commission for their production, the Government failed to retrieve them.

A decision of non-jurisdiction was issued on 20 July 1993 by the Public Prosecutor at Lice. Subsequently, the file was transferred to the Public Prosecutor at Diyarbakir State Security Court. In his report, the Public Prosecutor stated that his investigation was in respect of a crime committed by the applicant's brother in co-operation with "other PKK terrorists" who took part in an armed clash with security forces on 25 March 1993. The Public Prosecutor concluded that the investigation was more appropriately dealt with by the prosecution service of the State Security Court given the aims of the terrorists and the fact that the incident took place in the emergency region.

The State Security Court then transmitted the file to the Lice District Administrative Council for investigation. On 23 July 1993, an expert's report on the weapon and ammunition found alongside Abdulmenaf Kaya's body was drawn up by the Diyarbakir police forensic laboratory. On 17 June 1994, a Public Prosecutor took a statement from Hikmet Aksoy.

How the case was brought before the European Commission and Court of Human Rights

On 1 November 1998, Protocol 11 of the European Convention on Human Rights came into operation. The effect of Protocol 11 is to merge the European Commission of Human Rights and the European Court of Human Rights so that the European Court of Human Rights deals with all proceedings under the Convention, including fact-finding investigations. As *Kaya* and *Kurt* were decided prior to the Protocol 11 procedure coming into effect, an outline of the earlier procedure is given below.

The procedure involved in lodging a complaint with the former Commission has already been explained in our previous publication *Aksoy v. Turkey; Aydin v. Turkey - A Case Report on the Practice of Torture in Turkey* (December 1997). Further information about the procedure in the Commission and the Court, can be obtained from leading human rights textbooks such as *The Law of the European Convention of Human Rights* by D.J.Harris, M.O'Boyle and C.Warbrick (Butterworths, London Dublin and Edinburgh) and *Theory and Practice of the European Convention of Human Rights* by P. van Dijk and G.J.H. van Hoof (Kluwer Law and Taxation Publishers, The Netherlands).

The investigation hearings ("taking of oral evidence") under the pre-Protocol 11 procedure

If the former Commission considered it necessary, it was able, under former article 28(1)(a) of the Convention to "undertake...an investigation for the effective conduct of

which the state concerned shall furnish all necessary facilities". These powers of investigation were used in inter-state complaints and sometimes took the form of on-the-spot inquiries such as those in the complaint brought by Greece against the United Kingdom.[4]

In the case of individual complaints where the facts were in dispute, action under article 28(1)(a) of the Convention took the form of the Commission investigating the circumstances of a particular case, whereby the applicant's and Government's witnesses gave evidence before a selected number of Commission delegates (usually three).[5] Investigation hearings were held *in camera* with the parties in attendance. For the sake of convenience, they were usually conducted in the country of the respondent government. In *Kaya*, the Commission hearings were conducted in Diyarbakir before two Commission delegates.

The procedure adopted during investigation hearings required the parties to draw up a list of their witnesses, and subject to the Commission's approval and time constraints, for summonses to give evidence at the Commission hearing to be served on proposed witnesses. The Commission would hear the applicants and their witnesses first. The Government would then cross-examine them. The Government's witnesses were usually heard last and then cross-examined by the applicants' legal representatives. Investigation hearings enabled the Commission to establish the facts. Having had the advantage of hearing the witnesses 'live', it was able to observe their reactions and demeanor and thereby assess the veracity and probative value of their evidence. The requisite standard was that of proof beyond reasonable doubt but, as the Court has constantly stated in its case law (see for example, *Ireland v. United Kingdom,* Judgment of 18 January 1978), such proof could follow from "the coexistence of sufficiently strong, clear and concordant inferences".[6] In the course of investigation hearings, parties were also permitted to present documentary evidence to the Commission, including witness statements.

In *Kaya,* the Commission heard evidence from five witnesses. The applicant did not attend the hearing as, he stated, he feared reprisals if he were to give evidence before the Commission. The applicant's only eyewitness to the events in question, Hikmet Aksoy, also failed to appear to give evidence due to alleged Government threats towards him and his family.

[4]Application No.176/56, YB II (1972). On that occasion, an inquiry was made in Cyprus into the existence of certain torture practices allegedly undertaken by the UK and whether the threat to public order was such that the UK's interference was justified.
[5]The Commission was not empowered to compel witnesses to attend.
[6]*Supra* note 3, para 66.

THE APPLICANT'S COMPLAINTS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Before the Court, the applicant in *Kaya* complained of violations of articles 2, 6(1) and 13 of the Convention and violations of the same articles in conjunction with article 14. The applicant did not maintain his complaint under article 3. The Court held that Turkey was in breach of articles 2 and 13 of the Convention, as set out in Table 1.

Table 1

Articles allegedly violated	***Commission's Opinion***	***Court's Judgment***
Art.2	*Violation*	*Violation*
Art.3	*No violation*	*Complaint not pursued before the Court*
Art.6(1)	*Violation*	*More appropriate to consider under art.13*
Art.13	*No separate issue arose*	*Violation*
Art.14	*No violation*	*No violation*
Administrative practice of Convention breaches	*Not necessary to decide*	*No violation*

Article 2: Right to life

Article 2 of the Convention provides as follows:

1. *Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.*

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
(a) in defence of any person from unlawful violence;
(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

The applicant argued that the security forces without justification had deliberately killed his brother and that the authorities had failed to investigate the circumstances thereby engaging the State's responsibility under article 2. The applicant also argued that article 2 was violated on the ground that there was no independent system of investigating complaints of unlawful killing by security forces under Turkish law, the investigation of security force action being carried out by administrative boards and

councils whose decisions are influenced by the attitude taken by the security forces with respect to the complaints made against them.

The Government argued that the applicant's testimony was inconsistent and that the evidence of Hikmet Aksoy lacked credibility. Further, it submitted that the unavailability of the applicant's witnesses for cross-examination undermined the weight of that evidence. By contrast, the Government submitted that the testimony given by the members of the security forces under cross-examination was firm. It made submissions on other evidence, which it said supported their version of events and challenged the Commission's observations as to the evidence. In summary, it maintained that the applicant's brother had been lawfully killed by the security forces while taking part in a terrorist attack on their members and that the investigation conducted by the authorities was entirely adequate and appropriate under the circumstances.

The Commission found that the actual circumstances in which the applicant's brother died remained "a matter of speculation and assumption". Accordingly, it held that it had not been established, beyond reasonable doubt, that security forces had deliberately killed the applicant's brother. As to the adequacy of the investigation, the Commission considered that the uncertain circumstances surrounding the death required that the authorities conduct a thorough investigation. After reviewing the steps taken by the authorities to investigate, the Commission found that there were serious deficiencies in the conduct of the autopsy, the forensic examination of the body and the scene, and the steps taken by the public prosecutor, Ekrem Yildiz. It held that the investigation was so inadequate as to amount to a failure to protect the right to life under article 2 of the Convention.

The Court unanimously agreed with the Commission's findings as to the killing itself, holding that there was an insufficient factual and evidentiary basis upon which to conclude beyond reasonable doubt, that the applicant's brother was deliberately killed by the security forces.

With regard to the adequacy of the Government's investigation into the incident, the Court again agreed with the Commission and held that there had been a violation of article 2. It recalled that the right to life guaranteed by article 2 contained a procedural protection, requiring States to establish a procedure for reviewing the lawfulness of the use of lethal force by State authorities. It reasoned that the obligation to protect life under article 2 together with the general duty under article 1 to secure the rights under the Convention, "requires by implication that there should be some form of official investigation when individuals have been killed as a result of the use of force by, *inter alios*, agents of the State".[7] In practical terms, this meant subjecting the actions of State agents to independent and public scrutiny resulting in a determination as to whether the action was justifiable. The Court rejected the Government's contention that it was only required to observe minimal investigatory formalities, as the incident involved a clear-cut case of lawful killing by the security forces, because the official version of events was impaired by the absence of corroborating evidence. In addition, the Court considered that the steps which were taken by the Government were in

[7]Ibid., para 86.

themselves deficient. In particular, the Court noted that the Public Prosecutor apparently assumed that the deceased was a terrorist who died in a clash with the security forces and never tested that view against other evidence nor did he seek to verify the statement by Hikmet Aksoy. The terms of his non-jurisdiction decision effectively excluded any possibility that that the security forces may have been culpable, including with respect to the proportionality of the force used. The Court took the view that neither the prevalence of armed clashes nor high incidence of fatalities could displace the obligation under article 2.

Regarding the applicant's argument that the right to life was inadequately protected under domestic law, the Court held that it was not necessary to consider the claim in view of the fact that the Court found a violation on the basis of the inadequacy of the Government's investigation of the incident.

Article 6: Right to access to civil court

Article 6(1) of the Convention relevantly provides as follows:

In the determination of his civil rights ... everyone is entitled to a ... hearing ... by an independent and impartial tribunal established by law.

The applicant submitted that the inadequacy of the Government's investigation into his brother's death deprived him, and the deceased's other next-of-kin, of any prospect of successfully approaching a civil court for the purpose of making a claim for compensation and thereby constituted a breach of article 6 of the Convention. The applicant relied on the Public Prosecutor's entry in the post-mortem report that his brother was a terrorist who was killed in an armed confrontation with the security forces and the decision of non-jurisdiction to establish that the relatives were effectively precluded from bringing civil proceedings as there were no prospects of success.

The Government contended that, under Turkish law, a civil court was not precluded from adjudicating on a claim in the absence of a criminal investigation and was bound by a decision of a criminal court acquitting an accused of criminal responsibility. In addition, the Government relied on the failure of the applicant to attempt to bring a civil suit in arguing that there was no breach of article 6.

The Commission held that the Government's defective investigation into the incident effectively deprived the applicant of access to a tribunal for the determination of his civil rights and therefore gave rise to a breach of article 6(1) of the Convention.

The Court differed from the Commission in its conclusion on this point. The Court held that it was not possible to determine the outcome of a claim for compensation in a domestic court. Furthermore, it was of the view that the article 6 complaint was bound up with the more general complaint regarding the manner in which the investigating authorities treated the death of his brother and the repercussions of this on access to effective remedies which would have addressed the grievances the family harbored as a

result of the killing.[8] Accordingly, the Court held that the article 6 complaint was more appropriately dealt with under article 13 as this article was concerned with the more general obligation of States to provide an effective remedy in respect of violations of the Convention.

Article 13: Right to an effective remedy

Article 13 of the Convention provides as follows:

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.

The applicant argued that there was no effective remedy that could be invoked by the relatives in order to allow them the justice of securing a determination as to the truth of the circumstances of Abdulmenaf Kaya's death. Further, the applicant argued that there was no effective system of remedies that could establish the truth of the events in question. The applicant relied on the serious deficiencies of the investigation, including the attitude of the public prosecutor and the failings of the administrative board.

The Government responded that there were remedies available to the applicant under Turkish law but that the applicant did not even attempt to bring proceedings to obtain compensation or complain about his brother's death.

The Commission held that it was not necessary to decide whether or not there had been a violation of article 13 having regard to its finding that there was a violation of article 6.

The Court, by a majority of eight votes to one, recalled that article 13:

"... require(s) the provision of a domestic remedy to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under the Convention. The scope of the obligation under article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by article 13 must be 'effective' in practice as well as in law, in particular in the sense that its exercise must not be justifiably hindered by the act or the omissions of the authorities of the respondent State".[9]

It held that the nature of the right violated had implications for the nature of the remedies which must be guaranteed. Where the allegation is one of unlawful killing, the Court held that article 13 required "in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for

[8]Ibid., para 105.
[9]Ibid., para 106.

the relatives to the investigatory procedure". Thus the requirements imposed on States by article 13 are broader than that imposed under article 2 to conduct an effective investigation.[10]

In the present case, the Court reasoned that because the relatives had arguable grounds for claiming that Abdulmenaf Kaya was unlawfully killed by the security forces and as the investigations carried out by the authorities were deficient, then the relatives of the deceased were denied an effective remedy against the authorities contrary to article 13 of the Convention.

Article 14: Freedom from discrimination

Article 14 of the Convention provides as follows:

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

The applicant argued that the security forces adversely treated his brother because he was of Kurdish origin in violation of articles 2, 6 and 13 in conjunction with article 14 of the Convention. In particular, it submitted that the attitude of the security forces was to assume all Kurdish civilians were involved with the PKK.

The Government did not address this allegation.

The Commission held that the claim was, on the evidence, unsubstantiated.

The Court agreed with the Commission and unanimously dismissed the complaint under article 14.

Administrative practice of Convention breaches

The applicant contended that there was an officially tolerated practice of conducting inadequate investigations into killings committed by security force members in southeast Turkey and a pattern of not prosecuting those responsible. The applicant also complained that the State had adopted a practice of denial towards any claims of Convention violations and that this frustrated the rights of victims to effective remedies.

The Commission found that it was unnecessary to decide either of these claims.

The Court held that the claims were, on the evidence, unsubstantiated.

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[10]Ibid., para 107.

Just satisfaction: Compensation under article 50

Article 50 of the Convention provides as follows:

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

Entitlement to Just Satisfaction

Article 50 of the Convention[11] provides that the Court should grant compensation "if necessary". There is therefore no entitlement to an award of compensation and the Court, in exercising its discretion, is guided by the circumstances of each case. On many occasions the Court has held that no award should be made since the finding of a violation constituted sufficient just satisfaction. This reasoning would be quite unsatisfactory in respect of cases involving wilful destruction of property by the authorities.

Where the Court awards just satisfaction, it may do so by way of damages for pecuniary and non-pecuniary loss and by way of covering the successful applicant's legal costs. Pecuniary damages refer to the loss of tangible property, as well as loss of past and future earnings. Non-pecuniary damages are damages awarded in respect of distress, anxiety, loss of employment prospects and other forms of pain and suffering. As regards costs and expenses, the injured party must prove that these were actually and necessarily incurred and were reasonable in amount.

The applicant claimed a total sum of £60,000 by way of compensation for non-pecuniary damage, comprising £30,000 for the deliberate unlawful killing of his brother taking into account that this violation left a wife and seven children without any means of support; £10,000 in respect of the failure of the authorities to investigate the killing and their assumption that he was a terrorist; and £20,000 for the violation of articles 6 and 13 taking into account that there was an administrative practice of a violation of article 13. The applicant also claimed a total sum of £19,840.60 in respect of legal costs and expenses.

The Government argued that the applicant's claims were unsubstantiated and observed that he had not sought a remedy in the Turkish courts. Therefore, the applicant was not entitled to any award in just satisfaction.

The Court considered that a compensatory award of £15,000 should be made for breach of article 5 in respect of the applicant's son. In addition, the Court awarded £10,000 compensation to the applicant in respect of Turkey's breach under articles 3 and 13 of the Convention arising from the failure of the authorities to investigate her

[11]See generally: A. R. Mowbray, 'The European Court of Human Rights Approach to Just Satisfaction' [1997] Winter, Public Law, 647.

son's disappearance.

Regarding legal costs, the Court awarded a total sum of £15,000 having regard to the particularly complex issues raised in the case. It awarded interest based on the statutory rate of interest applicable in the United Kingdom, being 8% p.a.

PART II: KURT V. TURKEY

SUMMARY OF THE CASE

The case of *Kurt v. Turkey* concerned the disappearance of the applicant's son, Uzeyir Kurt, after being taken into custody by soldiers during military operations in the applicant's home village. The case also dealt with the requirement for the exhaustion of domestic remedies, the obligation of States towards parents of those who have "disappeared" and the problem of State intimidation of applicants and their lawyers for the purpose of interfering with the right of individual petition under the European Convention.

The applicant alleged that the State had violated articles 2, 3, 5, 13, 14, 18 and 25(1) of the European Convention on Human Rights (the Convention). On 25 May 1998, the European Court of Human Rights (the Court) delivered its judgment and found violations of articles 5 and 13 with respect to the State's conduct towards Uzeyir Kurt, a violation of article 3 with respect to the applicant herself and a violation of article 25(1) of the Convention.

THE FACTS

The facts as presented by the applicant

On 23 November 1993, Government security forces took up position around the village of Agilli near Bismil in southeast Turkey, acting upon intelligence reports that three terrorists would visit the village. There then ensued two clashes between the security forces and members of the Kurdistan Workers' Party (the PKK). The security forces proceeded to conduct a search of each house in the village and, on 24 November, the soldiers gathered the villagers together in the local schoolyard. On discovering that Uzeyir Kurt, a Turkish national of Kurdish origin, was not there, a search was conducted as a result of which Uzeyir was taken into custody and detained in a villager's house overnight.

On the morning of 25 November a child told Mrs Kurt, the applicant, that her son, Uzeyir, wanted cigarettes. The applicant found Uzeyir in front of a villager's house. She saw bruises and swelling on his face as though he had been beaten. He told his mother that he was cold and she returned with his jacket and socks. She then left as the soldiers would not allow her to stay. This was the last she was to see of her son and, it was submitted, there was no evidence that her son was seen elsewhere after this time.

The facts as presented by the Government of Turkey

The Government responded by directly denying that Uzeyir Kurt had been taken into custody by the security forces. It further stated that there was no reason for him to be taken into custody by them.

The Government's theory of the case was that Uzeyir had disappeared because either he had joined, or had been kidnapped by, the PKK. The Government relied upon allegations of previous involvement with the PKK by other Kurt family members and the fact that the applicant stated that Uzeyir hid when the security forces arrived in the village and that his house was burned down following the clash in the village. It also relied on the testimony of Mehmet Karabulut before the Commission's Delegates to the effect that, on the night following the first clash, Uzeyir was in Mevlude Kurt's home sleeping but when he woke Uzeyir was no longer there and that Karabulut had not seen or heard soldiers in the house. In addition, the Government emphasized the written statement of Hasan Kilic to the gendarmes, which affirmed that Mrs Kurt came to his house, talked to her son, who had spent a night there and then left with him. Further, he stated that soldiers had not left with Uzeyir, that her son had not asked for cigarettes to be brought to him at Kilics's house and he had not been detained in front of the house by soldiers or village guards.

The Government also relied upon the oral testimony of Captain Cural given at the Delegates' hearing to the effect that no village guards had entered the village to back-up the military operation being conducted. In addition, the Government challenged the applicant's account of events as being inconsistent, contradictory and unsubstantiated.

As to the allegation of intimidation of the applicant in order to persuade her to withdraw her complaints to the European Commission, the Government denied that she was subjected to any pressure. On the contrary, the Government argued that the applicant had acted in accordance with her own free will when she rejected the application to the European Commission. In particular, the Government pointed to allegations contained in the application which the applicant later denied that she had made. It argued that it was her lawyers, not the authorities, who had put pressure on the applicant with a view to abusing the Convention process for political purposes and, for this reason, the prosecution commenced against the applicant's lawyer was justified.

The findings of fact of the European Commission of Human Rights (article 31 report)

The Commission's Delegates had the benefit of hearing the oral testimony of six witnesses (13 had been summoned to give evidence) - the *muhtar* of the village and the applicant's brother-in-law; the public prosecutor in Bismil, whom the applicant first approached regarding her son's disappearance; the Commander of the relevant district gendarmerie, who had proposed the plan for the military operation in Agilli village; a commander of a commando unit which was deployed during the military operation; and Mehmet Karabulut, who had seen the applicant's son for the last time at Ali and Mevlude Kurt's house when the military operation commenced.

In assessing the evidence, the Commission had regard, *inter alia*, to "the need to take into account when reaching its conclusions the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact"[12]. The Commission also took into account the vulnerable position of villagers from southeast

[12]See Commission's Article 31 Report at para 144.

Turkey when giving evidence about incidents involving the PKK and the security forces.

The Commission found that, on 24 November 1993, a military operation, involving the gathering together of villagers in the schoolyard and the searching of their houses, was carried out in Agilli village. The previous evening terrorists had entered the village. Clashes between the terrorists and the security forces occurred during the operation and houses, including those of the applicant and her son, were burned down and 12 villagers taken into custody. The security forces left the village late on 25 November.

The Commission was satisfied that, as alleged by the applicant, Uzeyir Kurt had stayed in his uncle and aunt's house on the night of 23 November 1993 but that, when the villagers were gathered in the schoolyard by the security forces, Uzeyir was not among them. Further, it accepted the applicant's evidence that she saw Uzeyir surrounded by soldiers and village guards outside Hasan Kilic's house on the morning of 25 November and that this was the last time he was seen by any member of the family or the village.

In arriving at these findings the Commission preferred the applicant's evidence to that of the Government's witness, Hasan Kilic, who failed to respond to the summons to attend and give evidence before the Commission's Delegates. Nor did the Commission find the applicant's evidence significantly inconsistent, contradictory or unsubstantiated.

The findings of fact of the European Court of Human Rights (Judgment)

The Court recalled that, under its case law, fact finding is primarily the role of the Commission. It stated:

"While the Court is not bound by the Commission's findings of fact and remains free to make its own appreciation in the light of the material before it, it is only in exceptional circumstances that it will exercise its powers in this area."[13]

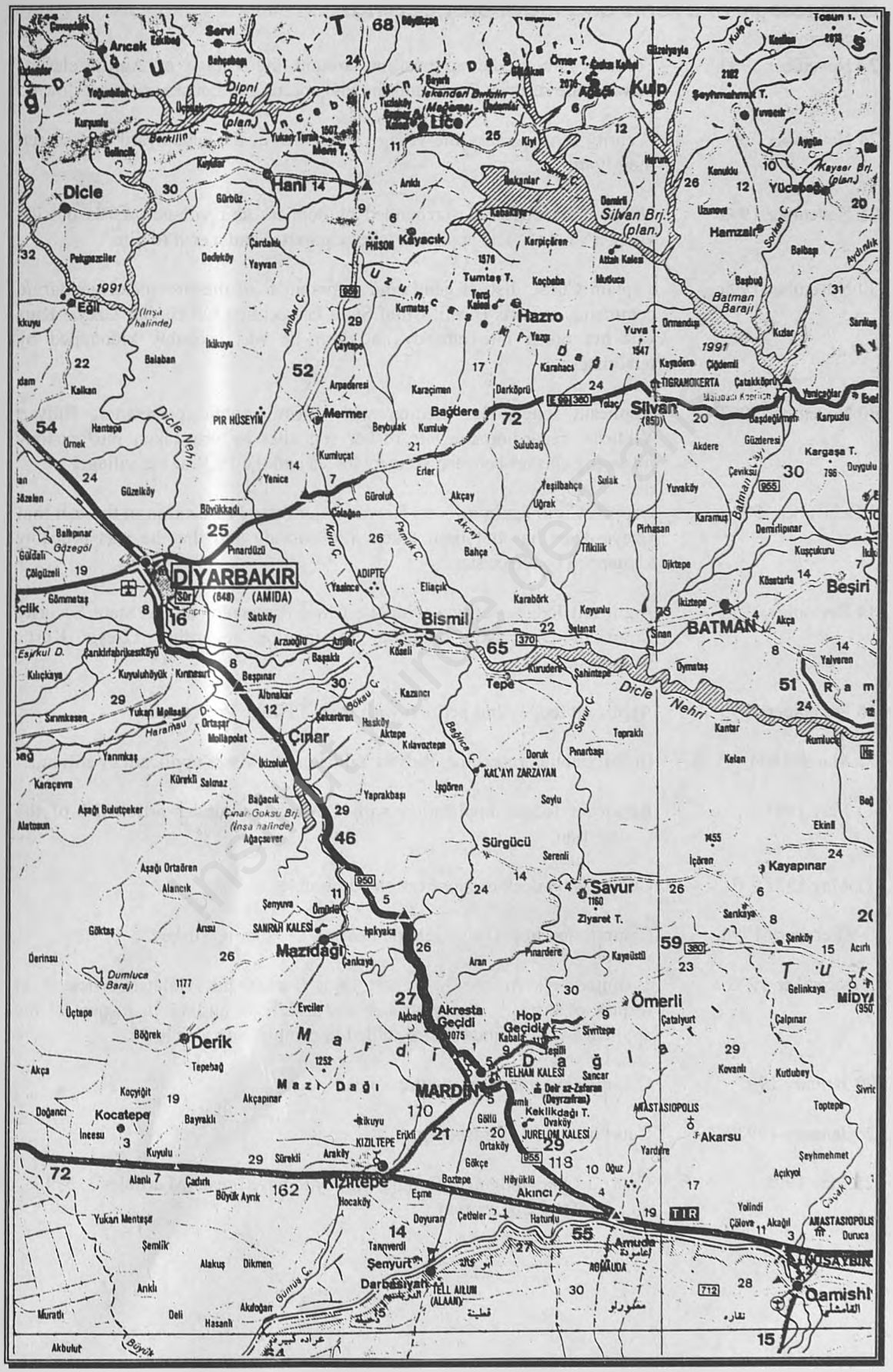
In *Kurt*, the Commission established the facts on the basis of an investigation during the course of which documentary evidence, including written statements, was submitted and oral evidence was heard. Witnesses were examined and cross-examined in detail and the Commission was therefore in a position to observe their demeanor and assess the veracity and probative value of the evidence given by the parties.

Before the Court, the Government disputed the Commission's findings of fact and contended that it had not been proved, beyond reasonable doubt, that the applicant had seen her son in the circumstances alleged. The Court reviewed the approach taken by the Commission towards the evidence, with particular attention to the manner in which the Commission dealt with the inconsistencies in the applicant's evidence and the conflicting evidence of Hasan Kilic. It concluded that the Commission had properly

[13]See the Court's judgment at para 98.

assessed all the evidence before it. Accordingly, it considered that in all the circumstances the Commission could properly conclude, beyond reasonable doubt, that the applicant did see her son outside Hasan Kilic's house as alleged and that he has not been seen since.

MAP OF THE AREA WHERE THE ALLEGED INCIDENT OCCURRED



THE LEGAL PROCEEDINGS

Chronology of events and legal proceedings

23 November 1993	Security forces take up position around the village of Agilli, clashes between the security forces and the PKK occur and houses are burnt down.
24 November1993	Security forces gather the villagers together in the schoolyard and search their homes.
25 November 1993	Uzeyir Kurt observed surrounded by soldiers and village guards outside villager's house. The applicant takes cigarettes and a coat to him.
30 November 1993	Captain Cural, district gendarme commander of the provincial gendarme command, informs Bismil Chief State Prosecution Office that Uzeyir Kurt was not taken into custody and that he was probably kidnapped by terrorists.
30 November 1993	Applicant lodges 1st petition with Bismil public prosecutor, Ridvan Yildirim, regarding the fate of her son after he was taken into custody following clashes between security forces and the PKK at her village.
4 December 1993	Captain Cural again informs Bismil Chief State Prosecution of the fact that Uzeyir Kurt has not been taken into custody and that he was probably kidnapped by terrorists.
14 December 1993	Applicant lodges petition with the Chief Prosecutor at the State Security Court of Diyarbakir requiring information regarding Uzeyir Kurt's whereabouts.
15 December 1993	Applicant lodges 2nd petition with Bismil Public Prosecutor.
21 March 1994	Bismil public prosecutor, Ridvan Yildirim, dismisses applicant's petition.
11 May 1994	Applicant lodges application with Commission under article 25 of the Convention.
22 May 1995	Commission declares application admissible.
8-9 February 1996	Commission holds investigation hearing at Ankara, Turkey.
5 December 1996	Commission's Article 31 Report finds Turkey has violated article 5 in respect of Uzeyir's disappearance and articles 3 and 13 in respect of the applicant. It also finds Turkey failed to comply with article 25.
22 January 1997	Commission refers case to the Court.
26 January 1997	Court hearing at Strasbourg.
25 May 1998	Court delivers judgment finding Turkey to have breached articles 3, 5, 13 and 25 of the Convention.

The proceedings before domestic authorities

Article 26 of the Convention provides as follows:

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

The applicant lodged a number of petitions with the Turkish authorities regarding her son's disappearance. First, on 30 November 1993, the applicant lodged a petition with the Bismil public prosecutor, Ridvan Yildirim, stating her son had been taken into custody by the security forces and requesting that she be informed about his fate. In response to this petition, Captain Cural, district gendarme commander, informed the Bismil Chief State prosecution service that Uzeyir Kurt had not been taken into custody and, it was believed, he had been kidnapped by terrorists. On 21 March 1994, the Bismil public prosecutor dismissed the applicant's petition. In the text of the decision the prosecutor stated that following a clash between the PKK and security forces, PKK members escaped from the village, kidnapping Uzeyir. Further, it stated that the crime involved fell within the jurisdiction of the State security courts and was referred to the Diyarbakir State Security Court.

Secondly, on 14 December 1993, the applicant lodged a petition with the Chief Prosecutor at the State Security Court at Diyarbakir, stating that Uzeyir Kurt had been taken into custody by gendarmes and that they were concerned for his life and requested information as to his whereabouts. The Chief State Prosecutor noted on the petition that Uzeyir Kurt was not on their custody records. Thirdly, on 15 December 1993 the applicant lodged a second petition, which repeated the terms of the 14 December petition.

The Government raised the preliminary objection before both the Commission and the Court that the applicant had not challenged the authorities' findings by instituting legal proceedings at the domestic level. In particular, it noted that under Turkish law the applicant could have sued the authorities in administrative law proceedings on the basis of their strict liability for damage caused by their acts. A further remedy was available under criminal law. However, as the applicant did not resort to any of these remedies, she must be considered to have failed to comply with article 26 of the Convention.

The Court rejected the Government's preliminary objection on the grounds that it was raised outside the time limit prescribed by the Rules of Court and because there were special circumstances that released the applicant from the obligation to exhaust domestic remedies. Regarding the latter point, the Court observed that the applicant had contacted the Bismil public prosecutor twice and also petitioned the State Security Court at Diyarbakir. It was satisfied that on all occasions she persisted in maintaining that her son had been taken into custody, but the authorities gave no serious consideration to her claim and failed to conduct an investigation into her complaint. In these circumstances, the Court held, there was no basis for any "meaningful

recourse"[14] by the applicant to domestic legal remedies.

THE APPLICANT'S COMPLAINTS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The applicant in *Kurt* complained of violations of articles 2, 3, 5, 13 and 14 of the Convention on account of her son's 'disappearance' and also complained that she herself was a victim of a violation of articles 3 and 13 of the Convention. In addition, she claimed that Turkey had failed to comply with its obligations under articles 18 and 25(1).

The Court, having agreed with the Commission's findings that the facts as alleged by the applicant were established, held that Turkey was in breach of a number of articles of the Convention. The Commission's and the Court's findings as to whether or not the articles were violated are set out in Table 1.

Table 1

Articles allegedly violated	***Commission's Opinion***	***Court's Judgment***
Art.2 regarding applicant's son	*Not necessary to decide*	*Not necessary to decide*
Art.3 regarding applicant's son	*Not appropriate to consider under this article*	*Not appropriate to consider under this article*
Art.3 regarding applicant	*Violation*	*Violation*
Art.5 regarding applicant's son	*Violation*	*Violation*
Art.13	*Violation*	*Violation*
Art.14	*No violation*	*No violation*
Art.18	*No violation*	*No violation*
Art.25(1)	*Violation*	*Violation*
Administrative practice of disappearances	*Not necessary to decide*	*No violation*

[14]Ibid., para 83.

Article 2: Right to life

Article 2 of the Convention provides as follows:

1. *Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.*

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
(a) in defence of any person from unlawful violence;
(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

The applicant contended that the fact that her son had been taken into custody and had not been seen since was sufficient evidence upon which to find a violation of article 2. The applicant urged the Court to find Turkey to be in breach of its positive obligation to protect her son's life and cited the Inter-American Court of Human Rights in *Velasquez Rodriguez v. Honduras*, Judgment of 29 July 1988, and the United Nations Human Rights Committee in *Mojica v. The Dominican Republic*, Judgment of 15 July1994.

Alternatively, the applicant argued, the well-documented history of torture and "disappearances" in southeast Turkey constituted evidence of a "practice of disappearance" such as to ground a claim that her son was the victim of an aggravated violation of the provision.

Furthermore, the applicant argued that the Court's case law provided two bases upon which to find an article 2 violation. First, applying the approach taken by the Court in *Tomasi v. France*, Judgment of 27 August 1992, the authorities had failed to provide any convincing explanation as to how he met his presumed death. Secondly, applying *McCann v. United Kingdom*, Judgment of 27 September 1995, the authorities' failure to conduct a prompt, thorough and effective investigation into Uzeyir Kurt's disappearance must itself be seen as a separate violation of article 2.

The Government maintained that there was no evidence to substantiate the applicant's allegations and thus no issue under article 2 arose.

The Commission rejected the applicant's arguments and considered that, in the absence of any evidence as to the fate of Uzeyir Kurt subsequent to his detention, it would be inappropriate to draw the conclusion that he had been a victim of a violation of article 2. Rather, the Commission thought that the claim was more properly considered under article 5 of the Convention.

The Court unanimously agreed with the Commission's finding. In particular, it held that the circumstantial evidence of her son's initial detention and general analyses of evidence of a state practice of disappearance and ill-treatment of detainees was not sufficient to establish, beyond reasonable doubt, that the applicant's son was killed by the authorities. Rather, it stated that it required "concrete evidence" before being

prepared to find that there was a death in custody.[15] Such evidence existed in the case of *McCann* where there was real evidence of a fatal shooting which could give rise to a positive obligation under article 2 to conduct an effective investigation into the circumstances surrounding an alleged unlawful killing by the agents of that State. Furthermore, the Court was not satisfied that there existed a practice of violation of article 2 by Turkey on the evidence adduced.

Article 3: Freedom from torture and inhuman and degrading treatment and punishment

Article 3 of the Convention provides as follows:

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

(a) Regarding Uzeyir Kurt

The applicant argued that the fact of her son's disappearance in a context devoid of basic, judicial safeguards must have exposed him to acute psychological torture. Further, the applicant had seen that he had been beaten by the security forces which gave rise to a presumption that he was physically tortured. This presumption was reinforced by the existence of a high incidence of torture of detainees in Turkey.

The applicant also argued that there had been an aggravated violation of article 3 on account of the existence of an officially tolerated practice of disappearances and ill treatment of detainees.

Finally, the applicant submitted that there were two further separate violations of article 3. First, there was a failure by the authorities to provide any satisfactory explanation for her son's disappearance. Secondly, the authorities failed to conduct an adequate investigation into her complaint.

The Government denied there was any evidence to substantiate the applicant's claims.

The Commission held that there was an absence of evidence as to the ill treatment to which Uzeyir Kurt may have been subjected while in custody and, therefore, it was not appropriate to consider the complaints of ill treatment under article 3. Rather, the matter fell to be considered under article 5.

The Court unanimously agreed with the Commission, relying on its reasons that lead to the rejection of the applicant's arguments regarding article 2. The Court also pointed to the necessity for further evidence of the alleged ill treatment and the alleged State practice of disappearance and ill treatment of detainees.

[15]Ibid., para 107.

(b) Regarding the applicant

The applicant also argued that she had been subjected to inhuman and degrading treatment on account of her son's disappearance. She relied on the decision of the United Nations Human Rights Committee in *Quinteros v. Uruguay*, Judgment of 21 July 1983, which held that next-of-kin of 'disappeared' persons must be considered victims of, *inter alia*, ill-treatment.

The Government argued that there was no evidence upon which to hold that security forces had detained the applicant's son. Accordingly, it reasoned, there was no causal link between the alleged violation of her son's rights and her distress and anguish.

The Commission, in view of its conclusion that the disappearance of the applicant's son was imputable to the authorities, held that the uncertainty, doubt and apprehension suffered by the applicant over a prolonged and continuing period of time constituted inhuman and degrading treatment within the meaning of article 3.

The Court (Judges Matscher, Golcuklu and Pettiti dissenting) took into account the applicant's anguish in knowing that her son had been detained, the authorities' complacency towards her distress, the prolonged period of time over which the applicant's anguish endured and the nature of the relationship between the applicant and the victim of the human rights violation, in concluding that Turkey had violated article 3.

Article 5: Right to liberty and security of person

Article 5 of the Convention relevantly provides:

1. Everyone has the right to liberty and security of the person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

...

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

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 official 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.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

The applicant argued that her son's disappearance violated article 5 in a number of respects. First, she claimed there was a violation in that he was deprived of his liberty in an arbitrary manner contrary to paragraph 2 by reason of the fact that his detention was unacknowledged by the Governmental authorities. Secondly, the applicant submitted, there were violations of paragraphs 2, 3, 4 and 5 by reason of the official cover-up of her son's whereabouts and fate, which placed him beyond the reach of the law.

The Government contended that no issue arose under article 5 as the applicant's claim was unsubstantiated and had been disproved by the investigation conducted by the authorities.

The Commission held that the finding that Uzeyir Kurt was in the custody of the security forces on 25 November 1993 raised a presumption of responsibility on the part of the authorities to account for his subsequent fate. This presumption could be rebutted by the authorities offering a credible and substantiated explanation for his disappearance and by demonstrating that they had taken effective steps to enquire into his disappearance and ascertain his fate. As neither of these requirements was satisfied, the Commission concluded that the unacknowledged detention and subsequent disappearance of Uzeyir Kurt involved a flagrant disregard of article 5.

The Court, by a six to three majority (Judges Matscher, Golcuklu and Pettiti dissenting), held that Turkey was in breach of article 5 of the Convention. In reviewing the nature, scope and purpose of the guarantees contained in article 5, the majority stated:

"Having assumed control over that individual it is incumbent on the authorities to account for his or her whereabouts. For this reason, Article 5 must be seen as requiring the authorities to take effective measures to safeguard against the risk of disappearance and to conduct a prompt investigation into an arguable claim that a person has been taken into custody and has not been seen since."[16]

Applied to the facts of the case, the Court found that the "absence of holding data recording such matters as the date, time and location of detention, the name of the detainee as well as the reasons for the detention and the name of the person effecting

[16]Ibid., para 124.

it" was contrary to the "very purpose" of article 5.[17]

In addition, the Court found that the prosecutor should have investigated more thoroughly her claim. In particular, he pointed to the prosecutor's failure to question Mrs Kurt as to the reason for her belief that her son was in detention or ask her to provide a written or oral statement and his failure to take statements from any of the soldiers or village guards present in the village at the time. The Court also the prosecutor's ready acceptance of the gendarmerie's explanation and its role in shaping his attitude to his enquiries.

The Court also examined the Government's theory of PKK involvement in the disappearance. It observed that the explanation was "advanced too hastily by the gendarmerie in the absence of corroborative evidence" and dismissed the statements given in support of the theory by three villagers on the basis that the gendarme officers posed questions designed to elicit responses which could support the PKK kidnapping theory.[18]

Similarly, the Court dismissed the Government's alternative theory, that Uzeyir Kurt joined the PKK, on the basis of the lack of evidence. In the circumstances, the Court concluded that the authorities "failed to discharge their responsibility to account for him and it must be accepted that he has been held in unacknowledged detention in the complete absence of the safeguards contained in article 5".[19]

Judge Pettiti disagreed with the majority's reasoning, arguing that it "speculates on the basis of a hypothesis of continued detention relying on their (the majorities' personal conviction", and found that there had been no breach of article 5. He stated that had the case concerned instructions given by the army, gendarmerie or the police, both with regard to the security operations and the verification of their implementation and follow-up, then a violation could have been found. This would have required both documents and witnesses, which were absent in this case. As it was, the authorities and police individually responsible were not identified. Furthermore, Pettiti J preferred the use of State complaint mechanisms instead of the individual petition procedure in cases involving presumed disappearances because an application by a State "would occasion an international regional inquiry enabling the situation to be assessed objectively and thoroughly".

Article 13: Right to an effective remedy

Article 13 of the Convention provides as follows:

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.

[17]Ibid., para 125.
[18]Ibid., para 127.
[19]Ibid., para 128.

The applicant argued that the authorities failed to conduct an effective investigation into her son's disappearance, which gave rise to a breach of article 13 of the Convention. Moreover, this failure showed the lack of an effective system of remedies in Turkey.

The Government responded that when the applicant initially contacted the public prosecutor she merely sought to ascertain whether or not her son had been taken into custody, and had never suggested that she feared that her son had been illegally detained or that his life was at risk. It also argued that it had endeavored, to no avail, to locate him but that these investigations had reinforced their view that he had been kidnapped by, or had voluntarily joined, the PKK. Thus there was no basis for finding a violation of article 13.

The Commission disagreed with the Government's arguments. It found that the applicant had brought the substance of her complaint to the public prosecutor's attention but it was not taken seriously. The Commission pointed to the fact that the prosecutor had not been prepared to enquire further into the report issued by the gendarme; that no statements were taken from the soldiers or village guards involved in the military operation; the ineffectiveness of the investigation; and the fact that the gendarme officers against whom the complaint was lodged, were given the task of taking the witness statements from the villagers.

The Court, by majority (Judges Matscher and Golcuklu dissenting), reviewed the nature of the protection afforded by article 13[20] and emphasised that, in the context of alleged disappearances involving State authorities, article 13 required a "thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure".[21] Accordingly, the requirements of article 13 are broader than those of article 5.

Commencing from the point that the applicant had an arguable complaint against the authorities, the Court thought that the complaint had never been the subject of a serious investigation and that the authorities had given too much weight to the view that the son had been kidnapped or joined the PKK. Accordingly, the Court held that the applicant was denied an effective remedy.

Article 14: Freedom from discrimination

Article 14 of the Convention provides as follows:

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

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[20]Ibid., para 140.
[21]Ibid.

The applicant, relying on the 1991 and 1995 reports of the United Nations Working Group on Enforced or Involuntary Disappearances, argued that her son was a victim of conduct contrary to article 14 on the basis that forced disappearances primarily affect persons of Kurdish ethnic origin.

The Government contended that there was no factual basis for the allegation and that Turkish Constitutional protections extend to all Turkish citizens.

The Commission held that this allegation had not been substantiated.

The Court agreed with the Commission and unanimously dismissed the complaint under article 14.

Article 18: Application of the Convention provisions

The applicant, pointing to the failure of the authorities to take custody records, claimed that Turkey knowingly allowed a practice of "disappearances" to develop without taking any steps to stop it.

The Government denied the allegation and emphasised that even when acting under emergency powers the military authorities are required to act in accordance with the law.

The Commission found the allegation was not substantiated.

The Court agreed with the Commission and unanimously dismissed the complaint, noting its similarity to the applicant's complaint under article 25 of the Convention.

Article 25(1): Right of individual petition

Article 25(1) of the Convention provides as follows:

The Commission may receive petitions addressed to the Secretary General of the Council of Europe from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognises the competence of the Commission to such petitions. Those of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right.

The applicant complained that there had been a violation of article 25(1) because she had been subjected to pressure by the authorities to withdraw her application to the Commission and because the authorities threatened to take criminal proceedings against her lawyer as a result of statements he made in relation to her application.

The Government denied the allegations, arguing that the Diyarbakir Human Rights Association was using the applicant for political purposes. Further, it stated that any criminal charges pressed against the applicant's lawyer would not relate to her application but to his connection with the PKK.

The Commission found that the authorities did not directly coerce the applicant into withdrawing her application but did apply improper, indirect pressure in breach of article 25(1) of the Convention.

The Court, by a majority of six (Judges Matscher, Golcuklu and Pettiti dissenting), held that Turkey had failed to comply with its obligations under article 25(1) of the Convention. In so holding the majority clarified the meaning of the expression "any form of pressure" stating that the term was broad enough to encompass "improper indirect acts or contacts designed to dissuade or discourage them from pursuing a Convention remedy".[22] It also observed that a determination under article 25 must be arrived at "in the light of the particular circumstances at issue".[23]

In the present case, the Court was not satisfied that the applicant had repudiated her application on her own initiative. Nor was the Court satisfied that the Government's arguments established that there was no official involvement in the applicant's visits to the notary to withdraw her statements made in support of her application. Further, the Court disagreed with the Government's assertion that the threatened criminal proceedings against the applicant's lawyer were unrelated to her application to the Commission as the threats concerned the statements made by the applicant's lawyer in the application itself.

Administrative practice of disappearances

The applicant, relying on reports by the United Nations Working Group on Enforced and Involuntary Disappearances, alleged that there was an administrative practice of disappearances in southeast Turkey which gave rise to aggravated violations of articles 2, 3 and 5 of the Convention. Furthermore, the applicant argued that there was an officially tolerated practice of ineffective remedies in southeast Turkey which constituted an aggravated violation of article 13. In particular, she pointed to evidence of a policy of denial of extra-judicial killings, torture of detainees and disappearances and of a systematic refusal or failure to conduct investigations into victims' grievances.

The Commission found that it was unnecessary to decide either of these claims.

The Court held that the claims were unsubstantiated.

[22]Ibid., para 160.
[23]Ibid.

Just satisfaction: Compensation under article 50

Article 50 of the Convention[24] provides as follows:

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

The applicant claimed a total sum of £70,000 by way of compensation for non-pecuniary damage, being £30,000 for her son in respect of his disappearance and failure of State investigatory mechanisms; £10,000 for herself in respect of her suffering on account of her son's disappearance and the denial of an effective remedy; and £30,000 for both on the basis of their being victims of a practice of disappearances in Turkey. She also claimed a total sum of £25,453.44 in respect of legal costs and expenses.

The Government argued that the applicant had not substantiated her claim and, in particular, that there was no causal connection between her suffering and the alleged disappearance.

The Court considered that a compensatory award of £15,000 should be made for breach of article 5 in respect of the applicant's son. In addition, the Court awarded £10,000 compensation to the applicant in respect of Turkey's breach under articles 3 and 13 of the Convention arising from the failure of the authorities to investigate her son's disappearance. Regarding legal costs, the Court awarded a total sum of £15,000 taking into account the particularly complex issues raised in the case. It awarded interest based on 8% p.a., the statutory rate of interest applicable in the United Kingdom.

[24] *Supra* note 11 .

APPENDIX A: KAYA v TURKEY

COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

Or. English

EUROPEAN COMMISSION
OF HUMAN RIGHTS

Application No. 22729/93

Mehmet KAYA

against

Turkey

Report of the Commission

(Adopted on 24 October 1996)

Strasbourg

EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 22729/93

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against

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REPORT OF THE COMMISSION

(adopted on 24 October 1996)

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1. 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 is a Turkish citizen, born in 1949 and resident in Dolunay village in the district of Lice in South-East Turkey. He was represented before the Commission by Mr. K. Boyle and Ms. F. Hampson, both teachers at the University of Essex, England. The application is brought by the applicant on his own behalf and on behalf of his deceased brother, Abdulmenaf Kaya.

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

4. The applicant alleges that his brother was unlawfully killed by security forces on 25 March 1993 and that this event was not adequately investigated by the State authorities. He invokes Articles 2, 3, 6, 13 and 14 of the Convention.

B. The proceedings

5. The application was introduced on 23 September 1993 and registered on 1 October 1993.

6. On 29 November 1993 the Commission decided, pursuant to Rule 48 para. 2 (b) of its Rules of Procedure, to give notice of the application to the respondent Government and to invite the parties to submit written observations on its admissibility and merits.

7. The Government's observations were submitted on 11 April 1994 after one extension of the time-limit fixed for this purpose. The applicant submitted further information and observations in reply on 6 June and 7 July 1994.

8. On 20 February 1995 the Commission declared the application admissible.

9. The text of the Commission's decision on admissibility was sent to the parties on 8 March 1995. The Government were requested to provide a copy of the autopsy report of the applicant's brother and a copy of the findings of fact, with any supporting evidence, made by the Public Prosecutor at the Diyarbakır State Security Court. The parties 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 might wish to put before delegates. Neither party availed itself of this possibility prior to the expiry of the time-limit fixed for this purpose.

10. On 1 July 1995 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. B. Conforti and Mr. J. Mucha. It notified the parties by letter of 20 July 1995, proposing certain witnesses and requesting the Government to identify the commander or commanders of the security forces involved in the incident on 25 March

1993 and the Public Prosecutors at Lice and the Diyarbakır State Security Court involved in the investigation of that incident. The Government were also requested to provide the contents of the investigation file which should include, in particular, the autopsy report, the photographs taken at the scene and the field report of the security forces concerning the incident. It was subsequently decided that oral evidence would be taken by the Delegates at a hearing on 9 November 1995.

11. The Government submitted a copy of the autopsy report on 11 August 1995. On 11 September 1995 they provided the names of two Public Prosecutors who had been involved in the investigation of the incident.

12. By letter dated 15 September 1995 the applicant requested that two further witnesses be heard.

13. On 15 September 1995 the Government provided the name of the commander of the security forces involved in the incident.

14. By letter of 26 September 1995 the Commission again requested the Government to submit copies of the investigation file, including in particular any photographs taken at the scene, any field reports by the security forces concerning the incident and any statements made by members of the security forces involved, and of the findings of fact made by the Public Prosecutor at the Diyarbakır State Security Court. The Government were further requested to indicate whether the commander of the security forces identified by them had in fact been on the scene of the incident when it happened and, if not, to identify the commanding officers who had been present.

15. On 11 October 1995 the Commission requested the Government to identify the gendarmes present at the incident.

16. By letter of 24 October 1995 the Commission urgently requested the Government to provide copies of the still outstanding documents, to confirm whether the commander of the security forces identified by them had in fact been on the scene of the incident, and to identify the gendarmes present at the incident.

17. On 30 October 1995 the Government submitted a number of documents from the preliminary investigation file held by the Public Prosecutor at the Diyarbakır State Security Court.

18. On 1 November 1995 the applicant's representatives notified the Commission that because of fear for reprisals the applicant did not find it possible to attend the hearing planned for 9 November 1995. They added that the applicant intended to provide an explanation for his absence in writing. The applicant's representatives further informed the Commission that a witness by the name of Hikmet Aksoy had been convicted and sentenced *in absentia* and would not appear at the hearing to give evidence.

19. Evidence was heard by the Delegates of the Commission in Diyarbakır on 9 November 1995. For health reasons, one of the Delegates, Mr. Mucha, was not able to attend the hearing. Before the Delegates the Government were represented by Mr. A. Gündüz, Agent, assisted by Mr. T. Özkarol, Mr. A. Şölen, Mr. A. Kaya, Mr. A. Kurudal,

Ms. N. Erdim and Mr. A. Kaya. The applicant, who did not appear in person, was represented by Mr. K. Boyle, counsel, assisted by Ms. A. Reidy, Mr. O. Baydemir and Ms. D. Deniz (interpreter).

20. By letter of 28 November 1995, the Commission requested the Government to submit a document which had been shown to the Delegates by Mr. Gündüz at the hearing containing a statement made by Hikmet Aksoy to a Public Prosecutor.

21. On 2 December 1995 the Commission decided to take further evidence in the case in Strasbourg. The applicant would be heard on that occasion as well as other witnesses who had not appeared at the earlier hearing. The new hearing was to take place on 7 and 8 March 1996.

22. The parties were informed of the decision to hold a further hearing by letter of 12 December 1995. The applicant's representatives were requested to confirm in writing that the applicant and the witness Hikmet Aksoy would attend. The Government were requested to submit copies of the photographs which had been annexed to the autopsy report regarding the applicant's brother.

23. By letter of 10 January 1996 the applicant's representatives informed the Commission that the witness Hikmet Aksoy was too afraid to attend the hearing. The attendance of the applicant at the hearing could not be confirmed.

24. On 16 January 1996 the parties were requested to inform the Commission whether in view of these circumstances they nevertheless wished to hear the remaining witnesses.

25. On 20 January 1996 the Commission decided not to maintain the hearing of further witnesses if the parties had not responded to the request of 16 January 1996 before the expiry of the time-limit fixed for that purpose. It also decided that in that event the parties should be invited to present their written conclusions on the merits of the case.

26. No reply to the request of 16 January 1996 was received from the parties before the expiry of the time-limit.

27. By letter of 22 January 1996 the Government submitted a copy of the statement made by Hikmet Aksoy to a Public Prosecutor.

28. On 7 February 1996 the Commission reminded the Government of the request still outstanding for copies of the photographs annexed to the autopsy report of the applicant's brother.

29. By letter of 8 March 1996 the Government informed the Commission that the attempts made by the Public Prosecutor at the Diyarbakır State Security Court to locate and obtain the photographs which had been annexed to the autopsy report had so far been unsuccessful. The search for these photographs would, however, continue.

30. On 11 March 1996 the applicant submitted his final observations on the merits.

31. The Government submitted their final observations on 29 April 1996, after expiry of the time-limit set for that purpose. On 30 May 1996 the Government submitted a reaction to the applicant's final observations.

32. Upon instruction by the Delegates the Commission's Secretariat requested the Government on 9 August 1996 to submit further information and documents. The Government have not responded to this request.

33. On 2 October 1996 the applicant's representatives asked the Commission whether they would be entitled to ask questions concerning the present case of the witness Hikmet Aksoy during a hearing in a number of different applications, scheduled to take place in November 1996, in which he had also been summoned to give evidence. For this hearing the Government had been requested to produce Hikmet Aksoy since he was being held in detention.

34. The Commission decided on 15 October 1996 that Hikmet Aksoy should not be asked again to give evidence.

35. 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 could be effected.

C. The present Report

36. 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:

Mr. S. TRECHSEL, President
Mrs. G.H. THUNE
Mrs. J. LIDDY
MM. E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H. DANELIUS
F. MARTINEZ
L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
G.B. REFFI
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
D. ŠVÁBY
G. RESS
A. PERENIČ
C. BÎRSAN
P. LORENZEN
K. HERNDL
E. BIELIŪNAS
E.A. ALKEMA
M. VILA AMIGÓ

37. The text of this Report was adopted on 24 October 1996 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.

38. 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.

39. The Commission's decision on the admissibility of the application is annexed hereto.

40. 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

41. The facts of the case, in particular those which relate to the events of 25 March 1993, are in dispute between the parties. For this reason, pursuant to Article 28 para. 1 (a) of the Convention, the Commission has conducted an investigation, with the assistance of the parties, and has examined written material, as well as oral testimony, presented before the Delegates. The Commission first presents a brief outline of the events, as submitted by the parties, and then a summary of the evidence adduced in this case.

A. The particular circumstances of the case

1. Concerning the events of 25 March 1993

a. *Facts as presented by the applicant*

42. The various accounts of events as submitted in written statements by the applicant are summarised in Section B below. The version as presented in the applicant's final observations on the merits is summarised here.

43. On the morning of 25 March 1993 the applicant's brother, Abdulmenaf Kaya, was going to the fields situated 300-400 metres from the village Çiftlibahçe and four kilometres from his own village of Dolunay, with Hikmet Aksoy. At that time a military operation was going on and Hikmet Aksoy was taken into custody. Seeing this, Abdulmenaf Kaya began to run away as he was frightened that he would also be taken into custody. The soldiers saw him running and opened fire injuring Abdulmenaf Kaya. The soldiers pursued him and found him in the bushes. They opened fire on him, riddling his body with bullets. Villagers witnessed this. The soldiers then planted a fire arm on him and took photographs. The soldiers eventually handed over the body of Abdulmenaf Kaya to villagers in the neighbourhood who had first explained to the soldiers that Abdulmenaf Kaya was an inhabitant of a neighbouring village and not a terrorist.

b. *Facts as presented by the Government*

44. In their written submissions on the merits of the application the Government submit that it appears from the oral evidence and other material before the Commission that Abdulmenaf Kaya's death did not occur in the manner and under the circumstances described by the applicant. In their observations on the admissibility of the application they stated that the facts were as follows.

45. On 25 March 1993 security forces conducting a field search at Dolunay village came under fire. There was an exchange of fire for some time and after the firing had stopped the search was continued. A body was recovered next to which a Russian-made automatic assault weapon and ammunition belonging to it were found. Photographs were taken of the body and a field report was drawn up by members of the security forces conducting the operation.

46. On the same day an official autopsy was carried out by the Lice Public Prosecutor and the Lice State doctor. The autopsy report showed that bullet wounds had caused the death. The identity of the deceased was found out at a later stage.

47. Hikmet Aksoy was not taken into custody on 25 March 1993. The authorities were seeking to arrest him as he was a member of the illegal PKK terrorist organisation.

2. Proceedings before the domestic authorities

48. In their observations on the admissibility of the application the Government submitted that a preliminary investigation had been initiated by a Public Prosecutor at Lice. It appears from the documents submitted to the Commission that this investigation concerned Abdulmenaf Kaya's involvement in an armed clash with the security forces on 25 March 1993. On 20 July 1993 Ekrem Yıldız, Public Prosecutor at Lice, issued a decision of non-jurisdiction and transferred the file to the Public Prosecutor at the Diyarbakır State Security Court. It appears that the investigation is currently still pending there.

49. On 17 June 1994 a Public Prosecutor, apparently at the request of the Chief Public Prosecutor at the Diyarbakır State Security Court, took a statement in relation to the death of Abdulmenaf Kaya from Hikmet Aksoy while the latter was detained at Lice.

50. In their final observations on the merits of the case the Government submit that the matter is currently also pending before the Lice Administrative Board for further investigation. No further details concerning this investigation have been submitted.

B. The evidence before the Commission

1. Documentary evidence

51. The parties submitted various documents to the Commission. These included reports drawn up in the course of the investigation on the domestic level into the death of the applicant's brother and statements from the applicant concerning his version of the events in the case.

52. The Commission had particular regard to the following documents:

a. *Official documents*

i. Incident report of 25 March 1993

53. This report is a handwritten document, signed by six members of the security forces, amongst whom Alper Sır, Paşa Bülbül, Ahmet Gümüs and Altan Berk.

54. It states that on 25 March 1993 around 09.00 hours a group of military forces, consisting of four teams, carried out a field search near the village of Dolunay. During the search an unspecified number of PKK members opened fire upon the teams and fire was returned. When firing had ceased the search was continued and, at the location where the firing had started, the body of a PKK member, a Kalashnikov rifle with serial number 59339, a cartridge clip and three rounds of live ammunition were found.

ii. Autopsy report of 25 March 1993

55. The report states that following a telephone call from the District Gendarmerie Headquarters on 25 March 1993 to the effect that the body of a person belonging to the PKK terrorist organisation had been captured during a clash, the Public Prosecutor Ekrem Yıldız and the District Government Doctor Arzu Doğru set out by military helicopter, accompanied by a gendarme staff sergeant who was to act as clerk.

56. On arrival at the scene the body was found to be lying on its back in the bushes on the bank of a creek. It was moved to a flat piece of ground. Beside the body there was a Kalashnikov rifle with serial number 8125298 and one round of ammunition containing three full and six empty cartridges. The body is described as being that of a 35-40 year old man with grey hair and dressed in blue and grey trousers with a cummerbund round the waist, a sleeveless black vest and a striped winter shirt, wearing rubber shoes but no socks. Since there was no one at the scene of the incident who could identify the deceased, the security forces took photographs from several angles.

57. A large number of bullet entry and exit holes were found in the neck of the body, in the throat, above the heart, in the upper left area of the abdomen, around the navel and around the groin, in the left hip and in the femur of both legs. The bones of the legs were broken as a result of the blows received.

58. The report goes on to say that the medical examiner was brought over, that the body was handed over to him and that he made the following statement:

<translation>

"I established the above findings together with the Public Prosecutor, and I agree that the findings are as described above. As the result of these findings, the cause of death is clear. There is no need to carry out a classical autopsy. The conditions in the field combined with the fact that we do not have sufficient security or instruments are in any case an impediment to performing a full classical autopsy. From the above findings I have come to the conclusion that the deceased died from cardiovascular insufficiency as a result of the wounds caused by firearms. That is my definite opinion."

59. The report further states that the rifle and the ammunition were seized for safekeeping as corpus delicti. It concludes by stating that the forensic examination of the body and the autopsy procedure had been completed. The report is signed by, inter alia, Alper Sır as the person receiving the body.

iii. Report of identification of 5 May 1993

60. This is a handwritten document signed by three members of the security forces. It states that on 25 March 1993 a member of the illegal PKK organisation entered into an armed conflict with the security forces and was found dead as a result of the clash in the fields of Dolunay village. An investigation established that the deceased was Abdulmenaf Kaya, a resident of Dolunay.

iv. Decision of non-jurisdiction of 20 July 1994

61. This decision, issued by a Public Prosecutor at Lice, Ekrem Yıldız, lists as accused of the crime of conducting an armed clash with the security forces Menaf Kaya, who was killed, and a group of PKK members. It states that the preparatory documents of investigation were examined.

62. The decision goes on to describe the incident by stating that on 25 March 1993 search activities were carried out by the security forces near the village of Dolunay. These forces were met by an unspecified number of members of the illegal PKK organisation. The armed conflict, which ensued between the parties, resulted in the finding of the dead body of one terrorist, one Kalashnikov rifle, one cartridge clip, three rounds of live ammunition and six rounds of empty cartridges. The rifle was sent to a criminal investigation laboratory and a report is still pending.

63. The Public Prosecutor concludes that the nature of the incident, the aims of the suspect and the fact that the incident occurred at a location where the state of emergency is in force indicate that the incident should be investigated by the Public Prosecutor at the Diyarbakır State Security Court in accordance with Section 11 of Act No. 2845.

v. Letter of 9 March 1994 from a District Gendarme Commander to the office of the Chief Public Prosecutor at the Diyarbakır State Security Court

64. This letter appears to be a reply to a letter dated 7 March 1994 from the Chief Public Prosecutor at the Diyarbakır State Security Court. It states that an investigation has shown that Hikmet Aksoy, who has been summoned to the office of the Chief Public Prosecutor, is understood to be a PKK member and to be alive. Upon his arrest he will be transferred as summoned.

vi. Letter of 10 January 1996 from Bekir Selçuk, Chief Public Prosecutor at the Diyarbakır State Security Court, to the Ministry of Justice, International Law and External Relations General Directorate

65. This letter concerns the search for the photographs which were taken of Abdulmenaf Kaya. It states that the photography session was recorded in the incident report and that the body of Abdulmenaf Kaya was released to the village mayor for burial.

b. *Statements by the applicant*

i. Statement dated 31 March 1993 taken by Abdullah Koç of the Diyarbakır branch of the Human Rights Association

66. At around 08.00 hours in the morning of 25 March 1993 Abdulmenaf Kaya and Hikmet Aksoy were going to the fields 300-400 metres from Çiftlibahçe village and four kilometres from Dolunay village. At that time a military operation was starting in Boyunlu, Dolunay, Çiftlibahçe and Ormankaya villages. Soldiers participating in the operation took Hikmet Aksoy into custody. Seeing this, Abdulmenaf Kaya started to run upon which the soldiers opened fire. Abdulmenaf Kaya ran the remaining

300-400 metres to Çiftlibahçe and hid there in the bushes. The soldiers found him there and, according to eye-witnesses, fired over 100 bullets into his body, planted a firearm on him and took photographs. They did not want to give the body to the villagers, but the villagers insisted that the deceased was from a neighbouring village and that he was not a terrorist. Finally, the soldiers gave the body to the villagers.

67. Later, the commander of the military unit threatened the inhabitants of Çiftlibahçe and Dolunay with the destruction of their villages.

68. Most of the people who came to offer their condolences on the death of Abdulmenaf Kaya suffered abuse of various kinds.

69. Hikmet Aksoy has been in custody ever since the incident.

ii. Supplementary statement dated 20 September 1993 taken by Sedat Aslantaş of the Diyarbakır branch of the Human Rights Association

70. Abdulmenaf Kaya was injured while he was running. The security forces followed him when he went to the bushes where they killed him.

71. Only the security forces took photographs of the body. When the applicant's family received the body they had to bury it immediately. An autopsy was conducted but the applicant was not given a copy of the autopsy report.

72. The witnesses who saw the body of Abdulmenaf Kaya have left the village, being frightened of the security forces and the intimidation to which they would be subjected if they spoke out publicly.

73. Abdulmenaf Kaya left a wife and seven children.

c. *Statements by other persons*

Hikmet Aksoy

i. Statement dated 17 June 1994 taken by Özcan Küçüköz, Lice Public Prosecutor

74. This statement was taken following a letter dated 17 May 1994 from the Public Prosecutor at the Diyarbakır State Security Court. When Aksoy made the statement, he was detained in Lice prison for possession of hashish.

75. Like Aksoy, Abdulmenaf Kaya was from the village of Dolunay. On 25 March 1993 Aksoy left his house to go and tend his beehives which were situated on a piece of land along a road between Dolunay and Çiftlibahçe. When he reached the entrance of the village, he met Abdulmenaf Kaya who wanted to come along with him.

76. When he reached the beehives, he heard some people running and saw about ten soldiers approaching him. The soldiers tied up his hands and asked who he was and why he was wandering about. Two or three minutes later the soldiers noticed Abdulmenaf Kaya running away. The soldiers shouted after Abdulmenaf Kaya and told him to stop, but he either did not hear them or chose to ignore them as he increased his

walking pace. The second lieutenant ordered the soldiers to shoot at Abdulmenaf Kaya's feet. At that time Abdulmenaf Kaya was approximately fifty to sixty metres away.

77. When the soldiers started shooting at his feet, Abdulmenaf Kaya started running towards Çiftlibahçe. The soldiers chased him, taking Aksoy along with them. Abdulmenaf Kaya disappeared beyond a slope and when the soldiers reached the slope he was nowhere to be seen. They then came to the approximately ten houses which are situated at some small distance from Çiftlibahçe where they encountered some other soldiers who said that they had seen Abdulmenaf Kaya. Aksoy and the soldiers waited in the street for about half an hour. Then he heard shots being fired; he estimates that three full cartridge clips were shot in succession. About ten minutes later a helicopter landed but it was too far away from Aksoy for him to be able to see what was happening. The helicopter left again after ten minutes. Later a first lieutenant approached Aksoy and told him that they had killed Menaf.

78. Aksoy was taken to Lice and kept in custody for fifteen days.

ii. Statement dated 22 November 1995 taken by two police officers of the anti-terrorist branch

79. This statement was submitted by the applicant's representatives as an appendix to their final observations on the merits of the application. Aksoy is said to have made this statement whilst in detention following his arrest on 14 November 1995.

80. Aksoy states how from 1990 he provided food to groups of PKK members who came to his village of Dolunay. From 1991 he was also involved with ensuring the attendance of villagers at funerals of terrorists.

81. In March 1992 six PKK members came to the village and told him to go and get Abdulmenaf Kaya. After Abdulmenaf Kaya had appeared, he and one of the PKK members talked to each other in a separate place. Two months later three PKK members came with a group totalling ten people. Abdulmenaf Kaya was told to organise the attendance of villagers at a funeral. Two months after that the military staged an operation during which Abdulmenaf Kaya died.

iii. Statement dated 23 November 1995 to a Public Prosecutor

82. Aksoy retracts the statement of 22 November 1995 (paras. 79-81), saying that he was forced to sign a statement which the police had written.

83. He denies the accusations that have been made against him, namely that he acted as a courier for the PKK. In this statement he does not mention Abdulmenaf Kaya.

2. Oral evidence

84. The applicant did not give evidence before the Commission's Delegates at the hearing in Diyarbakır nor could it be confirmed that

he would appear at a subsequent hearing which the Delegates intended to hold in Strasbourg and which was subsequently cancelled. It was submitted on behalf of the applicant that he was afraid of possible reprisals should he give evidence before the Commission.

85. Nor did it prove possible to ensure the appearance of all the other persons summoned by the Delegates to be heard during the hearing in Diyarbakır.

86. Hikmet Aksoy, witness to the alleged events, sent a note dated 8 November 1995 to the Commission in which he stated that he would not give evidence during the hearing in Diyarbakır as police had put pressure on him and his family in order to stop him from doing so. However, he submitted that his earlier statements concerning the killing of Abdulmenaf Kaya were correct. Moreover, the applicant's representatives submitted that although Hikmet Aksoy was eager to give evidence at a hearing in Strasbourg, he felt it would be irresponsible to do so.

87. On 2 October 1996 the applicant's representatives requested that Hikmet Aksoy should again be asked to give evidence in the present case during a hearing relating to other cases in which he had also been summoned as a witness and in which the Government had been requested to ensure his appearance as he was being held in detention (para. 33). The Commission decided, however, that Hikmet Aksoy should not be asked again to give evidence on that occasion (para. 34). It considered in this respect that Hikmet Aksoy had on two occasions clearly indicated that he did not wish to appear before the Delegates to give evidence and the Commission had not been informed that he had changed his mind. Since in proceedings before the Commission witnesses cannot be forced to give evidence, the Commission found that it would be inappropriate, in view of Hikmet Aksoy's previous decision not to give evidence and in the absence of any new declaration by him regarding his position on this matter, to ask him questions in the present case at a time when he was being held in detention and was thus unable to decide himself whether or not he should appear before the Delegates.

88. At the hearing in Diyarbakır, the Public Prosecutor at Lice, Ekrem Yıldız, who had been present at the autopsy performed on the body of Abdulmenaf Kaya and who had issued a decision of non-jurisdiction was also unavailable to give evidence as he had been assigned to a Voting Committee and his presence was required elsewhere. In respect of the Public Prosecutor at the Diyarbakır State Security Court, the Government submitted that he had let it be known that he had only been involved in the investigation before the Diyarbakır State Security Court and not in the investigation conducted in the Lice Prosecutor's office during which the evidence would have been gathered. He therefore felt that he would be unable to give relevant information pertaining to the investigation and had decided not to attend the hearing.

89. The evidence of five witnesses heard by the Delegates may be summarised as follows:

i. Dr. Arzu Doğru

90. Dr. Doğru stated that he was born in 1969. In March 1993 he had been practising as a Government doctor at the Lice Central Health Clinic. Although he remembered the circumstances under which the autopsy on the applicant's brother had taken place, he had no independent recollection of his findings. At the time of the autopsy he had been practising as a doctor for less than a year.

91. He explained that as a Government doctor he would be called upon by a Public Prosecutor to conduct an autopsy if and when a body was found. An autopsy would also be carried out if a death occurred in suspicious circumstances.

92. On 25 March 1993 the Public Prosecutor had informed him that a dead body had been found and that an autopsy was to be conducted. They had gone to the site together with a clerk in several helicopters. The helicopters had landed between some hills. He had been afraid since something could have happened at any moment.

93. It had been his duty to decide whether the person who had been found was dead or alive and, if dead, to find out the cause of death. He could not remember whether he had been told in advance of the autopsy that the body belonged to a terrorist.

94. The body had been found next to the river and he had had it moved to a place where the surface was flatter. There had been no houses in the area. Reading from the autopsy report, he described the dress of the deceased. He confirmed that photographs had been taken and he assumed that these would have been annexed to the autopsy report.

95. During the autopsy only the Public Prosecutor and the clerk had been present. There had been no forensic expert and no other onlookers. He had counted the number of entry and exit wounds and had dictated that part of the autopsy report which dealt with the lesions on the body. The report had been drawn up as the autopsy was being conducted and he had signed it on the spot.

96. He explained from the autopsy report that there had been many bullet wounds on various parts of the body. The legs had also been broken. It had been determined that death had occurred through cardiovascular insufficiency as a result of bullet wounds. He estimated that the body must have been hit by approximately seven or eight bullets. When it was put to him that according to witnesses the body had been riddled with bullets, he said that if there had been more entry and exit wounds they would have been included in the report. It was not within the scope of his expertise to say whether just one or two bullets were capable of fracturing the bones of both legs. However, both legs must have been hit since the report stated that there was an entry hole on the femur of each leg. He stated that it would be impossible for a person with two legs broken in this manner to either run or walk.

97. Since the report did not contain any finding of an entry wound on the back of the body, it could be concluded that there had been no such wound.

98. He had not drawn a map of the body indicating the location of the entry and exit wounds, the recording of these wounds in the report being sufficient. In this respect it was of no importance that the deceased was said to have been a terrorist. He had no opinion as to whether such a sketch of the body might be of assistance in any subsequent investigation relating to criminal liability.

99. The autopsy had consisted of an external examination. In view of the fact that this examination had enabled him to establish the cause of death, there had been no need for a classical autopsy. Consequently, he was unable to say whether any bullets had been lodged in the body. He did not know whether bullets lodged in the body might have contributed to the determination of the weapon which had fired them. Moreover, his expertise did not extend to determining the distance from which the bullets had been fired.

100. He did not remember to whom the body had been handed over after the autopsy. Since the identity of the deceased had been unknown at the time, he thought it unlikely that the body had been handed over to a relative. He was not aware of any subsequent investigation into the incident.

101. He was not a member of the Turkish Medical Association and was unaware that this Association has called for greater independence for doctors when conducting autopsies.

ii. Alper Sır

102. Sır said that he was born in 1967. In March 1993 he had been in charge of a commando unit as a Gendarme First Lieutenant. He had begun work in the area of the villages of Dolunay and Çiftlibahçe in 1991. As regards the general security situation he said that the terrorists were very active in the Lice area.

103. A military operation had been planned on 25 March 1993 after information had been received that terrorists were hiding in the area of the villages of Dolunay and Çiftlibahçe. He had taken part in the operation with four teams, each consisting of thirteen or fourteen soldiers. When the teams had arrived in the area assigned to them, he had ordered them to deploy themselves in a line formation. As the teams had been advancing, they had come under fire.

104. He had told his soldiers to take up their positions and to return fire in the directions from where the shooting was coming. The shooting had come from the hills and from the creek. Based on the heavy shooting the number of terrorists had been estimated at between 30 and 35. The shooting had continued for 35 to 40 minutes. After the shooting had stopped, he had proceeded with his teams towards the area where the terrorists might be found.

105. After having advanced approximately one kilometre they had found the body of a dead man. It had been decided that the deceased must have been a terrorist since an armed clash had just taken place in the area and a gun was lying next to the body. He had ordered his teams to secure the area. Next, he had requested the district gendarme commander to come to the scene.

106. The district gendarme commander, together with the Public Prosecutor and the doctor, had arrived by helicopter approximately 2 to 2,5 hours later. Theirs had been the only helicopter around that day. An autopsy had been conducted after his soldiers had moved the body to a flatter area at the request of the doctor. He had been in the vicinity when the autopsy was being conducted but he had not watched it. Afterwards the body had been handed over to him as there had been nobody else around. He had signed the autopsy report as the person receiving the body. At that time the body had not yet been identified and for that reason photographs had been taken. He could not recall who had taken the photographs but he remembered that front and side shots had been made.

107. He had subsequently handed the body over to three villagers whose names he could not recall. They had been living in a house belonging to Çiftlibahçe village; he had summoned them to receive the body and minutes had been prepared. The villagers had not recognised the dead man. He had not found out the name of the deceased until three or four months afterwards and he did not know who had identified the body.

108. The team commanders whom he had sent to secure the safety of the helicopter and the area had reported to him that they had found traces of blood. It had thus been established that the terrorists had fled in the direction of Hazro and the commando unit there had been notified. However, on that day no other terrorists had been found or captured. None of his men had been injured or killed during the clash.

109. He accepted that Abdulmenaf Kaya must have been shot by a bullet fired by one of his soldiers during the clash. However, he had not observed the body closely and was therefore unable to estimate how many bullets had hit Abdulmenaf Kaya.

110. He did not know that a person by the name of Hikmet Aksoy had allegedly been present in the area at the time of the clash. He had not seen anybody and submitted that it was impossible for a person to remain in an area where a clash was enfolding. He had never experienced villagers to be present during a clash.

111. He dismissed as ill-founded the allegation that the firearm found next to the body had been planted by the soldiers in order to make the deceased appear to be a terrorist. He was not aware of any investigation having taken place about the circumstances of Abdulmenaf Kaya's death.

112. Asked whether Turkish law allowed for the shooting of a person who is running away he stated that he would only shoot, or give the order to shoot, a person in flight if it was not possible to apprehend the person in any other way and if the arrest was absolutely necessary. In that case he would first ask the person to stop and then shoot in the air and at his legs. He had not given an order to shoot at the legs of Abdulmenaf Kaya since no escape had taken place during the clash.

113. He denied having threatened the villagers of Dolunay that he would destroy their village next time he came.

iii. Ahmet Gümüs

114. Gümüs stated that he was born in 1970. In March 1993 he had been a Non-Commissioned Officer with the rank of Senior Sergeant.

115. On 25 March 1993 he had been told that there was a terrorist group in the area of the Dolunay and Çiftlibahçe villages and he and his team had been ordered to stage a military operation. Approximately sixty gendarmes had taken part in the operation. Just after having arrived in the area they had come under heavy fire. They had immediately taken up their positions and had retaliated. The shooting had lasted half an hour to an hour and had come from the hillsides and the bed of the creek. He had not seen the shooting from the creek but he had perceived it. He estimated that about 20 terrorists had been involved. The distance between the opposing forces had been around 300 metres to start with and had spread to perhaps 500 metres during the clash.

116. Subsequently he had assured the safety of his team-mates who had had to continue the operation and he had remained in the area. As a result of the search of the terrain a body had been found in the bed of the creek. When the body had been found the shooting had already stopped. He had not seen the body but his team-mates had told him that it was a terrorist and that he had been armed. He did not know what had happened to the body of the terrorist and he was not curious about this. He had experienced many incidents of this sort and when a terrorist died the subject was closed.

117. He confirmed that he had signed the incident report (para. 53). It was customary for all officers in the unit to sign such a report even though they had not personally participated in every aspect of the operation. He had been responsible for assuring the safety of the gendarmes in the area and it had been his unit commander who had dealt with the dead body. He had not seen the autopsy report.

118. He was unable to confirm whether it had been the gendarmes or the terrorists who had killed Abdulmenaf Kaya. The wounds on Abdulmenaf Kaya's body which were described to him were not inconsistent with the intense shooting that had been going on. He said that it was not impossible that when Abdulmenaf Kaya had first come under fire he had not been adequately covered and that he had been shot while moving to another spot. However, he had not seen Abdulmenaf Kaya run.

119. During the clash no gendarme had been injured and he had not heard of any more casualties on the terrorists' side.

120. He had never heard of Hikmet Aksoy and he denied the account of the facts as related by Hikmet Aksoy in his statement to a Public Prosecutor (paras. 74-78). He said that no person named Hikmet Aksoy had been present at the site of the incident.

121. The gendarmes had been using long-range G3 A4 infantry rifles. Their range was from 400 to 600 metres. They had also used MG3 and K23 machine guns which had a longer range. He said that Kalashnikovs had more or less the same range as MG3s but that they held more bullets and were easier to use.

122. Asked about the rules in Turkish law concerning the circumstances in which a gendarme may open fire on a person who is running away he said that Law No. 2800 on the duties of the gendarmerie and Law No. 2559 on the duties of the police allowed these organisations to use arms. First an attempt would be made to catch the fleeing person by running after him. If this failed, the person would be ordered to stop and surrender. Then shots would be fired in the air. If it was still not possible to apprehend the person, an attempt would be made to stop him by using the minimum amount of force necessary, i.e. by shooting at the legs or feet. If the person had committed serious crimes against the Government and it had not been possible to stop him by shooting at his legs, he could be fired at indiscriminately. However, women and children would not be shot at.

123. He confirmed hearing that sometimes the PKK would kill one of its own members who had been wounded in order to prevent capture by the security forces. He had sometimes heard shots coming from the direction of the terrorists without these shots being aimed at the gendarmes.

iv. Paşa Bülbül

124. Bülbül said that he was born in 1970. In March 1993 he had been a Non-Commissioned Officer with the rank of Senior Sergeant.

125. On 25 March 1993 his unit had gone to the area where a planned operation was to take place. Just as they had been about to take their places in the area assigned to them they had come under fire from the hills and the creekbed. He guessed that there had been approximately 30 terrorists. His unit had immediately taken up their positions, which means that the men lay down on the ground in order to reduce the target area, and had retaliated. It had been possible for him to see the creek from where he was.

126. Later they had started to advance in a line position and they had seen traces of blood. They had been told that soldiers had found the body of a terrorist and they had been ordered to secure the body. He had seen the body but he had not looked at it closely and was unable to tell how many bullets might have hit it. He had not been present during the autopsy, but he had seen the helicopter arrive.

127. He knew that the deceased had been a terrorist as he had had a Kalashnikov in his hands. He did not believe that the weapon had been planted on the deceased.

128. In his opinion, the creekbed had not actually been a very good place to have a terrorist attack from as the creek was not very long. It was possible that the deceased had got caught in the crossfire and he might have been shot by the terrorists who had been shooting from the hills. He did not wish to express an opinion as to whether an investigation of the body might assist in establishing what weapon had fired the bullets.

129. He did not remember what clothes the deceased had been wearing. Informed of the description of the deceased's dress contained in the autopsy report (para. 56), he confirmed that this was the dress of local men. He said that terrorists wore uniforms but also dressed like villagers. Furthermore, it was not unusual for a 35 to 40 year old man to be involved with PKK terrorists.

130. The clash had lasted about 30 to 40 minutes. There had been no injuries on his side. He did not know whether any other terrorists had been killed or wounded.

131. He did not know anybody called Hikmet Aksoy. He had not seen any civilians in the area of the military operation. In his experience, local people did not stay in areas where terrorists operated and they would not walk around in the vicinity of a clash. Furthermore, there were no tobacco fields in the region of the clash and no cattle was kept there.

v. Altan Berk

132. Berk stated that he was born in 1970. In March 1993 he had been a Non-Commissioned Officer with the rank of Sergeant.

133. He had participated in the security force operation in the region of the Çiftlibahçe and Dolunay villages on 25 March 1993. The teams had had to search an area of terrorist activity on a hillside. As the teams had been advancing in a line formation, heavy shooting had come from the hills and the teams had retaliated. He estimated that the clash had lasted between 35 and 45 minutes and that the distance from which the terrorists had been shooting had been between 800 metres and one kilometre. The shooting had come from the hills and from the area between two hills where the creekbed was. He confirmed that there were bushes near the creek. There had been no casualties or injuries on the side of the gendarmes.

134. During the land search following the clash a dead terrorist had been found. He had seen the body of the deceased. However, he had only glanced at the body and had not seen where the bullets had hit the man. There had been blood on certain parts of the body. A Kalashnikov infantry gun had been lying next to the body. The man had obviously been a terrorist as a clash had taken place in the area where he had been found and because there had been a firearm next to him. He denied that the Kalashnikov could have been placed next to the body in order to make him look like a terrorist. He had not been present during the autopsy and said that the gendarmes might have shot the man but that he could also have been shot by his own side. In his opinion it was not impossible for someone to get hit by so many bullets during heavy shooting even if he was trying to take cover.

135. He recalled that the man had been wearing something blue or greenish like a T-shirt or a shirt. Informed of the description of the deceased's dress contained in the autopsy report (para. 56), he said that in general terrorists did not dress like that. Terrorists would wear grey and brown clothing suitable for the terrain. He could not remember whether some terrorists dressed as villagers.

136. He did not think that there was any inconsistency in the fact that the deceased had been a terrorist as well as being a local villager 41 years of age.

137. He had never heard of Hikmet Aksoy and he had not seen anybody in the area that day who did not belong to the terrorists. He had never experienced an incident in which a civilian had got caught in the middle of a clash between PKK and gendarmerie.

C. Relevant domestic law and practice

138. The Government submit that the following domestic law is relevant to the case:

139. Pursuant to Section 23 of the Act on the State of Emergency, security forces, special forces on duty and members of the armed forces are, under the circumstances stipulated in the relevant Acts, empowered to use their weapons while carrying out their duties. The security forces thus empowered are to open fire and to shoot at a person if a command to surrender is not accepted, disobeyed or met with counter-fire or if they have to act in self-defence.

140. The plea of self-defence is enacted in Section 49 of the Criminal Code which, insofar as relevant, provides:

<translation>
"No punishment shall be imposed if the perpetrator acted ...

2. in immediate necessity to repel an unjust assault against his own or another's person or chastity."

141. Furthermore, the Criminal Code contains provisions dealing with unintentional homicide (Sections 452, 459), intentional homicide (Section 448) and murder (Section 450). For these offences 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 crimes 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.

III. OPINION OF THE COMMISSION

A. Complaints declared admissible

142. The Commission has declared admissible the applicant's complaints that his brother Abdulmenaf Kaya was unlawfully killed by security forces on 25 March 1993 and that this event was not adequately investigated by the State authorities.

B. Points at issue

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

- whether there has been a violation of Article 2 of the Convention;

- whether there has been a violation of Article 3 of the Convention;

- whether there has been a violation of Article 6 of the Convention;

- whether there has been a violation of Article 13 of the Convention; and

- whether there has been a violation of Article 14 of the Convention.

C. The evaluation of the evidence

144. Before dealing with the applicant's allegations under specific Articles of the Convention, the Commission considers it appropriate to assess the evidence and attempt to establish the facts, pursuant to Article 28 para. 1 (a) of the Convention. The following general considerations are relevant in this context:

i. It is the Commission's task to establish the facts, and in doing so the Commission will be dependent on the co-operation of both parties. In some cases, such as the present one, the Commission must to a large extent base its conclusions on statements by witnesses who have direct or indirect knowledge of the situation which is the basis of the application. The Commission has no means to force a person to come forward to give evidence as a witness, but it is clear that where an important witness fails to appear, this may affect to a considerable extent the possibilities of the Commission to establish the facts beyond reasonable doubt. In this respect, the Commission notes that both the applicant himself and the witness Hikmet Aksoy have failed to give oral evidence in the present case. Moreover, two Public Prosecutors, whose presence had been requested by the Commission, also failed to appear before the Delegates.

ii. There has been no detailed investigation on the domestic level as regards the death of Abdulmenaf Kaya on 25 March 1993; the Commission has accordingly based its findings on the evidence given orally before the Delegates or submitted in writing in the course of the proceedings.

iii. In the assessment of the evidence as to whether or not the applicant's allegations are well-founded, the standard of proof is that of "beyond reasonable doubt" as adopted by the Court in the Ireland v. the United Kingdom case in relation to Article 3 (Eur. Court HR, judgment of 18 January 1978, Series A no. 25, p. 65, para. 161) and applied by the Commission in a number of cases concerning allegations against the security forces in South-East Turkey (cf. No. 23178/94, Sükran Aydın v. Turkey, Comm. Rep. 7.3.96, pp. 28-29, para. 163 sub iii, currently pending before the Court; No. 22275/93, İsmet Gündem v. Turkey, Comm. Rep. 3.9.96, p. 23, para. 152, currently pending before the Court **(??)**). Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact.

iv. In relation to the oral evidence, the Commission has been aware of the difficulties attached to assessing evidence obtained orally through interpreters: it has therefore paid careful and cautious attention to the meaning and significance which should be attributed to the statements made by witnesses appearing before its Delegates.

1. Concerning the death of the applicant's brother

145. The applicant alleges that his brother Abdulmenaf Kaya was deliberately killed by security forces on 25 March 1993. The Government submit that the death of Abdulmenaf Kaya occurred during an armed clash between the security forces and a group of terrorists. According to the Government, the security forces retaliated in self-defence and did not target any specific person.

146. The Commission notes that it has been presented with diverging versions of the circumstances of the death of the applicant's brother. The applicant was summoned by the Delegates to give evidence but failed to appear. He explained his absence by claiming to fear the consequences if he should appear before the Delegates. The Commission feels concern about this explanation and is unable to determine whether or to what extent such fear may have been justified. In this respect the Commission observes that no written explanation for his absence, which the applicant allegedly intended to provide (para. 18), has been submitted.

147. Whatever reason there may have been for the applicant's absence, it is clear that his failure to give evidence and explain in person the elements on which he based the allegation that his brother had been deliberately killed by security forces must to some extent affect the evaluation of the facts of his case. At the same time, the Commission notes that the applicant has not claimed to have been a direct witness to the events and that his testimony would therefore have been of limited importance as evidence.

148. What is of greater importance in the present case is the fact that the only person who has claimed to have been an eye-witness to the killing, Hikmet Aksoy, has not given evidence before the Delegates. Here too, the reason was stated to be fear. The Commission notes that, at the time of the hearing before the Delegates on 9 November 1995 in Diyarbakır, Hikmet Aksoy was apparently sought by the authorities (para. 47) and he seems to have been arrested shortly afterwards (para.

79). However, it also appears that on 17 June 1994, while held in detention, he made a statement in relation to the death of the applicant's brother to a Lice Public Prosecutor in which he confirmed to a large extent the applicant's account of events (paras. 74-78). He also told police officers of the anti-terrorist branch on 22 November 1995 in a statement which he retracted one day later that the applicant's brother had died some time in the summer of 1992 and he did not then recount the circumstances which he had described in his previous statement (paras. 81, 82, cf. paras. 76, 77).

149. The Commission considers that in light of the above (para. 148) it is difficult to make an assessment of Hikmet Aksoy's statements. Since all gendarmes heard by the Delegates denied seeing a man not belonging to the terrorists at the scene of the clash (Sır, para. 110; Gümüs, para. 120; Bülbül, para. 131; Berk, para. 137) and as it is claimed by the applicant that Hikmet Aksoy was close to the place where Abdulmenaf Kaya was killed, it would have been of considerable importance for the Delegates to hear his version of the events, to question him about his various statements to the authorities and to get a general impression about his personality and his credibility. Nevertheless, for the reasons enumerated in para. 87 above, the Commission did not find it appropriate to ask Hikmet Aksoy for a third time to appear before the Delegates even though it is aware that the lack of his testimony affects to a considerable extent the evaluation of the facts which the Commission is called upon to make.

150. The Commission notes that the only clear and undisputed facts in the present case are that on 25 March 1993 the body of Abdulmenaf Kaya was found lying in the bushes on the bank of a creek near the village of Dolunay. The body was dressed in blue and grey trousers with a cummerbund round the waist, a sleeveless black vest and a striped winter shirt, wearing rubber shoes but not socks. A large number of bullet entry and exit holes were found in the neck of the body, in the throat, above the heart, in the upper left area of the abdomen, around the navel and the groin, in the left hip and in the femur of both legs. The bones of the legs were broken as a result of the impact of the bullets. The total number of bullet wounds is not recorded in the autopsy report but was estimated by Dr. Arzu Doğru in his oral evidence to the Delegates as seven or eight (para. 96). It is further not in dispute that an autopsy, consisting only of an external examination, was carried out on the body by Dr. Doğru at or near the site of the killing and that subsequently the body was handed over on the instructions of the Commander of the commando unit, Alper Sır, to three villagers from the nearby Çiftlibahçe village.

151. Although some of the soldiers heard by the Delegates did not exclude that Abdulmenaf Kaya might have been accidentally shot by terrorists (Bülbül, para. 128; Berk, para. 134), they were in general prepared to accept that he could have been killed by the security forces (Sır, para. 109; Gümüs, para. 118; Berk, para. 134). However, it was their evidence that the applicant's brother had not been targeted and deliberately killed by the soldiers but had died in a clash between the security forces and terrorists in which he had been involved since he had been armed (Sır, para. 105; Gümüs, para. 116; Bülbül, para. 127; Berk, para. 134).

152. The accounts of the clash given by the soldiers whose evidence was heard, while deficient in detail, were broadly consistent with one another. It was claimed that four teams, each consisting of thirteen or fourteen soldiers, were in the area of the villages of Dolunay and Çiftlibahçe when they came under fire from terrorists positioned in the hills and in the bed of the creek. Based on the heavy fire to which the soldiers were subjected, the number of terrorists involved was variously estimated at 20 (Gümüs, para. 115), 30 (Bülbül, para. 125) and 30-35 (Sır, para. 104). The soldiers, having taken up their positions, returned the fire. The distances between the opposing forces was variously estimated as between 300 and 500 metres (Gümüs, para. 115) and between 800 and 1,000 metres (Berk, para. 133). The clash was claimed to have lasted between 30 and 60 minutes (Gümüs, para. 115; Bülbül; para. 130, Sır, para. 104; Berk, para. 133).

153. It was further claimed that, after the shooting had stopped, the soldiers searched the terrain and found the body of a dead man approximately one kilometre away: a Kalashnikov was lying next to the body (Sır, para. 105; Berk, para. 134) or in the hands of the body (Bülbül, para. 127). No other bodies were discovered following the clash and no terrorists were found or captured. None of the soldiers had been injured or killed during the clash.

154. All the gendarmes heard as witnesses by the Delegates thus supported the Government's version to the effect that there was nothing suspicious about the circumstances of the death of the applicant's brother. However, when evaluating the Government's account of events, the Commission finds some elements which give reason for doubt.

155. It is at least surprising that during an armed clash between 50-60 soldiers and 20-35 PKK terrorists which lasted between 30 and 60 minutes, no one on either side should be killed or injured with the single exception of the applicant's brother who, by contrast, was hit by a considerable number of bullets in all parts of his body. To have sustained such wounds he must have been fully exposed to the firing. It was suggested in evidence by Ahmet Gümüs that it was not impossible that, when Abdulmenaf Kaya had first come under fire from the soldiers, he had not been adequately covered and had been shot while moving to another spot (para. 118). However, since according to the soldiers' own account this was a planned attack by the PKK terrorists, it is difficult to understand why the applicant's brother, if he was himself a terrorist, should have been inadequately covered. Moreover, there is no evidence that any of the PKK terrorists had been seen or shot while running for cover.

156. The Commission also observes that Abdulmenaf Kaya's body was hit by a large number of bullets which all appear to have entered from the front and both his legs were broken from the force of the bullets. The extent and severity of the bullet wounds cast serious doubt on the suggestion that the applicant's brother was shot from a distance of between 300 and 1,000 metres. In this regard, the Commission notes that the evidence of Ahmet Gümüs was to the effect that the range of the long-range G3 A4 infantry files which were being used by the soldiers was from 400 to 600 metres, although it was said that MG3 and K23 machine guns which had a longer range had also been used (para. 121).

157. The Commission notes, moreover, that the clothes which Abdulmenaf Kaya was wearing when he was killed were traditional for a local farmer and unlike the clothes typically worn by PKK terrorists. In addition, he wore no socks which would appear unusual for a terrorist living in rough, mountainous terrain and taking part in a planned assault on the security forces.

158. Furthermore, there is no forensic evidence to show that the applicant's brother had handled any weapon or to connect the rifle which was alleged to have been found beside or in the hands of the body with the applicant's brother.

159. In addition, it is at least improbable that the body of a person, who had not as yet been identified by the soldiers but who was believed to be an active terrorist who had recently taken part in a planned and sustained attack on the security forces should be handed over to three unknown villagers from a different village.

160. Finally, the statements of the various gendarmes must also be evaluated with caution, having regard to the fact that the security forces are accused by the applicant of being responsible for his brother's death and that it would not be surprising if the individual gendarmes wished to defend these forces against such allegations.

161. The Commission is of the opinion that these elements cause concern and are difficult to reconcile with the undisputed facts. However, it cannot be concluded from this that the applicant's allegations have been sufficiently proven. The Commission considers that the actual circumstances in which the applicant's brother died cannot be said to have been clarified but remain to some extent a matter of speculations and assumptions. Having regard to the standard of proof to be applied (see para. 144 sub iii), and on the basis of a general assessment of the written and oral evidence, the Commission cannot find it proved beyond reasonable doubt that the applicant's brother was deliberately killed by soldiers in circumstances such as those alleged by the applicant.

2. Inquiries and investigations at the domestic level into the death of the applicant's brother

162. Noting that the applicant also alleges that the investigations by the domestic authorities into his brother's death were inadequate, the Commission will next assess the evidence relating to these investigations. The Commission has already noted that there was no detailed investigation at the domestic level (para. 141 sub ii). However, the Commission will evaluate the investigations actually made insofar as information regarding these investigations has been provided.

163. As regards the autopsy on the body of the applicant's brother the Commission notes that in his oral testimony Dr. Doğru told the Delegates that the only purpose of the autopsy which he had conducted on 25 March 1993 was to decide whether the person who had been found was dead or alive and, if dead, to find out the cause of death (para. 93). The Commission notes that the autopsy was thus limited to an external examination. The findings of the autopsy were laid down in a report drawn up on the spot by Dr. Doğru and the Public Prosecutor Ekrem Yıldız.

164. The Commission finds that the contents of the autopsy report are rather imprecise. For instance, the report does not indicate the number of bullets which had hit the applicant's brother but only mentions a large number of bullet entry and exit holes (para. 57). Having to resort to the autopsy report when asked about the number of bullets which had hit the deceased, Dr. Doğru was thus unable to give an exact answer and had to make an estimation (para. 96), although he also told the Delegates that he had counted the number of wounds as part of the autopsy proceedings (para. 95). Furthermore, the description in the report of the location of the entry and exit wounds on the body appears to lack precision.

165. It does not appear that any attempt at a classical autopsy or a forensic examination of the body, including tests for finger prints or for traces of gunpowder on the body, was made either at the time of the autopsy or at a later date. It is true that such proceedings may have been difficult to carry out on the spot in view of the security situation in the area. However, the Commission finds it in any event doubtful whether Dr. Doğru possessed sufficient expertise to conduct a forensic examination. In this respect it refers to the acknowledgement by Dr. Doğru that his expertise did not extend to determining the distance from which bullets had been fired (para. 99).

166. In these circumstances it strikes the Commission as quite remarkable that rather than taking the body by helicopter to a place where further examinations could have been carried out, such as the removal of any bullets lodged in the body, it was handed over for burial to a number of villagers who, according to the witness Sır, did not even know the identity of the deceased (para. 107), thereby effectively precluding any subsequent examination.

167. The Commission further finds it surprising that apart from information of a medical nature the autopsy report contains the phrase that the deceased had been a PKK terrorist (para. 55), a statement which casts doubt on the objectivity of any investigation which was to follow.

168. The Commission notes that apart from the autopsy a short incident report was drawn up on 25 March 1993 and signed by a number of gendarmes in which the finding of the dead body of a PKK member was described (paras. 53-54). Furthermore, the Kalashnikov and the ammunition found next to the body were seized for safekeeping as corpus delicti (para. 59). However, the Commission has not been provided with any information concerning the forensic examination of these items, despite the fact that the decision of non-jurisdiction states that they were sent to a criminal investigation laboratory and that a report was still pending (para. 62). The Government have, moreover, provided no explanation as to the discrepancy between the serial numbers of the rifle appearing in the incident report and the autopsy report (paras. 54, 56) despite an express request for such an explanation (para. 32).

169. As to any subsequent investigations into the death of the applicant's brother, the Government refer to the preliminary investigation which was instigated by a Lice Public Prosecutor, Ekrem Yıldız, and the ongoing investigation by the Public Prosecutor at the Diyarbakır State Security Court. The Commission observes, however, that it cannot automatically be assumed that these investigations were concerned with finding out how and by whom the applicant's brother had

been killed. It would rather appear from the text of the decision of non-jurisdiction that the investigation examined the involvement of the applicant's brother with terrorist activities, since it names him and a group of members of the PKK organisation as accused of the offence of conducting an armed clash with the security forces (para. 61). There is nothing to suggest that the Public Prosecutor ever considered the possibility that the account of the death of the applicant's brother contained in the incident report of 25 March 1993 and in the autopsy report was not based on true facts.

170. On the other hand, the Commission also notes that, apparently at the request of the Public Prosecutor at the Diyarbakır State Security Court, Hikmet Aksoy was questioned on 17 June 1994 about the killing of the applicant's brother (paras. 74-78). The text of Aksoy's statement does not suggest that he was specifically asked about any involvement which the applicant's brother may have had with the PKK.

171. On the basis of the foregoing, the Commission first considers that the autopsy conducted on the body of the applicant's brother on 25 March 1993 was defective and incomplete. Secondly, the Commission notes that no detailed investigation about the circumstances of the applicant's brother's death was carried out. It would seem that the authorities took it for granted that the applicant's brother was a terrorist and that they did not find it necessary to examine seriously the possibility that he had been killed in circumstances which would have involved the responsibility of the security forces.

172. In order to allow a full assessment of the investigatory measures taken by the authorities, the Delegates had requested the hearing of two Public Prosecutors, i.e. on the one hand Ekrem Yıldız, who had been present at the autopsy and had subsequently issued a decision of non-jurisdiction, and on the other hand the Public Prosecutor at the Diyarbakır State Security Court in charge of the subsequent investigation. However, both these Public Prosecutors failed to appear before the Delegates for reasons which the Commission cannot find convincing (para. 88). The Commission recalls, in this respect, the respondent Government's duty under Article 28 para. 1 (a) of the Convention to facilitate the effective conduct of an investigation into the facts of an admissible case. This must in principle be considered to include an obligation to ensure the appearance before Delegates of public officials who, in the Commission's assessment, might be able to contribute to the establishment of the facts.

173. On the basis of these findings the Commission will now proceed to examine the applicant's complaints under the various Articles of the Convention.

D. As regards Article 2 of the Convention

174. Article 2 of the Convention provides as follows:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

a. in defence of any person from unlawful violence;

b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

c. in action lawfully taken for the purpose of quelling a riot or insurrection."

175. The applicant complains that his brother was intentionally killed by security forces in circumstances in which it was not necessary to open fire and the force used was disproportionate. Alternatively he submits that there was a violation of Article 2 on account of the killing of his brother in violation of the State's obligation to protect his brother's right to life. Moreover, he alleges a violation of Article 2 on account of the lack of any effective system for ensuring protection of the right to life and on account of the inadequate protection of the right to life in domestic law.

176. The Government maintain that the death of the applicant's brother occurred as a result of an armed clash between the security forces and a group of terrorists during which the security forces retaliated in self-defence in a fashion proportionate to the attack.

177. The Commission recalls its finding above (para. 161) that, on the basis of the written and oral evidence before the Commission, it cannot be considered to have been established beyond reasonable doubt that the applicant's brother was deliberately killed by soldiers in circumstances such as those alleged by the applicant. The Commission considers, therefore, that it has an insufficient factual basis on which to reach a conclusion that there has been a violation of Article 2 of the Convention on account of the killing of the applicant's brother.

178. The Commission finds, however, that it should also look at the manner in which the death of the applicant's brother was dealt with by the authorities. In its Report in the case of McCann and Others v. the United Kingdom, the Commission stated that the obligation to protect the right to life under Article 2 "includes the minimum requirement of a mechanism whereby the circumstances of a deprivation of life by the agents of a state may receive public and independent scrutiny". And the Commission added:

> "The nature and degree of scrutiny which satisfies this minimum threshold must, in the Commission's view, depend on the circumstances of the particular case. There may be cases where the facts surrounding a deprivation of life are clear and undisputed and the subsequent inquisitorial examination may legitimately be reduced to a minimum formality. But equally there may be other cases where a victim dies in circumstances which are unclear, in which event the lack of any effective procedure to investigate the cause of the deprivation of life could by itself raise an issue under Article 2 of the Convention." (McCann and Others v. the United Kingdom, Comm. Rep. 4.3.94, Eur. Court HR, Series A no. 324, p. 79, para. 193)

179. In its judgment in that case the Court confirmed the view of the Commission that a formal legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities:

> "The obligation to protect the right to life under this provision, read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within their 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 by, inter alios, agents of the State." (ibid., p. 49, para. 161).

180. Referring to its finding above (para. 161), the Commission recalls that the circumstances of the death of the applicant's brother were unclear. Having regard, furthermore, to the elements contained in the Government's account which, in the Commission's view, gave reason for doubting that the applicant's brother had been killed as a result of an armed confrontation (paras. 155-160), the Commission considers that the circumstances were such as to require the authorities to carry out a thorough investigation.

181. The major deficiencies in the investigation which was carried out have been specified in paras. 164-169. To some extent these deficiencies may be explained by the security situation in South-East Turkey and the extraordinary circumstances which prevailed and made full investigations more difficult. The Commission does not in any way underestimate the problems faced by the authorities, both military and judicial, in this area. Nevertheless, even making full allowance for these difficult conditions, the Commission considers that when a death occurs in circumstances which are unclear and may involve the responsibility of the security forces, the requirements of Article 2 of the Convention demand an effective investigation into the events giving rise to the death. The Commission finds that such an effective investigation was not carried out in the present case.

182. It is possible that if the Commission had been able to examine the two Public Prosecutors who had been summoned to give evidence before the Delegates, a fuller assessment of the investigatory measures taken by the authorities could have been made, and certain doubts as to the adequacy of the measures might have been dispelled. However, as has been noted above (para. 88), these Public Prosecutors failed to appear before the Delegates. In the absence of their evidence, and on the basis of the available material, the Commission considers that the investigation into the death of the applicant's brother was so inadequate as to amount to a failure to protect the right to life.

CONCLUSION

183. The Commission concludes, by 27 votes to 3, that there has been a violation of Article 2 of the Convention.

E. As regards Article 3 of the Convention

184. Article 3 of the Convention reads as follows:

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

185. The applicant alleges that the risk of being unlawfully killed is very much greater in South-East Turkey than elsewhere in Turkey and that this constitutes discrimination against people of Kurdish origin. In his opinion, such difference in treatment amounts to discrimination on grounds of race or ethnic origin and constitutes degrading treatment.

186. The Government maintain that there is no evidence to substantiate the applicant's allegations.

187. The Commission recalls its finding above (para. 161) that, on the basis of the written and oral evidence before the Commission, it cannot be considered to have been established beyond reasonable doubt that the applicant's brother was deliberately killed by soldiers in circumstances such as those alleged by the applicant. It further notes that the applicant's complaint in regard to Article 3 relates to the general conditions in South-East Turkey and finds no factual basis on which to reach a conclusion that there has been a violation of that Article in the present case.

CONCLUSION

188. The Commission concludes, unanimously, that there has been no violation of Article 3 of the Convention.

F. As regards Article 6 para. 1 of the Convention

189. Article 6 para. 1 of the Convention provides as follows:

"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 .."

190. The applicant complains of a denial of effective access to court to seek compensation contrary to Article 6 para. 1 of the Convention. Without criminal proceedings, the applicant has no prospect of success in civil proceedings. In this respect the applicant submits that the facts of the present case indicate that there was no intention to carry out an investigation, that there was in fact a failure to carry out an investigation and to bring a prosecution for the killing of his brother.

191. The Government contend that under domestic criminal and civil law there are several effective remedies at the applicant's disposal. Furthermore, there are pending investigations being carried out by the Public Prosecutor at the Diyarbakır State Security Court and the Lice District Administrative Council.

192. The Commission recalls that Article 6 para. 1 of the Convention requires effective access to court for civil claims. This requirement must be entrenched not only in law but also in practice. The individual should have a clear, practical and effective opportunity to challenge an act by the authorities that gives rise to a claim for compensation (mutatis mutandis, Eur. Court HR, de Geouffre de la Pradelle v. France judgment of 16 December 1992, Series A no. 253-B, p. 43, para. 34).

193. The Commission refers to its decision on the admissibility of the present application where it referred to the ongoing inquiry but stated, in connection with the question of exhaustion of domestic remedies, that it was not satisfied that this inquiry could be considered as furnishing an effective remedy for the purposes of Article 26 of the Convention.

194. In the present case, the effectiveness of any remedy depended on the findings which were made in the course of the official investigation regarding the events of 25 March 1993. A separate claim for damages, based on an allegation that soldiers had deliberately killed the applicant's brother, would hardly have any chance of success, unless the investigation gave support for the allegation that there was in fact responsibility of the authorities for his brother's death.

195. The Commission recalls its finding that the autopsy in the present case was defective and incomplete and that no full investigation into the applicant's brother's death was carried out (para. 171). It also appears that the authorities took it for granted that the applicant was a terrorist who had been killed in an armed confrontation and that they did not examine seriously any alternative possibilities (para. 171).

196. In these circumstances, the Commission considers that the deficiencies of the investigation also deprived the applicant of his right under Article 6 of the Convention to effective access to a tribunal that could have determined his civil right to damages within the meaning of Article 6 of the Convention.

CONCLUSION

197. The Commission concludes, by 27 votes to 3, that there has been a violation of Article 6 of the Convention.

G. As regards Article 13 of the Convention

198. Article 13 of the Convention reads as follows:

> "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."

199. The applicant alleges that the lack of an independent investigation into the killing of his brother and the absence of a determination of the circumstances of the killing represent a denial of an effective remedy for his complaint contrary to Article 13 of the Convention. He refers to findings of the Commission in the cases of Akdivar v. Turkey (Comm. Rep. 26.10.95, Eur. Court HR, to be published

in Reports of Decisions and Judgment 1996) and Aksoy v. Turkey (No. 21897/93, loc. cit.) as well as reports by the European Committee for the Prevention of Torture and the United Nations Committee against Torture.

200. The Government contend that under domestic criminal and civil law there are several effective remedies at the applicant's disposal. Furthermore, there are pending investigations being carried out by the Public Prosecutor at the Diyarbakır State Security Court and the Lice District Administrative Council.

201. The Commission recalls its conclusion that the absence of an effective judicial remedy in the present case constituted a violation of Article 6 of the Convention (para. 197). Having regard to this conclusion, the Commission does not consider it necessary also to examine whether Article 13 of the Convention has been violated.

CONCLUSION

202. The Commission concludes, by 28 votes to 2, that no separate issue arises under Article 13 of the Convention.

H. As regards Article 14 of the Convention

203. Article 14 of the Convention provides as follows:

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

204. The applicant complains of discrimination on grounds of ethnic origin in the enjoyment of the rights guaranteed by Articles 2, 6 and 13 of the Convention. In his opinion, the fact that it is people of Kurdish origin who are the overwhelming majority of victims of killings by security forces and that it is these people who are most adversely affected by military operations, in conjunction with the failure of the State to take adequate measures to minimise risks to civilian lives when conducting such operations, means that the protection of the right to life afforded to people of Kurdish origin by the State is significantly lower than that afforded to people of non-Kurdish origin.

205. The Government have not addressed these allegations beyond denying the factual basis of the substantive complaints.

206. The Commission recalls its finding above (para. 161) that it has not been established beyond reasonable doubt that the applicant's brother was deliberately killed by security forces as alleged by the applicant. The Commission has, however, found a violation of Article 2 of the Convention on account of the inadequate investigation into Abdulmenaf Kaya's death (para. 183) and the question could thus arise whether the inadequacy of this investigation was due to Abdulmenaf Kaya's Kurdish origin. The Commission has examined this matter in the light of the evidence submitted to it, but considers the allegation of a violation of Article 14 in this respect to be unsubstantiated.

207. As regards the right to a determination by a court under Article 6 and the right to an effective remedy under Article 13, the Commission also finds the applicant's allegations, insofar as they relate to Article 14, to be unsubstantiated.

CONCLUSION

208. The Commission concludes, unanimously, that there has been no violation of Article 14 of the Convention.

I. Recapitulation

209. The Commission concludes, by 27 votes to 3, that there has been a violation of Article 2 of the Convention (para. 183 above).

210. The Commission concludes, unanimously, that there has been no violation of Article 3 of the Convention (para. 188 above).

211. The Commission concludes, by 27 votes to 3, that there has been a violation of Article 6 of the Convention (para. 197 above).

212. The Commission concludes, by 28 votes to 2, that no separate issue arises under Article 13 of the Convention (para. 202 above).

213. The Commission concludes, unanimously, that there has been no violation of Article 14 of the Convention (para. 208 above).

H.C. KRÜGER
Secretary
to the Commission

S. TRECHSEL
President
of the Commission

(Or. English)

CONCURRING OPINION OF MM. S. TRECHSEL, L. LOUCAIDES AND B. CONFORTI

The majority of the Commission is of the opinion that although many elements of this case, as they appear after an evaluation of the evidence, cause concern, the circumstances of the death of the applicant's brother remain unclear. In our opinion, these elements make the respondent Government's version of the facts quite unbelievable. Let us recall them as they are indicated in paras. 155-159 of the Report:

(1) It is at least surprising that during an armed clash between 50-60 soldiers and 20-35 PKK terrorists which lasted between 30 and 60 minutes, no one on either side should be killed or injured with the single exception of the applicant's brother who, by contrast, was hit by a considerable number of bullets in all parts of his body. To have sustained such wounds he must have been fully exposed to the firing. It was suggested in evidence by Ahmet Gümüs that it was not impossible that, when Abdulmenaf Kaya had first come under fire from the soldiers, he had not been adequately covered and had been shot while moving to another spot. However, since according to the soldiers' own account this was a planned attack by the PKK terrorists, it is difficult to understand why the applicant's brother, if he was himself a terrorist, should have been inadequately covered. Moreover, there is no evidence that any of the PKK terrorists had been seen or shot while running for cover.

(2) Abdulmenaf Kaya's body was hit by a large number of bullets which all appear to have entered from the front and both his legs were broken from the force of the bullets. The extent and severity of the bullet wounds cast serious doubt on the suggestion that the applicant's brother was shot from a distance of between 300 and 1,000 metres. In this regard, the Commission noted that the evidence of Ahmet Gümüs was to the effect that the range of the long-range G3 A4 infantry files which were being used by the soldiers was from 400 to 600 metres, although it was said that MG3 and K23 machine guns which had a longer range had also been used.

(3) Furthermore, there is no forensic evidence to show that the applicant's brother had handled any weapon or to connect the rifle which was alleged to have been found beside or in the hands of the body with the applicant's brother.

(4). In addition, it is at least improbable that the body of a person, who had not as yet been identified by the soldiers but who was believed to be an active terrorist who had recently taken part in a planned and sustained attack on the security forces should be handed over to three unknown villagers from a different village.

It seems to us that in the light of these elements the statement made by Hikmet Aksoy on 17 June 1994 to the Lice Public Prosecutor acquires a decisive importance. Hikmet Aksoy was the only person who has claimed to be an eye-witness to the killing of the applicant's brother and his statement of 17 June 1994 - a statement which was made, moreover, to a Public Prosecutor and not to a lawyer or a representative of a humanitarian association - gives full support to the applicant's complaint (see paras. 74-77 of the Report). It is true that subsequently, on 22 November 1995, in a new statement made to two police officers of the anti-terrorist branch following his arrest, Hikmet Aksoy gave a "pro-Government" version of the facts (paras. 79-81 of the Report). However, on balance, we do not think that the new statement is capable of annulling the first one, not only because Aksoy retracted his new statement one day later as having been made under pressure but also since this retraction was once again made before a Public Prosecutor (paras. 82-83 of the Report). It is also true that the Delegates were unfortunately not able to question Hikmet Aksoy who allegedly did not appear before them for fear of adverse consequences; but again this circumstance is not capable of nullifying the statement of 17 June 1994 which contains a convincing account of the events.

Furthermore, we have come to the conclusion that the behaviour of the authorities after the shooting confirm the finding that the applicant's brother was killed unlawfully. It can hardly be routine to fly in a medical doctor by helicopter whenever there are casualties on the side of the PKK. The only reasonable interpretation of the fact that it was done here is, in our view, that a defence was built up against the allegation of an unlawful killing. On the other hand, the enquiry was so superficial and unprofessional, that there was no danger that the truth would come to light.

In conclusion, we have reached the conviction that the applicant's brother was deliberately killed by the security forces of the respondent Government. It is a conviction which is derived from a final and careful examination of all the elements of the case as well as, insofar as Mr. Conforti is concerned, a personal reaction to the statements of the witnesses made during the hearing in Diyarbakır.

(Or. English)

PARTLY DISSENTING OPINION OF MRS. G.H. THUNE

While I agree with the majority of the Commission that there has been a violation of Articles 2 and 6 of the Convention in the present case, I have voted against the conclusion that no separate issue arises as regards the complaint under Article 13.

As I understand the applicant's complaints, he does not only allege that he was denied effective access to court in order to seek compensation, but also that there was a lack of an independent investigation in order to try to establish the particular circumstances of the killing of his brother. This seems to me to raise a broader question than the one addressed by the majority in response to the complaint under Article 6. Although the deficiencies in the investigation carried out in the present case are to some extent covered by the Commission's finding of a violation of Article 2, I still consider this aspect of the case sufficiently serious to justify an additional finding of a violation of Article 13.

Effective domestic remedies are, in my view, essential in order to obtain respect for basic human rights. For this reason I find it difficult to accept a restrictive interpretation of Article 13 of the Convention. On this point I refer to my dissenting opinion in the case of Sükran Aydın against Turkey (No. 23178/94, Comm. Rep. 7.3.96, currently pending before the Court).

(Or. français)

OPINION PARTIELLEMENT DISSIDENTE DE M. A.Ş. GÖZÜBÜYÜK

A mon regret, je ne puis partager l'opinion de la majorité de la Commission sur la question de la violation des articles 2 et 6 de la Convention.

Je souscris pleinement au raisonnement de la Commission développée dans l'affaire McCan et autres c. Royaume Uni, reprise dans la présente affaire et selon laquelle :

> "Considérant par conséquent la nécessité d'assurer la protection effective des droits garantis par la Convention, qui prend une importance accrue dans le contexte du droit à la vie, la Commission conclut que l'obligation imposée à l'Etat, selon laquelle le droit de toute personne à la vie sera "protégé par la loi", peut inclure un aspect procédural. Ceci englobe la condition minimale d'un dispositif par lequel les circonstances d'un homicide commis par les représentants d'un Etat peuvent être soumises à un examen approfondi, public et indépendant. La nature et le niveau d'un examen qui satisfasse au seuil minimum doivent, de l'avis de la Commission, dépendre des circonstances de l'espèce. Des affaires peuvent se présenter dans lesquelles les faits entourant un homicide sont clairs et incontestés et où l'examen inquisitoire subséquent peut légitimement se réduire à une formalité minimale. Mais, de la même manière, d'autres situations peuvent se présenter dans lesquelles une victime meurt dans des circonstances troubles, auquel cas l'absence de toute procédure effective permettant d'enquêter sur la cause de l'homicide pourrait par elle-même soulever une question au titre de l'article 2 de la Convention" (rapport Comm. 4.3.94, Cour eur. D.H., série A n° 324, p. 79, par. 193).

Toutefois, je n'approuve pas l'analyse suivie en l'espèce par la majorité qui est parvenue à la conclusion qu'il existait des doutes quant aux circonstances exactes du décès de Abdülmenaf Kaya.

J'observe en premier lieu que les dépositions faites par les gendarmes devant les délégués de la Commission sont précises, concordantes et convaincantes. En revanche, ni le requérant ni la personne citée par le requérant comme principal témoin des faits en cause n'ont comparu devant la Commission.

Je relève par ailleurs que les témoignages recueillis par les délégués de la Commission mettent en évidence que les faits concernant la mort de Abdülmenaf Kaya sont clairs et ne laissent planer aucun doute quant aux circonstances décrites par les gendarmes qui ont pris part à l'opération militaire en question.

Les doutes exprimés par la majorité de la Commission dans les paragraphes 155-160 du rapport me paraissent relever quelque peu de la spéculation et sans rapport avec la réalité des opérations militaires se déroulant dans des régions montagneuses ou sur de grands espaces :

- le fait que la victime ait été touchée par sept ou huit balles (par. 96) n'a rien d'étonnant, compte tenu de la rapidité et de la puissance des fusils de guerre utilisés de nos jours. Il suffirait à la victime un moment d'une seconde d'inattention ou de déplacement pour recevoir autant de balles ;

- la thèse des gendarmes selon laquelle la victime aurait été touchée au front et aux jambes à une distance de 300-1000 mètres parait tout à fait plausible du fait de la longue portée des fusils de guerre ;

- la tenue vestimentaire n'est pas réputée être un élément de distinction entre un membre du PKK et un villageois, mais il s'agit plutôt d'une méthode de camouflage utilisée par les militants du PKK qui se déguisent en villageois ;

- on ne peut s'attendre des gendarmes en pleine opération militaire dans les montagnes à ce qu'ils gardent avec eux le corps de la victime, même si cette dernière est présumée être un terroriste. Il faut observer que les constats par le procureur et par le médecin avaient déjà été faits avant que le corps ne soit rendu aux villageois.

En ce qui concerne l'enquête pénale menée au plan national, les procureurs qui sont intervenus dans la présente affaire ont constitué le dossier et ont déclenché une instruction contre les présumés auteurs de l'attaque contre les forces de l'ordre. Ni un membre de la famille de la victime (y compris le requérant), ni une autre personne n'ont soutenu devant les procureurs la thèse selon laquelle les forces de l'ordre auraient délibérément tué Abdulmenaf Kaya alors que celui-ci était non armé. Une telle allégation a été formulée pour la première fois devant la Commission. Ni le requérant, ni le témoin cité par le requérant n'ont comparu devant les délégués de la Commission. Par ailleurs, la déposition faite par ce témoin le 17 juin 1994 devant le procureur de Lice, lequel a fait également l'objet des poursuites pour avoir aidé le PKK, est loin d'être précise et crédible, celui-ci ayant pu inventer cette histoire afin d'échapper aux poursuites. En tout état de cause, la Commission n'a pas eu la possibilité de vérifier ce témoignage et ce, en raison uniquement d'un manquement imputable à la partie requérante.

Je conclus dès lors que les faits relatifs au décès de Abdülmenaf Kaya étaient "clairs et incontestés" et que "l'examen inquisitoire subséquent" était suffisant et proportionné à la nature de l'incident. Pour ces raisons, j'ai voté en l'espèce pour la non-violation des articles 2 et 6 de la Convention.

(Or. français)

OPINION PARTIELLEMENT DISSIDENTE COMMUNE A MM. J.-C. SOYER ET E. BIELIUNAS CONCERNANT L'ARTICLE 2 DE LA CONVENTION

A notre regret, nous ne pouvons partager l'opinion de la majorité de la Commission sur la question de la violation de l'article 2 de la Convention. Nous souscrivons à cet égard à l'opinion dissidente de M. GÖZÜBÜYÜK dans la mesure où elle parvient à la conclusion que les faits relatifs au décès de Abdulmenaf Kaya étaient clairs et incontestés et que l'examen inquisitoire subséquent était suffisant pour les besoins de l'article 2 de la Convention.

(Or. English)

PARTLY DISSENTING OPINION OF MR. N. BRATZA JOINED BY MR. G.B. REFFI

I fully share the conclusion and reasoning of the majority of the Commission that there has been a violation of Article 2 of the Convention in the present case by reason of the lack of any effective investigation into the circumstances of the death of Abdulmenaf Kaya.

Since the absence of any adequate and effective investigation into the death similarly underlies the applicant's complaints under Articles 6 and 13 of the Convention, I have not found it necessary to examine separately the complaint under either Article.

APPENDIX

DECISION OF THE COMMISSION

AS TO THE ADMISSIBILITY OF

Application No. 22729/93
by Mehmet KAYA
against Turkey

The European Commission of Human Rights sitting in private on 20 February 1995, the following members being present:

MM. C. A. NØRGAARD, President
H. DANELIUS
C.L. ROZAKIS
S. TRECHSEL
A.S. GÖZÜBÜYUK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
Mrs. G.H. THUNE
Mr. F. MARTINEZ
Mrs. J. LIDDY
MM. L. LOUCAIDES
M.P. PELLONPÄÄ
B. MARXER
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
I. BÉKÉS
J. MUCHA
D. ŠVÁBY
E. KONSTANTINOV
G. RESS

Mr. H.C. KRÜGER, Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 23 September 1993 by Mehmet KAYA against Turkey and registered on 1 October 1993 under file No. 22729/93;

Having regard to:

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 11 April 1994 and the information and observations in reply submitted by the applicant on 6 June and 7 July 1994;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, a Turkish citizen of Kurdish origin, was born in 1949 and lives at Lice/Dolunay. He is represented before the Commission by Professor Kevin Boyle and Ms. Françoise Hampson, both university teachers at the University of Essex. The applicant states that he is bringing the application on his own behalf and on behalf of his deceased brother.

The facts as submitted by the parties may be summarised as follows.

A. The particular circumstances of the case

The applicant states that the following occurred:

On 25 March 1993 at around 8.00, the applicant's brother A. Menaf Kaya was going to the fields 300-400 metres from Çiftlibahçe, four kilometres from Dolunay village, together with Hikmet Aksoy. At that time, a military operation was starting in Boyunlu, Dolunay, Çiftlibahçe and Ormankaya villages. Soldiers participating in the operation took Hikmet Aksoy into custody. Seeing this, A. Menaf Kaya started to run towards a village. The soldiers opened fire. A. Menaf Kaya was injured but ran the remaining 300-400 metres to Çiftlibahçe village where he hid in the bushes. The soldiers found him there and, according to eye-witnesses, fired over 100 bullets into his body. The witnesses then left the village, being frightened of the security forces and the intimidation to which they would be subjected if they spoke out publicly.

The security forces planted a firearm on A. Menaf Kaya and took photographs. They did not want to give his body to the villagers. The villagers insisted, saying, "This man is from a neighbouring village; he is not a terrorist or anything". Someone else said "He is my uncle". They also said, "You have killed him; at least give us the body". Finally, the soldiers gave the body to the villagers. Hikmet Aksoy was detained for six days but was released following interrogation.

There was an autopsy report, which is currently in the hands of the Public Prosecutor. The applicant has asked for the report but has not been able to obtain it.

Later, the commander of the military unit is alleged to have threatened the inhabitants of two villages with the destruction of their villages.

Most of those who came to give their condolences on the death of A. Menaf Kaya suffered abuse of various kinds. Fifteen persons in a minibus from Dibek village were taken into custody together with the village imam. They suffered various abuses and were beaten up. The village imam was removed from his position.

The respondent Government state as follows.

Security forces conducting a field search at Lice, Dolunay village came under fire from 500 metres east of the field. There was an exchange of fire for some time. When the firing came to an end, the

search continued. A body was found, identity unknown at that time, a Russian made automatic assault weapon and ammunition by its side.

Photographs were taken of the body and an official field report made by the security forces.

An official autopsy was conducted on the body on 25 March 1993 and the report indicated that death was caused by bullet wounds.

The identity of the deceased as A. Menaf Kaya, was established and a preliminary investigation was initiated by the Diyarbakır Public Prosecutor. He found that he had no jurisdiction and sent the case to be dealt with by the Public Prosecutor at the Diyarbakır State Security Court, where it is still pending.

According to the statement of 9 March 1994 of the Lice Community Gendarme Commander, Hikmet Aksoy was not taken into custody as alleged and he is currently sought by the authorities as being a member of the PKK (Kurdish Workers' Party - an armed separatist movement).

B. Relevant domestic law and practice

The Turkish Criminal Code contains provisions dealing with unintentional homicide (Articles 452, 459), intentional homicide (Article 448) and murder (Article 450).

Article 49 of the Criminal Code provides for the defence of self-defence: in its second paragraph, it states (translation):

"No punishment shall be imposed if the perpetrator acted...

2. in immediate necessity to repel an unjust assault against his own or another's person or chastity."

Article 23 of the State of Emergency Act (25 October 1983) provides with regard to the use of weapons by the security forces (translation):

> "After the declaration of the State of Emergency security forces and special forces on duty and members of the armed forces while carrying out their duties are empowered to use their weapons under circumstances as stipulated in relevant acts.
>
> Under the conditions when the State of Emergency is declared according to art. 3 section b of this act - (in the event of the emergence of serious indications of widespread acts of violence aimed at the destruction of the free democratic order established by the Constitution or of fundamental rights and freedoms or serious deterioration of public order because of acts of violence, as stated in art. 120 of the Constitution) - those security forces empowered to use weapons are to open fire and shoot directly without hesitation at the target in cases where a surrender command is not obeyed or is met by counter fire or where security forces are left in a self-defence situation."

COMPLAINTS

The applicant complains of violations of Articles 2, 3, 6, 13 and 14 of the Convention.

As to Article 2, he complains of the unlawful killing of his brother by soldiers in circumstances in which it was not necessary to open fire and the force used was disproportionate. Alternatively there was a violation of Article 2 on account of the killing of his brother in violation of the State's obligation to protect his right to life. Moreover, Article 2 was violated on account of the lack of any effective system for ensuring protection of the right to life and on account of the inadequate protection of the right to life in domestic law.

As to Article 3, he complains of discrimination based on race and/or ethnic origin, which constitutes degrading treatment.

As to Article 6, he complains of the failure to initiate proceedings before an independent and impartial tribunal against those responsible for the killing, as a result of which he cannot bring civil proceedings arising out of the killing. He is thereby denied effective access to court.

As to Article 13, he complains of the lack of any independent national authority before which these complaints can be brought with any prospect of success.

As to Article 14, he complains of discrimination on the grounds of race and/or ethnic origin in the enjoyment of the rights guaranteed by Articles 2, 6 and 13 of the Convention.

The applicant maintains that there is no requirement that he pursue alleged domestic remedies. In his opinion any alleged remedy is illusory, inadequate and ineffective because

(a) there is an administrative practice of non-respect for the rule which requires the provision of effective domestic remedies (Article 13);

(b) there is an administrative practice of unlawful killing at the hands of the Turkish security forces in South-East Turkey;

(c) whether or not there is an administrative practice, domestic remedies are ineffective in this case, owing to the failure of the legal system to provide redress;

(d) whether or not there is an administrative practice, the situation in South-East Turkey is such that potential applicants have a well-founded fear of the consequences, should they pursue alleged remedies.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 23 September 1993 and registered on 1 October 1993.

On 29 November 1993, the Commission decided to communicate the application to the Government and to ask for written observations on the admissibility and merits of the application.

The Government's observations were submitted on 11 April 1994 after one extension in the time-limit. The applicant submitted further information and observations in reply on 6 June 1994 and 7 July 1994.

THE LAW

The applicant alleges that his brother was killed in circumstances for which the State is responsible. He invokes Article 2 (the right to life), Article 3 (prohibition on inhuman and degrading treatment), Article 6 (the right of access to court), Article 13 (the right to effective national remedies for Convention breaches) and Article 14 (prohibition on discrimination).

Exhaustion of domestic remedies

The Government argue that the application is inadmissible since the applicant has failed to exhaust domestic remedies as required by Article 26 of the Convention before lodging an application with the Commission.

The Government point out that there is an ongoing investigation by the Public Prosecutor at the State Security Court at Diyarbakır which is still pending.

Further, the Government submit, without giving detail, that the applicant has the possibility of introducing an action in the civil courts for compensation in respect of claims against State officials.

The applicant maintains that there is no requirement that he pursue domestic remedies. Any purported remedy is illusory, inadequate and ineffective since, inter alia, the operation in question in this case was officially organised, planned and executed by agents of the State. He refers to an administrative practice of unlawful killings and of not respecting the requirement under the Convention of the provision of effective domestic remedies.

Further, the applicant submits that, whether or not there is an administrative practice, domestic remedies are ineffective in this case having regard, inter alia, to the situation in South-East Turkey which is such that potential applicants have a well-founded fear of the consequences; the lack of genuine investigations by Public Prosecutors and other competent authorities; positive discouragement of those attempting to pursue remedies; an official attitude of legal unaccountability towards the security forces; and the lack of any prosecutions against members of the security forces for alleged extra-judicial killings or torture.

In respect of the investigation by the Public Prosecutor at the State Security Court at Diyarbakır, the applicant submits that the prosecutor has had adequate time to complete his investigation and that the file is simply being left open with no ongoing inquiries being conducted.

The Commission recalls that Article 26 of the Convention only requires the exhaustion of such remedies which relate to the breaches of the Convention alleged and at the same time can provide effective and sufficient redress. An applicant does not need to exercise remedies which, although theoretically of a nature to constitute remedies, do not in reality offer any chance of redressing the alleged breach. It is furthermore established that the burden of proving the existence of available and sufficient domestic remedies lies upon the State invoking the rule (cf. Eur. Court H.R., De Jong, Baljet and Van den Brink judgment of 22 May 1984, Series A no. 77, p. 18, para. 36, and Nos. 14116/88 and 14117/88, Sargin and Yagci v. Turkey, Dec. 11.05.89, D.R. 61 p. 250, 262).

The Commission does not deem it necessary to determine whether there exists an administrative practice on the part of Turkish authorities tolerating abuses of human rights of the kind alleged by the applicant, because it agrees with the applicant that it has not been established that he had at his disposal adequate remedies to deal effectively with his complaints.

The Commission notes that while the Government refers to the pending inquiry by the Public Prosecutor into the death of the applicant's brother on 25 March 1993, almost two years have elapsed since the killing and the Commission has not been informed of any significant progress having been made in the investigation. In view of the delays involved and the serious nature of the alleged crime, the Commission is not satisfied that this inquiry can be considered as furnishing an effective remedy for the purposes of Article 26 of the Convention.

The Commission finds that in the circumstances of this case the applicant is not required to pursue any other legal remedy in addition to the Public Prosecutor's inquiry (see eg. No. 19092/91, Yagiz v. Turkey, Dec. 11.10.93, to be published in D.R.75). The Commission concludes that the applicant should be considered to have complied with the domestic remedies rule laid down in Article 26 of the Convention. Consequently, the application cannot be rejected for non-exhaustion of domestic remedies under Article 27 para. 3 of the Convention.

As regards the merits

The Government deny that there is any administrative practice of unlawful killings by the State and assert that death incidents are usually terrorist acts carried out by illegal terrorist organisations operating within the area of State of Emergency. They refer in particular to the illegal organisation known as the PKK (Kurdish Workers' Party) which is carrying out a campaign of terrorism and intimidation in face of which the Government are striving to maintain security and order.

The Government submit that the applicant's brother was found in possession of a lethal weapon and that the inquiry of the Public Prosecutor of Diyarbakır State Security Court indicates that security forces opened fire in self-defence and in compliance with the state of emergency rules on the use of their weapons.

The applicant maintains his submissions. He states that his brother, unarmed and posing no threat to the security forces, was shot as he ran away and that the arms found on his brother's body were planted there by the soldiers. In these circumstances, the use of lethal force cannot be justified as absolutely necessary within the meaning of Article 2 of the Convention. Insofar as the state of emergency legislation authorises the opening of fire simply on account of a failure to stop or surrender, the applicant submits that this is in violation of Article 2 of the Convention.

The Commission considers, in the light of the parties' submissions, that the case raises complex issues of law and fact under the Convention, the determination of which should depend on an examination of the merits of the application as a whole. The Commission concludes, therefore, that the application is not manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention. No other grounds for declaring it inadmissible have been established.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION ADMISSIBLE, without prejudging the merits of the case.

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (C.A. NØRGAARD)

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

CASE OF KAYA v. TURKEY

(158/1996/777/978)

JUDGMENT

STRASBOURG

19 February 1998

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SUMMARY[1]

Judgment delivered by a Chamber

Turkey – alleged unlawful killing by security forces and failure of authorities to carry out effective investigation into killing

I. THE GOVERNMENT'S PRELIMINARY OBJECTION (applicant's lack of standing and validity of application)

Government failed to raise this objection at the admissibility stage of the proceedings before the Commission - estoppel.

Conclusion: objection dismissed (eight votes to one).

II. ARTICLE 2 OF THE CONVENTION

A. Alleged unlawful killing of applicant's brother

Reiteration of case-law on Commission's role in establishment of facts.

In instant case, deeply conflicting accounts of circumstances in which victim was killed – Commission's fact-finding seriously hindered on account of failure of applicant and alleged key eyewitness to testify before Delegates – while sharing Commission's concerns about certain features of Government's case, Court considers nevertheless there are no exceptional circumstances which lead it to depart from Commission's finding of no violation - insufficient factual and evidentiary basis to conclude, beyond reasonable doubt, that deceased intentionally killed in circumstances alleged by applicant.

Conclusion: no violation (unanimously).

B. Alleged inadequacy of official investigation

Reiteration of case-law on procedural obligation inherent in Article 2 requiring Contracting State to conduct some form of effective investigation when individuals killed by agents of State.

In instant case, circumstances surrounding killing disputed – could not be considered a clear-cut case of lawful killing which could be disposed of by means of minimum formalities – investigation (forensic examination, autopsy, further enquiries) seriously deficient – investigating authorities proceeded throughout on assumption that deceased was a terrorist killed in an armed clash with security forces – not prepared to test that assumption – neither prevalence of armed clashes in region nor high incidence of fatalities can displace obligation under Article 2 to ensure effective investigation into deaths arising out of clashes with security forces – authorities failed to comply with obligation in this case.

1. This summary by the registry does not bind the Court.

Conclusion: violation (eight votes to one).

C. Alleged lack of protection in domestic law for the right to life

Conclusion: not necessary to consider complaint (unanimously).

III. ARTICLES 6 § 1 AND 13 OF THE CONVENTION

A. Article 6 § 1 of the Convention

Applicant did not at any stage pursue a compensation claim before a civil or administrative court – not possible therefore for Court to determine whether domestic court would have adjudicated on claim notwithstanding applicant's contention that legal proceedings would offer no prospect of success in view of inadequacy of official investigation into killing – complaint under Article 6 § 1 in reality linked to Article 13 complaint that seriously deficient investigation resulted in denial of effective remedy.

Conclusion: not necessary to consider complaint (unanimously).

B. Article 13 of the Convention

Reiteration of Court's case-law on nature of an effective remedy in cases of alleged serious violations of Convention rights.

In instant case, authorities confronted with an allegation of unlawful killing by security forces – relatives of deceased had arguable grounds for making allegation in view of doubts about exact circumstances of killing – authorities obliged in circumstances to conduct, for benefit of relatives, thorough and effective investigation – no such investigation conducted having regard to Article 2 conclusion – accordingly applicant and next-of-kin also denied on that account an effective remedy and thereby access to other remedies, including compensation proceedings.

Conclusion: violation (eight votes to one).

IV. ARTICLES 2, 6 AND 13 OF THE CONVENTION IN CONJUNCTION WITH ARTICLE 14

Complaints not substantiated.

Conclusion: no violation (unanimously).

V. ARTICLE 50 OF THE CONVENTION

A. Non-pecuniary damage

Claim in respect of applicant disallowed – sum awarded to deceased's widow and children.

Conclusion: respondent State ordered to pay a specified sum to deceased's widow and children only (eight votes to one).

B. Costs and expenses

Applicant's claim allowed in part.

Conclusion: respondent State ordered to pay a specified sum (unanimously).

COURT'S CASE-LAW REFERRED TO

27.4.1988, Boyle and Rice v. the United Kingdom; 27.9.1995, McCann and Others v. the United Kingdom; 18.12.1996, Aksoy v. Turkey; 25.9.1997, Aydın v. Turkey; 28.11.1997, Menteş v. Turkey

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

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

Mr R. BERNHARDT, *President*,
Mr Thór VILHJÁLMSSON,
Mr F. GÖLCÜKLÜ,
Mr C. RUSSO,
Mr J.M. MORENILLA,
Mr K. JUNGWIERT,
Mr P. KŪRIS,
Mr E. LEVITS,
Mr J. CASADEVALL,

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

Having deliberated in private on 27 October 1997 and on 2 February 1998,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 5 December 1996, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in an application (no. 22729/93) against the Republic of Turkey lodged with the Commission under Article 25 of the Convention on 23 September 1993 by Mr Mehmet Kaya, a Turkish national, on his own behalf and on behalf of his deceased brother, Mr Abdülmenaf Kaya, and the latter's surviving widow and seven children.

Notes by the Registrar

1. The case is numbered 158/1996/777/978. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

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

The Commission's request referred to Articles 44 and 48 of the Convention and to the declaration of 22 January 1990 whereby Turkey recognised the compulsory jurisdiction of the Court (Article 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 2, 3, 6, 13 and 14 of the Convention.

2. In view of the applicant's lack of response to the enquiry as to whether he wished to take part in the proceedings and to designate representatives for this purpose (Rule 33 § 3(d) of Rules of Court A), the President of the Chamber, acting through the Registrar, took steps to clarify the applicant's intentions by writing to him directly at his address in Diyarbakır Prison on 3 June 1997. In response to that letter, which was delivered with the assistance of the Agent of the Turkish Government ("the Government"), the applicant stated in a letter of reply dated 25 June 1997 and communicated through the intermediary of the Government that he wished to take part in the proceedings. He authorised his daughter, Miss Leyla Kaya, to act as his intermediary for this purpose. The latter, acting on behalf of the applicant, designated the lawyers who would represent him (Rule 30).

By letter dated 18 March 1997, the President of the Chamber refused the applicant's request under Rule 27 for leave to provide for interpretation in a non-official language at the oral hearing having regard to the fact that two of the applicant's lawyers used one of the official languages of the Court.

3. The Chamber to be constituted included *ex officio* Mr F.Gölcüklü, the elected judge of Turkish nationality (Article 43 of the Convention), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 § 4 (b)). On 20 January 1997, in the presence of the Registrar, the President of the Court, Mr R. Ryssdal, drew by lot the names of the other seven members, namely, Mr Thór Vilhjálmsson, Mr C. Russo, Mr J.M. Morenilla, Mr K. Jungwiert, Mr P. Kūris, Mr E. Levits and Mr J. Casadevall (Article 43 *in fine* of the Convention and Rule 21 § 5).

4. As President of the Chamber (Rule 21 § 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the Government, the applicant's lawyers and the Delegate of the Commission on the organisation of the proceedings (Rules 37 § 1 and 38). Pursuant to the order made in consequence on 11 March 1997, the Registrar received the Government's memorial on 25 June 1997 and the applicant's memorial on 8 September 1997, the applicant having been granted an extended deadline for the submission of his memorial by the President on 29 July 1997 in view of the steps being taken to clarify the applicant's intention with respect to the proceedings (see paragraph 2 above).

On 9 October 1997 the Commission supplied a number of documents from its case file, including the verbatim record of the hearing of witnesses before the Delegates in Diyarbakır and the original application lodged with the Commission by the applicant. These documents had been requested by the Registrar on the instructions of the President.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 21 October 1997. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*
Mr A.S. AKAY, *Acting Agent*,
Mr ABDÜLKADIR KAYA, *Counsel*,
Mr K. ALATAŞ,
Mr F. POLAT, *Advisers*;

(b) *for the Commission*
Mr H. DANELIUS, *Delegate*;

(c) *for the applicant*
Mr K. BOYLE, Barrister-at-Law, University of Essex,
Ms A. REIDY, Barrister-at-Law, University of Essex, *Counsel*.

The Court heard addresses by Mr Danelius, Ms Reidy, Mr Boyle and Mr Akay.

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

1. The applicant

6. The applicant, Mr Mehmet Kaya, is a Turkish citizen born in 1949. At the time of the events in question (see paragraph 8 below) he was a farmer living in Dolunay village in the district of Lice which is situated in the province of Diyarbakır in south-eastern Turkey. He is currently detained in Diyarbakır E-type prison (see paragraph 2 above). His brother, Mr Abdülmenaf Kaya, who also lived and farmed in Dolunay before his

death, was killed on 25 March 1993 in the vicinity of the village in circumstances which are disputed and which have given rise to the proceedings before the Convention institutions.

7. The original application to the Commission was lodged by the applicant on his own behalf and on behalf of his deceased brother and the widow and seven children of the deceased.

2. The facts in dispute

8. The applicant has alleged that his brother was deliberately killed by the security forces on 25 March 1993. The Government on the contrary have contended that Mr Abdülmenaf Kaya was killed in a gun battle between members of the security forces and a group of terrorists who had engaged the security forces on the day in question. They claim that the applicant's brother was among the assailants. The facts as presented by the parties are set out in Section A below.

The applicant and the Government have defended their opposing accounts of the circumstances surrounding the death of Abdülmenaf Kaya on the basis of documentary material, which appears in Section B. The measures taken by the domestic authorities after 25 March 1993 to investigate the killing of Abdülmenaf Kaya are described in Section C.

The Commission appointed Delegates to take oral evidence from key witnesses at a hearing held in Diyarbakır on 9 November 1995. Having regard to the testimony of those witnesses who appeared before the two Delegates and to its examination of relevant material, the Commission assessed the evidence and established its conclusions in respect of both the killing of Abdülmenaf Kaya and the adequacy of the domestic investigation into his death. These conclusions and the reasons supporting them are summarised at Section D.

A. The events of 25 March 1993

1. Facts as presented by the applicant

9. The applicant has based his account of the events surrounding the killing of his brother on 25 March 1993 on the evidence of villagers from Çiftlibahçe village whom he alleges witnessed the incident and on the testimony of Mr Hikmet Aksoy, a villager from Dolunay whom he maintains was in the company of his brother on the day the latter was killed. The applicant was not himself an eyewitness to the events.

10. The applicant alleges that on the morning of 25 March 1993 his deceased brother was going to the fields situated 300 - 400 metres from the village of Çiftlibahçe and four kilometres from his own village of Dolunay together with Hikmet Aksoy. A military operation was being conducted at

the time. Hikmet Aksoy turned off the road at one point to tend to his beehives but was detained by soldiers. Seeing this, Abdülmenaf Kaya began to run away as he was frightened that he would also be taken into custody. The soldiers saw him running and opened fire. Abdülmenaf Kaya ran towards Çiftlibahçe village and hid in some bushes. The soldiers gave chase and found him. According to villagers from Çiftlibahçe who witnessed the incident the soldiers killed him, riddling his body with bullets. The soldiers then planted a weapon near his body and took photographs of the scene. The villagers requested that the body be handed over to them. At first the security forces refused but when the villagers insisted that the deceased was not a terrorist but the uncle of one of the inhabitants of a neighbouring village they relented. The villagers were verbally abused and threatened by the security forces.

Hikmet Aksoy was taken into custody and held in Lice Gendarmerie station for six days.

2. Facts as presented by the Government

11. The Government's account of the circumstances which led to the death of the applicant's brother is based on the statements made to the Commission's Delegates at the hearing in Diyarbakır on 9 November 1995 (see paragraph 8 above) by members of the security forces involved in the alleged clash with terrorists on 25 March 1993, namely: Alper Sır, a first lieutenant who had been charge of the four teams of soldiers involved in the anti-terrorist operation on the day in question; Mr Ahmet Gümüs and Mr Paşa Bülbül, both senior sergeants commanding units involved in the operation; and Sergeant Altan Berk who had been in one of the units.

12. The Government maintain that the security forces arrived in the vicinity of Dolunay on 25 March 1993 having received information that terrorists had been seen in the area. While they were conducting a field search in line formation they came under fire somewhere between Dolunay village and Çiftlibahçe village. The gunfire was directed at them from a rocky area, a creek and from the hills around. The security forces, numbering about sixty, took cover and returned fire using mainly G3 and A4 guns with an effective range of between 300 and 1,000 metres as well as longer range MG 3 and K 23 machine guns. The firing distance between the security forces and their assailants varied between 300 and 500 metres. The terrorists retreated after about 30 minutes and in the lull a search of the scene of the attack was carried out during which the security forces recovered a dead body alongside of which lay an automatic assault gun (later confirmed as Chinese-made in the ballistics report - see paragraph 32 below) bearing the serial number 59339 together with ammunition including three cartridge clips, three rounds of which were spent and three unused. During the field search considerable traces of blood were found along the route used by the terrorists to make their escape.

13. The team commander, First Lieutenant Alper Sır, secured the area and contacted the office of the Public Prosecutor of Lice about the incident. Two and half hours later the Public Prosecutor, Mr Ekrem Yıldız, and the District Government doctor, Dr Arzu Doğru, arrived at the scene by helicopter accompanied by assistants. An on-the-spot autopsy was performed on the body by Dr Doğru and an autopsy report (see paragraphs 26-30 below) was prepared there and then. The Public Prosecutor drew up a burial certificate.

14. The body, which was not identified at that stage (see paragraph 15 below), was handed over to First Lieutenant Alper Sır who signed the necessary forms. First Lieutenant Alper Sır's team subsequently advanced to the nearest village, Ciftlibahçe, where the body of the deceased was handed over to the mayor and two other villagers for burial. They signed for the body.

An incident report was drawn up in a hand-written form on 25 March. It was signed by six members of the security forces, amongst whom Alper Sır, Paşa Bülbül, Ahmet Gümüs and Altan Berk (see paragraph 11 above). The report confirms the above-mentioned account of the events (see paragraphs 12 and 13 above).

15. The identity of the deceased was in fact only discovered some months after the incident. According to a hand-written report signed by three gendarme officers and dated 5 May 1993, the investigation which was carried out after the incident revealed that the body was that of Abdülmenaf Kaya, a resident of Dolunay village, who was killed in a clash with security forces conducting an operation in the outskirts of Dolunay.

B. Materials adduced in support of these accounts

1. Statements made by the applicant

16. The applicant maintains that he personally confirmed the above account of the events (see paragraph 10 above) in a statement which he gave to Mr Abdullah Koç of the Diyarbakır branch of the Human Rights Association on 31 March 1993, just six days after the fatal shooting and in a supplementary statement which he made to Mr Sedat Aslantaş also of the Diyarbakır branch of the Human Rights Association on 20 September 1993.

(a) Statement dated 31 March 1993 taken by Abdullah Koç of the Diyarbakır branch of the Human Rights Association

17. In his statement the applicant declared that at around 08.00 hours on the morning of 25 March 1993 Abdülmenaf Kaya and Hikmet Aksoy were going to the fields 300-400 metres from Çiftlibahçe village and four kilometres from Dolunay village. At that time a military operation was

starting in Boyunlu, Dolunay, Çiftlibahçe and Ormankaya villages. Soldiers participating in the operation took Hikmet Aksoy into custody. Seeing this, Abdülmenaf Kaya started to run whereupon the soldiers opened fire. Abdülmenaf Kaya ran the remaining 300-400 metres to Çiftlibahçe and hid there in the bushes. The soldiers found him and, according to eyewitnesses, fired over 100 bullets into his body, planted a firearm on him and took photographs. They did not want to give the body to the villagers, but the villagers insisted that the deceased was from a neighbouring village and that he was not a terrorist. The soldiers finally gave the body to the villagers.

Later, the commander of the military unit threatened the inhabitants of Çiftlibahçe and Dolunay with the destruction of their villages. Most of the people who came to offer their condolences on the death of Abdülmenaf Kaya suffered abuse of various kinds.

The applicant concluded in his statement that Hikmet Aksoy had been taken into custody and his whereabouts were unknown.

(b) Supplementary statement dated 20 September 1993 taken by Sedat Aslantaş of the Diyarbakır branch of the Human Rights Association

18. In this statement, the applicant declared that Abdülmenaf Kaya was injured while running away and that the security forces followed him to the bushes and killed him there.

The applicant stated that the security forces alone took photographs of the body and when the applicant's family received the body they had to bury it immediately. An autopsy was conducted but the applicant was not given a copy of the autopsy report although he had requested one. The applicant also declared in the statement that the witnesses who saw the body of Abdülmenaf Kaya had left the village, being frightened of the security forces and the intimidation to which they would be subjected if they spoke out publicly. He could not remember any of the names of the villagers who witnessed the killing. The applicant concluded his statement by mentioning that Hikmet Aksoy had been detained in Lice gendarmerie station for six days for questioning and then released.

2. Statements made by Hikmet Aksoy

19. The applicant maintains that his account of the events is confirmed by statements made by Hikmet Aksoy to the authorities in circumstances which would have made it impossible for the latter to know of the content of his own statements (see paragraphs 17 and 18 above) to the Diyarbakır Human Rights Association.

(a) Statement dated 17 June 1994 taken by Özcan Küçüköz, Lice Public Prosecutor

20. This statement was taken following a letter dated 17 May 1994 from the Public Prosecutor at the Diyarbakır State Security Court (see paragraph 33 below). When Aksoy made the statement, he was detained in Lice prison for possession of hashish.

21. Like Aksoy, Abdülmenaf Kaya was from the village of Dolunay. On 25 March 1993 Aksoy left his house to go and tend his beehives which were situated on a piece of land along a road between Dolunay and Çiftlibahçe. When he was leaving Dolunay village, he met Abdülmenaf Kaya who asked if he could accompany him.

When he reached his beehives, he heard some people running and saw about ten soldiers approaching him. The soldiers tied up his hands and asked who he was and why he was wandering about. Two or three minutes later the soldiers noticed Abdülmenaf Kaya running away. The soldiers shouted after him to stop, but he either did not hear them or chose to ignore them as he increased his walking pace. The lieutenant ordered the soldiers to shoot at Abdülmenaf Kaya's feet. At that time Abdülmenaf Kaya was approximately fifty to sixty metres away.

When the soldiers started shooting at his feet, Abdülmenaf Kaya began to run towards Çiftlibahçe. The soldiers chased him, taking Aksoy along with them. Abdülmenaf Kaya disappeared beyond a slope and when the soldiers reached the slope he was nowhere to be seen. They then came to the ten or so houses which are situated at a short distance from Çiftlibahçe where they encountered some other soldiers who said that they had seen Abdülmenaf Kaya. Aksoy and the soldiers waited in the street for about half an hour. He then heard shots being fired; he estimates that three cartridges were fired. About ten minutes later a helicopter landed but it was too far away from Aksoy for him to be able to see what was happening. The helicopter left again after ten minutes. Later a lieutenant approached Aksoy and told him "we have killed Menaf".

Aksoy was taken to Lice and kept in custody for fifteen days.

(b) Statement dated 22 November 1995 taken by two police officers of the anti-terrorist branch

22. Aksoy is said to have made this statement whilst in detention following his arrest on 14 November 1995. According to the applicant the statement cannot be taken to be reliable and must be considered to have been obtained under pressure, as confirmed by Aksoy's subsequent retraction (see paragraphs 24 and 25 below).

23. Aksoy states how from 1990 he provided food to groups of Workers' Party of Kurdistan ("PKK") members who came to his village of Dolunay. From 1991 he was also involved with ensuring the attendance of villagers at funerals of terrorists.

In March 1992 six PKK members came to the village and told him to go and get Abdülmenaf Kaya. After Abdülmenaf Kaya had appeared, he and one of the PKK members talked to each other in a separate place. Two months later three PKK members arrived with a group of ten people. Abdülmenaf Kaya was told to organise the attendance of villagers at a funeral. Two months later the military staged an operation during which Abdülmenaf Kaya died. According to the Government, this last part of his statement is an inaccurate translation of Aksoy's words. They maintain that Aksoy in fact related that Abdülmenaf Kaya died during an armed clash.

(c) Statement dated 23 November 1995 to a Public Prosecutor

24. In this statement Aksoy retracted the statement of 22 November 1995 (see paragraphs 22 and 23 above), saying that he was forced to sign a statement which the police had written.

25. In the statement he denies the accusations that have been made against him, namely that he acted as a courier for the PKK. No mention is made of Abdülmenaf Kaya in the statement.

3. The autopsy report of 25 March 1993

26. This report was drawn up by Dr Arzu Doğru who had been flown to the scene of the fatal shooting to perform the field autopsy. It was prepared on-the-spot (see paragraph 13 above).

27. The report states that following a telephone call from the District Gendarmerie Headquarters on 25 March 1993 to the effect that the body of a person belonging to the PKK terrorist organisation had been captured during a clash, the Public Prosecutor Ekrem Yıldız and the District Government Doctor Arzu Doğru set out by military helicopter, accompanied by a gendarme staff sergeant who was to act as clerk. On arrival at the scene the body was found to be lying on its back in the bushes on the bank of a creek. It was moved to a flat piece of ground. Beside the body there was a Kalashnikov rifle with serial number 8125298 and one round of ammunition containing three full and six empty cartridges. The body is described as being that of a 35-40 year old man with grey hair and dressed in blue and grey trousers with a cummerbund round the waist, a sleeveless black vest and a striped winter shirt, wearing rubber shoes but no socks. Since there was no one at the scene of the incident who could identify the deceased, the security forces took photographs from several angles.

28. A large number of bullet entry and exit holes were found in the neck of the body, in the throat, above the heart, in the upper left area of the abdomen, around the navel and around the groin, in the left hip and in the femur of both legs. The bones of the legs were broken as a result of the blows received.

29. The report subsequently mentions that the medical examiner was brought over, that the body was handed over to him and that he made the following statement:

> "I established the above findings together with the Public Prosecutor, and I agree that the findings are as described above. As the result of these findings, the cause of death is clear. There is no need to carry out a classical autopsy. The conditions in the field combined with the fact that we do not have sufficient security or instruments are in any case an impediment to performing a full classical autopsy. From the above findings I have come to the conclusion that the deceased died from cardiovascular insufficiency as a result of the wounds caused by firearms. That is my definite opinion."

30. The report further states that the rifle and the ammunition were seized for safekeeping as *corpus delicti*. It concludes by stating that the forensic examination of the body and the autopsy procedure had been completed. The report is signed by, *inter alia*, First Lieutenant Alper Sır as the person receiving the body.

C. Proceedings before the domestic authorities

31. Following the events of 25 March 1993 and the identification of the body as that of Abdülmenaf Kaya (see paragraph 15 above), a decision of non-jurisdiction was issued on 20 July 1993 by Ekrem Yıldız, Public Prosecutor at Lice and the file was transferred to the Public Prosecutor at the Diyarbakır State Security Court.

In his decision, the Public Prosecutor stated that "the preliminary documents have been examined" in respect of a crime committed by Abdülmenaf Kaya who, together with other PKK terrorists, took part on 25 March 1993 in an armed clash with the security forces The decision describes how the body of the deceased was recovered by the security forces after the clash together with an assault rifle and spent ammunition. The decision notes that the ballistics report on the weapon was not yet available. The Public Prosecutor concluded that, having regard to the aims of the terrorists and to the fact that the attack took place in an area subject to emergency rule, the investigation should be carried out by the prosecution service of the State Security Court on account of the fact that he lacked jurisdiction in the matter.

The State Security Court in turn transmitted the file to the Lice District Administrative Council for investigation.

32. An expert report on the weapon and ammunition found beside Abdülmenaf Kaya's body was drawn up by the Diyarbakır police forensic laboratory on 23 June 1993. The report, which was not available at the time the Public Prosecutor issued his decision of non-jurisdiction (see paragraph 31 above), stated that the weapon was a Chinese-made Kalashnikov automatic rifle serial no. 8125298/59339 and that the three pent bullets examined had been fired from the rifle "which was found with the dead terrorist".

33. On 17 June 1994 a Public Prosecutor, apparently at the request of the Chief Public Prosecutor at the Diyarbakır State Security Court, took a statement in relation to the death of Abdülmenaf Kaya from Hikmet Aksoy while the latter was detained at Lice (see paragraphs 20 and 21 above).

34. During the proceedings before the Commission, the Government were requested to supply the photographs which were allegedly appended to the autopsy report (see paragraph 27 above).The authorities have so far been unable to retrieve the photographs.

D. The evaluation of the evidence and the Commission's findings in respect of the death of the applicant's brother and the adequacy of the official investigation

1. The witnesses

35. At the hearing held before two Commission delegates in Diyarbakır on 9 November 1995 oral evidence was taken from five witnesses: (i) Dr Arzu Doğru, who conducted the field autopsy on the deceased; (ii) First Lieutenant Alper Sır; (iii) Senior Sergeant Ahmet Gümüs; (iv) Senior Sergeant Paşa Bülbül; (v) Sergeant Altan Berk.

36. The applicant did not attend the hearing. He notified the Commission on 1 November 1995 that he feared reprisals if he were to give evidence at the hearing. The nature of his fears was not specified. Nor did Mr Hikmet Aksoy appear. In a letter dated 8 November 1995 Mr Aksoy, through the intermediary of the Diyarbakır Human Rights Association, informed the Commission that he and his family had been subjected to pressure by the police in order to prevent him from giving evidence at the hearing and he would not therefore be attending.

37. Moreover, although summoned to give evidence, neither the Lice Public Prosecutor, Mr Ekrem Yıldız, nor the Public Prosecutor attached to the Diyarbakır State Security Court attended the hearing. The former was unavailable on account of other commitments and the latter had taken the view that he would be unable to give any relevant information to the Delegates on the pursuit of the investigation into Abdülmenaf Kaya's death since he had only become involved in the investigation after jurisdiction had been transferred to the Diyarbakır State Security Court.

2. The approach to the evaluation of the evidence

38. The Commission assessed the documentary and oral evidence before it on the basis of the evidentiary standard of proof beyond reasonable doubt, taking into account the fact that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. In this respect it noted that the failure of the applicant and of Mr Hikmet Aksoy as well as of the two Public Prosecutors to give evidence at the hearing in Diyarbakır had a considerable impact on the determination of whether the evidentiary standard had been attained. The Commission noted however that the applicant was not a direct witness to the events and his testimony would therefore have been of limited evidentiary value. On the other hand, the presence of Hikmet Aksoy would have been valuable since he claimed to be an eyewitness and his failure to attend meant that he could not be cross-questioned with a view to assessing his credibility and the probative value of his evidence. Further, the absence of any detailed investigation at the domestic level into the circumstances surrounding the death of the applicant's brother (see paragraphs 31-34 above) meant that the Commission had to reach its conclusions on the basis of the oral and documentary evidence which it itself had collected in accordance with its powers under Article 28 §1 (a) of the Convention.

3. The assessment

39. The Commission's assessment of the evidence concerning the death of Abdülmenaf Kaya can be summarised as follows:

(i) The only clear and undisputed facts were that on 25 March 1993 the body of Abdülmenaf Kaya was found lying in the bushes on the bank of a creek near the village of Dolunay. The body was dressed in blue and grey trousers with a cummerbund round the waist, a sleeveless black vest and a striped winter shirt, wearing rubber shoes but not socks. A large number of bullet entry and exit holes were found in the neck of the body, in the throat, above the heart, in the upper left area of the abdomen, around the navel and the groin, in the left hip and in the femur of both legs. The bones of the legs were broken as a result of the impact of the bullets. The total number of bullet wounds is not recorded in the autopsy report but was estimated by Dr Arzu Doğru in his oral evidence to the Delegates as seven or eight. It was also not in dispute that an autopsy, consisting only of an external examination, was carried out on the body by Dr Doğru at or near

the site of the killing and that subsequently the body was handed over on the instructions of First Lieutenant Alper Sır to three villagers from the nearby Çiftlibahçe village.

(ii) The accounts of the clash given by the soldiers whose evidence was heard (see paragraph 35 above), while deficient in detail, were broadly consistent and in line with the Government's version of the events (see paragraphs 11-15 above).

(iii) There were however a number of factors which gave reason to doubt the Government's account of the events: there was only one casualty despite the number of soldiers (50-60) and PKK terrorists (20-35) engaged in the gun battle which reportedly lasted between 30 and 60 minutes; the extent and severity of the bullet wounds to the deceased's body having regard to the range of the soldiers' weapons (400-600 metres) and the firing-distance between the soldiers and their attackers (300-1,000 metres); the fact that there were bullet wounds to all parts of the body suggested that the deceased must have been fully exposed to gunfire whereas neither he nor any of the other terrorists had actually been seen during the clash; the deceased's clothing was not typical of PKK mountain apparel; the body was handed over to three unknown villagers even though he was considered to have been an active terrorist; and the absence of any forensic evidence linking the deceased to the weapon found beside his body.

4. The findings concerning the death of the applicant's brother

40. While the Commission took the view that the matters referred to above (see paragraph 39 (iii)) gave rise to concern and were difficult to reconcile with the undisputed facts, it could not be concluded on the basis of a general assessment of the written and oral evidence that it was proved beyond reasonable doubt that Abdülmenaf Kaya was deliberately killed by soldiers in the circumstances alleged by the applicant.

5. The findings concerning the domestic investigation into the death

41. The Commission's assessment of the inquiries and investigation into the death of Abdülmenaf Kaya was made in the absence of any detailed investigation by the authorities into the events of 25 March 1993 and without the Delegates having had the benefit of the oral evidence of the key Public Prosecutors responsible at various stages for the investigation (see paragraph 37 above). The Commission considered the reasons given for their non-attendance at the Delegates' hearing unconvincing.

The Commission found that the autopsy performed on the body was defective and incomplete. In the first place, no attempt had been made to record the number of bullets which struck the deceased or the distance from

which the bullets had been fired and the autopsy report was imprecise as regards the location of the entry and exit wounds. Secondly, no tests for fingerprints or gunpowder traces on the deceased's clothes or body were made at the scene. While acknowledging that the autopsy and the forensic examination may have been carried out under difficult field conditions in view of the security situation, the Commission found it remarkable that the body was not flown to a place where further analyses could have been made of, for example, the bullets lodged in the body. The handing over of the body to the villagers precluded any further examination. Thirdly, it appeared to the Commission that the authorities took it for granted that the deceased was a PKK terrorist and they did not consider it necessary to examine seriously the possibility that he had been killed in circumstances engaging the responsibility of the security forces. In this respect, the Commission had regard to the mention made in the autopsy report that the deceased was a PKK terrorist, to the wording of the non-jurisdiction decision issued by the Public Prosecutor, Mr Ekrem Yıldız, (see paragraph 31 above) and to the apparent failure of the Public Prosecutor attached to the Diyarbakır State Security Court to put any questions to Hikmet Aksoy about the deceased's possible involvement with the PKK (see paragraphs 20 and 21 above).

II. RELEVANT DOMESTIC LAW AND PRACTICE

42. The Government submitted before the Commission and the Court that the following domestic law is relevant to the case:

A. Circumstances entitling the security forces to open fire

43. Pursuant to Section 23 of Decree No. 285 (the Act on the State of Emergency), security forces, special forces on duty and members of the armed forces are, in the circumstances stipulated in the relevant Act, empowered to use their weapons when carrying out their duties. The security forces thus empowered may open fire and shoot at a person if a command to surrender is not accepted, disobeyed or met with counter- fire or if they have to act in self-defence.

44. The plea of self-defence is enacted in Section 49 of the Turkish Criminal Code which, insofar as relevant, provides:

> "No punishment shall be imposed if the perpetrator acted ...
>
> 2. in immediate necessity to repel an unjust assault against his own or another's person or chastity."

B. Investigation and prosecution of the offence of homicide under the Code of Criminal Procedure

45. The Criminal Code contains provisions dealing with unintentional homicide (Sections 452, 459), intentional homicide (Section 448) and murder (Section 450). In respect of these offences, complaints may be lodged, pursuant to Articles 151 and 153 of the Turkish Code of Criminal Procedure, with the Public Prosecutor or the local administrative authorities. The Public Prosecutor and the police have a duty to investigate crimes reported to them (Article 153), 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 (Article 165).

46. The applicant has drawn attention to the provisions of Article 4 § 1 of Decree No. 285 which requires a Public Prosecutor to transfer authority for the investigation of allegations against the security forces to local administrative boards or councils. According to the applicant this provision is immune from judicial challenge, being contained in a decree having the force of law. An identical provision in Article 15 § 3 of Law No. 3713 (the Anti-Terrorism Law 1981) was in fact declared unconstitutional by the Supreme Court in its decision of 31 March 1992. The applicant contends that the administrative boards, which are composed of appointed civil servants with no legal training, lack independence and entrust investigations into alleged wrongdoing by members of the security forces to a senior member of the security forces. The investigator makes a recommendation as to whether or not a prosecution should be initiated and this recommendation is endorsed by the administrative board whose decisions are subject to review by the Council of State.

C. The relationship between criminal and civil liability under Turkish law

47. The Government have provided the Court with a description of the relationship between criminal and civil liability under Turkish law.

When a civil court decides on whether a person was at fault in respect of the commission of a particular act it is not bound by criminal law considerations. The judge in a civil case is not bound by the rules of the criminal law on liability nor by the decision of a criminal court to acquit a person of the wrongdoing which forms the object of civil law proceedings. It follows from Article 53 of the Turkish Code on Obligations that the judge in civil matters does not need to adopt the findings of a criminal court as regards either the absence of fault or the existence and degree of fault.

Article 53 provides:

"The court is not bound by the provisions of the penal laws concerning criminal responsibility nor by an acquittal by a criminal court in deciding questions of fault or capacity to act."

48. Under Turkish law, considerations of crime and fault are not the same as in civil law. Criminal liability comprises the imposition of sanctions whereas civil law is only concerned with the payment of compensation to damages to a plaintiff who can establish fault on the part of the defendant. Liability in criminal and civil law proceedings are determined at different levels and in accordance with different criteria. Under the criminal law, intent on the part of the accused has to be established; in principle it does not consider negligence as a fault in terms of criminal liability. The position is different under civil law.

49. The criminal court may decide the criminal aspects of a case as well as its civil aspects if requested by aggrieved party under the Law on Criminal Procedure. Thus, the criminal court may make an award of damages. In such a case the criminal court's decision on the payment of compensation is binding.

50. A civil court dealing with a claim for compensation against a defendant does not need to await a preliminary ruling from a criminal court hearing the criminal law aspects of the case. It is only where a criminal court has ruled that an accused has committed an act amounting to an offence that a civil court would be bound by that finding. However if the criminal court has acquitted an accused person on the ground that the evidence against him was not sufficient to sustain a conviction, the civil court would not be bound by that decision if the act of which he was accused formed the object of civil litigation. The issue of civil law liability would be determined in accordance with civil rules and procedures. On this latter point a Court of Appeal ruled in 1971 that:

"The fact that the criminal proceedings resulted in the acquittal of the suspect or the fact that the wrongful act had been committed by many people [and] it is not possible to determine who committed it shall not bind the civil court judge in a compensation case opened afterwards".

PROCEEDINGS BEFORE THE COMMISSION

51. In his application to the Commission (no. 22729/93) introduced on 23 September 1993, the applicant complained that his brother, Abdülmenaf Kaya, was unlawfully killed by the security forces on 25 March 1993 and that the circumstances surrounding his killing had not been adequately investigated by the authorities. The applicant alleged violations of Articles 2, 3, 6, 13 and 14 of the Convention.

52. The Commission declared the application admissible on 20 February 1995. In its report of 24 October 1996 (Article 31), it expressed the opinion by 27 votes to 3 that there had been a violation of Article 2 of the Convention on account of the inadequacy of the investigation conducted by the authorities into the death of the applicant's brother; unanimously, that there had been no violation of Article 3 of the Convention; by 27 votes to 3 that there had been a violation of Article 6 of the Convention; by 28 votes to 2 that no separate issue arose under Article 13 of the Convention; and, unanimously, that there had been no violation of Article 14 of the Convention. The full text of the Commission's opinion and the five separate opinions contained in the report are reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT

53. In his memorial and at the oral hearing the applicant requested the Court to find that the facts of the case disclosed a breach by the respondent State of Articles 2, 6, and 13 of the Convention and of the same Articles in conjunction with Article 14 of the Convention. He did not maintain the complaint under Article 3 which had been submitted to the Commission. He also requested the Court to award him just satisfaction under Article 50.

54. The Government for their part requested the Court both in their memorial and at the oral hearing to declare the case inadmissible on account of the fact that Mr Kaya had failed to prove that he enjoyed the status of an applicant for the purposes of the proceedings before the Convention institutions. In the alternative, they requested the Court to reject the applicant's complaints as disclosing no breach of the Convention.

AS TO THE LAW

I. THE SCOPE OF THE CASE

55. The Court notes that the Commission, when referring the case to the Court, asked for a decision on whether the facts gave rise to *inter alia* a breach of Article 3 of the Convention (see paragraph 1 above). The applicant has not however maintained that complaint in the proceedings

1. *Note by the Registrar.* For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* 1998), but a copy of the Commission's report is obtainable from the registry.

before the Court, either in his memorial or at the oral hearing (see paragraph 53 above). Neither the Government nor the Delegate of the Commission addressed the complaint at the public hearing.

The Court does not propose to consider this allegation having regard to these circumstances.

II. THE GOVERNMENT'S PRELIMINARY OBJECTION

56. The Government challenged Mr Kaya's standing as an applicant in the proceedings before the Convention institutions. They contended that it was questionable whether he had ever in fact consciously lodged an application with the Commission since the proceedings were initiated on the strength of a statement he made to Mr Abdullah Koç of the Diyabakır branch of the Human Rights Association (see paragraph 16 above). That statement was written by Mr Koç and bore an illegible scratched signature purporting to be that of Mr Kaya. The Commission processed the "application" on the incorrect assumption that there was a *bona fide* applicant in the case at issue.

The Government insisted that Mr Kaya had never at any stage participated in the proceedings. Significantly, he failed to turn up at the hearing held by the Commission's Delegates in Diyabakır on 9 November 1995 and could not confirm his attendance at a further hearing which the Commission had wished to hold in Strasbourg in March 1996.

For these reasons, the Government requested the Court to dismiss the case on account of the absence of an applicant.

57. The applicant's legal representatives repudiated the Government's challenge to his standing. Before the Court, they asserted that it had always been his intention to seek redress before the Convention institutions. He had actively participated in an early phase by making statements on two occasions to the Diyabakır Human Rights Association (see paragraphs 16 - 18 above), by making unsuccessful attempts to secure a copy of the post mortem report and by contacting villagers who had witnessed the killing of his brother. It was his fear of reprisals from the authorities which had prevented him from appearing at the Delegates' hearing. Furthermore, he had confirmed his wish to continue with the proceedings before the Court in a signed written declaration addressed from his cell in Diyabakır Prison (see paragraph 2 above).

58. The Delegate of the Commission did not address the Government's preliminary objection.

59. The Court notes that the Government's challenge to Mr Kaya's standing was not raised at the admissibility stage, or even at any subsequent stage, of the proceedings before the Commission. It is to be observed that the sole objection raised at the admissibility stage concerned his failure to

exhaust domestic remedies, an objection which has only been pursued before the Court as a defence to the applicant's Article 6 complaint and not with respect to the admissibility of the case as a whole (see paragraph 100 below).

60. The Government must therefore be considered to be estopped from disputing before the Court either the validity of Mr Kaya's application to the Commission or his standing as an applicant (see *mutatis mutandis* the Aydın v. Turkey judgment of 25 September 1997, *Reports of Judgments and Decisions* 1997-..., p... §§ 58 and 60). The Government's preliminary objection is accordingly rejected.

III. ALLEGED VIOLATIONS OF ARTICLE 2 OF THE CONVENTION

61. The applicant submitted that his brother had been deliberately killed on 25 March 1993 by members of the security forces without justification, in breach of Article 2 of the Convention. Furthermore, the authorities' failure to investigate the circumstances surrounding his brother's death also engaged their responsibility under the same Article. These two distinct violations of Article 2 were further compounded by the inadequacy of the protection afforded to the right to life in the domestic law of the respondent State.

Article 2 of the Convention provides:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 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."

62. The Government repudiated the factual basis of the applicant's allegations, maintaining that his brother had been lawfully killed by the security forces while taking part in a terrorist attack on their members and that the investigation conducted by the authorities was entirely adequate and appropriate in the clear circumstances of the case.

The Commission for its part found that Article 2 had been violated only to the extent that the authorities had failed to conduct an adequate investigation into the circumstances surrounding the killing of the applicant's brother.

A. As to the alleged unlawful killing of the applicant's brother

1. Arguments of those appearing before the Court

(a) The applicant

63. The applicant contended that there existed sufficiently strong, clear and concordant inferences and unrebutted presumptions of fact which inexorably led to the conclusion that his brother was intentionally killed by the security forces in circumstances where there was no threat to their lives (see paragraph 39 above). The onus was on the authorities to prove that the force used was justified in the circumstances and strictly proportionate in pursuance of one of the aims delineated in the second paragraph of Article 2. They failed to adduce any credible evidence to support either their claim that the deceased was a terrorist or that the security forces had been obliged to retaliate in self defence in the face of an armed terrorist attack.

64. The applicant stressed in this respect that the Government had not advanced any evidence which proved that the deceased had used the weapon which was allegedly found by his body; nor had they given any explanation as to why, if he was a terrorist as claimed, he was dressed in civilian clothes at the time of his death. Furthermore, the assertion that the deceased was an unidentified terrorist who was shot dead during a gun battle did not sit comfortably with the facts that a Public Prosecutor and a doctor were specially flown to the scene to conduct a post-mortem on the corpse and that the remains were subsequently handed over to villagers for burial (see paragraphs 13 and 14 above).

65. Moreover, the Government had failed to present any independent evidence which corroborated their view that an armed confrontation had taken place on the day in question. Not one bullet was recovered from the scene which would have borne out the alleged duration and intensity of the gun battle; nor had there been any independent confirmation of the existence of the traces of blood which had supposedly been found on the route used by the terrorists to make their retreat.

66. Even if it were possible to concede that the applicant's brother had been killed in a gun battle with the security forces, the authorities could still not justify his death by an appeal to the provisions of paragraph 2 of Article 2 of the Convention. They had failed to establish that the force

used was strictly proportionate in order to rout the assailants and defend themselves, having regard to the number, severity and location of the bullet wounds in the deceased's body as well as to the absence of other casualties. These factors were consistent with a finding that his brother was targeted and intentionally killed.

67. His own statements as well as the statement given by Hikmet Aksoy to the Public Prosecutor on 17 June 1994 (see paragraphs 16-21 above) were entirely consistent with the undisputed facts as found by the Commission (see paragraph 39 above) and provided convincing accounts of how his brother had been intentionally killed by the security forces. Neither he nor Aksoy had deliberately avoided giving evidence at the Delegates' hearing in Diyabakır on 9 November 1995. They both feared reprisals from the authorities. In fact, Aksoy's fears were borne out by the fact that he was detained shortly after the date when he was due to testify at that hearing.

(b) The Government

68. The Government insisted that the applicant's allegations were unsubstantiated and based on statements whose authors had never been subjected to cross-examination at the Delegates' hearing. In fact, the applicant was not an eye-witness to the alleged events and Hikmet Aksoy must be considered a discredited witness, being a convicted drugs offender with links to the PKK. Aksoy had, like the applicant, deliberately avoided attendance at the Delegates' hearing. He could not plead fear of reprisals as an excuse given the fact that he had no qualms about making damning statements against the security forces to the Public Prosecutor while detained in prison (see paragraphs 20 and 21 above).

69. There were moreover inconsistencies in the applicant's two hearsay accounts of the events which undermined the credibility of the allegation. It was, for example, highly improbable that the applicant's brother would have been able to run three hundred to four hundred metres if he had been wounded as alleged by the applicant in his second statement (see paragraph 18 above). It also belied belief that a member of the security forces would have informed Aksoy that the applicant's brother had been killed if he had in fact been deliberately executed by the security forces as alleged (see paragraph 21 above).

70. On the other hand, all the members of the security forces who testified before the Delegates were consistent and firm in their testimony. Their account of the occurrence of an armed attack on the day in question and the subsequent discovery of an unidentified, armed body in the bushes following the terrorists' retreat was confirmed by an unsolicited observation

made by a local mayor in the course of a hearing held by Delegates in an unrelated case to the effect that Abdülmenaf Kaya had been killed in an armed clash with the security forces.

71. The Government also maintained that the concerns expressed by the Commission about the official version of the events (see paragraph 39 above) and which were relied on by the applicant in support of his contention were without foundation. The terrorists had indeed suffered other casualties, as was confirmed by the discovery of patches of blood on the path used to make their escape. In any event, the absence of casualties was not inconsistent with the occurrence of an armed and intense confrontation having regard to the experience of previous encounters. Furthermore, the number of bullet wounds in the deceased's body was entirely consistent with the range and fire power of the soldiers' automatic weapons. The applicant's brother only had to be exposed for a few seconds to be struck many times. Moreover, neither the deceased's age nor his apparel were conclusive of the fact that he was not a terrorist.

72. The Government concluded by requesting the Court to find that the applicant's brother had been killed while engaged in a clash with the security forces and that his death resulted from a legitimate act of self defence.

(c) The Commission

73. Before the Court, the Delegate of the Commission stated that the Commission's attempts to clarify the events of 25 March 1993 were hampered on account of the failure of the applicant and especially of Hikmet Aksoy to testify before the Delegates. The Delegates had heard the evidence of four officers, all of whom were broadly consistent in their affirmations that the security forces had come under fire, had retaliated and that a body dressed in civilian clothes was subsequently found in bushes in a creek close to Dolunay village. The Commission had nevertheless identified a number of elements which suggested that the deceased may not in fact have been a terrorist involved in an armed attack (see paragraph 39 above). However, it found that the actual circumstances in which the applicant's brother died remained to some extent a matter of speculation and assumption, and it was impossible to conclude beyond reasonable doubt that he had been deliberately killed as alleged.

2. The Court's assessment

74. The Court notes at the outset that it is confronted with fundamentally divergent accounts of how the applicant's brother died. Both the applicant and the Government have pleaded that the undisputed facts as found by the Commission (see paragraph 39 above) militate in favour of their respective positions having regard to the arguments and materials which they have

adduced before the Court. It must however be observed that similar arguments and material were advanced before the Commission and duly considered by it in its attempts to shed light on the events of 25 March 1993. However, the Commission was unable to elucidate the precise sequence of events on that day.

75. It is important to emphasise in this respect that under the Court's settled case-law the establishment and verification of the facts are primarily a matter for the Commission (Article 28 § 1 and 31 of the Convention). While the Court is not bound by the Commission's findings of fact and remains free to make its own appreciation in the light of all the material before it, it is only in exceptional circumstances that it will exercise its powers in this area (see, in the context of an Article 2 complaint, the McCann and Others v. the United Kingdom judgment of 27 September 1995, Series A, no. 324, p. 50, §169; as well as the Aksoy v. Turkey judgment of 18 December 1996, *Reports of Judgments and Decisions* 1996-p. ..., § 38; the above-mentioned Aydın judgment, p. ..., § 70; and the Menteş v. Turkey judgment of 28 November 1997, Reports 1997-p...., § 66).

76. The Court is not persuaded that there exist any exceptional circumstances which would compel it to reach a conclusion different from that of the Commission. In the instant case the Commission was unable to draw a complete picture of the factual circumstances surrounding the death of the applicant's brother. The Commission's fact-finding was considerably impaired on account of the failure of the applicant and in particular Hikmet Aksoy to testify before the Delegates; nor were the Delegates able to secure the presence at the hearing of the villagers who, according to both the applicant and Hikmet Aksoy, were eyewitnesses to the alleged killing of the Abdülmenaf Kaya by the security forces. The inability of the Delegates to test the probative value of their evidence and to observe how they withstood the cross-examination of the Government side must be considered to constitute a serious impediment to the attainment of the evidentiary requirement which the Commission correctly sought to apply (see paragraph 38 above), namely proof beyond reasonable doubt (see for example the above-mentioned Aydın judgment, p. ..., §72).

77. It is also to be noted that the applicant relies essentially on the doubts which certain features of the Government's account of the events raised in the minds of the members of the Commission. The Court for its part considers that those doubts are in fact legitimate and it cannot be maintained that they have been allayed by the explanations which the Government have advanced in their pleadings (see paragraph 70 above). Notwithstanding, it is not convinced that, taken together, these elements substantiate the applicant's allegation. While it is true that the attainment of the required evidentiary standard (see paragraph 76 above) may follow from the coexistence of sufficiently strong, clear and concordant inferences (see

the above-mentioned Aydın judgment, p. ..., § 72), it must be concluded that their probative force must be considered in the circumstances at issue to be off-set by the total absence of any direct oral account of the applicant's version of the events before the Delegates.

78. Having regard to the Commission's fact-finding and to its own careful examination of the evidence, the Court considers that there is an insufficient factual and evidentiary basis on which to conclude that the applicant's brother was, beyond reasonable doubt, intentionally killed by the security forces in the circumstances alleged by the applicant.

B. As to the alleged inadequacy of the investigation

1. Arguments of those appearing before the Court

(a) The applicant

79. The applicant asserted that no official investigation was in fact conducted into the death of his brother. The report of the autopsy performed at the scene failed to record critical data such as the nature, size and number of the bullet wounds in the deceased's body. The incomplete and superficial nature of the autopsy was also confirmed by the absence of any findings on the presence or absence of traces of gunpowder on the hands or clothes of the deceased or of any observations on the distance from which the fatal shots were fired. The photographs which were supposedly taken of the body have never been recovered and it would appear that no record was kept of where they were filed (see paragraph 34 above). The decision to hand the body over to the villagers (see paragraph 14 above) immediately after the field autopsy had been performed made it impossible to carry out any further medical or forensic examinations of the body or clothes worn by the deceased.

80. Further, the Public Prosecutor failed to carry out any material investigation at the scene of the killing. No attempt was to made to check the weapon allegedly used by the deceased for fingerprints or to retain the bullets lodged in the body for further analysis. No statements were taken from the soldiers either at the scene or afterwards, even though none of the military witnesses who had signed the incident report (see paragraph 14 above) or had been questioned by the Delegates was able to affirm that he had in fact seen the applicant's brother being killed during the alleged attack. The Public Prosecutor had in effect convinced himself from the very beginning that the deceased was a terrorist who had been killed in a clash. That conviction determined his attitude to the investigation thereafter since it effectively excluded the possibility of any alternative version of the cause of death.

81. It could only be concluded that the investigation was so superficial and inadequate as to constitute a failure to protect the right to life in breach of Article 2 of the Convention.

(b) The Government

82. The Government pleaded that the investigation could in the circumstances be legitimately reduced to a minimum. It was plainly the case that the applicant's brother had died in a clash with the security forces. He was armed at the time of his death, and was killed while trying to kill. In spite of the obvious dangers to which they were exposed the Public Prosecutor and Dr Doğru courageously conducted an on-the-spot autopsy and forensic examination. An autopsy report was drawn up, a burial certificate prepared and the body, as yet unidentified, handed over to the villagers. Official attempts were made afterwards to identify the body, and the Public Prosecutor transmitted the file to the State Security Court for further investigation. The latter court in turn transferred the file to the Lice Administrative Council.

83. The Government maintained that nothing more could have been expected of the authorities under Article 2 of the Convention in the clear circumstances of the case.

(c) The Commission

84. The Commission considered that the circumstances surrounding the killing of the applicant's brother were unclear and such as to require the authorities to carry out a thorough investigation, especially since there were a number of crucial points left unanswered which raised doubts as to whether the applicant's brother was in fact a terrorist who had been killed in an armed confrontation with the security forces (see paragraph 39 above). However, the investigation was seriously deficient as regards the conduct of the autopsy, the forensic examination of the body and of the scene of the killing and the measures taken subsequently by the Public Prosecutor, Mr Ekrem Yıldız. The latter in fact proceeded throughout on the assumption that the deceased was a terrorist without questioning the truth of the security forces' account; nor did the Public Prosecutor attached to the State Security Court consider it worthwhile to check whether there was any foundation to the allegations made by Hikmet Aksoy on 17 June 1994.

85. For these reasons, the Commission concluded that the investigation was so inadequate as to amount to a failure to protect the right to life in violation of Article 2 of the Convention.

2. The Court's assessment

86. The Court recalls at the outset that the general legal prohibition of arbitrary killing by agents of the State contained in Article 2 of the

Convention would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under Article 2, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms 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 by, *inter alios*, agents of the State (see the above-mentioned McCann and Others judgment, p.48, § 161).

87. The Court observes that the procedural protection for the right to life inherent in Article 2 of the Convention secures the accountability of agents of the State for their use of lethal force by subjecting their actions to some form of independent and public scrutiny capable of leading to a determination on whether the force used was or was not justified in a particular set of circumstances.

88. The Court recalls the Government's contention that the instant case is a clear-cut case of lawful killing by the security forces and for that reason the authorities were dispensed from having to comply with anything other than minimum formalities. It cannot accept that submission having regard to the fact that the official account of the events was impaired through the absence of corroborating evidence. In addition, it also considers that the minimum formalities relied on by the Government were in themselves seriously deficient even for the purposes of an alleged open and shut case of justified killing by member of the security forces.

89. The Court is struck in particular by the fact that the Public Prosecutor would appear to have assumed without question that the deceased was a terrorist who had died in a clash with the security forces. No statements were taken from any of the soldiers at the scene and no attempt was made to confirm whether there were spent cartridges over the area consistent with an intense gun battle having been waged by both sides as alleged. As an independent investigating official he should have been alert to the need to collect evidence at the scene, to make his own independent reconstruction of the events and to satisfy himself that the deceased, despite being dressed as typical farmer, was in fact a terrorist as alleged. There are no indications that he was prepared in any way to scrutinise the soldiers' account of the incident.

His readiness to accept at face value the information given by the military may also explain why no tests were carried out on the deceased's hands or clothing for gunpowder traces or why the weapon was not dusted for fingerprints. In any event, these shortcomings must be considered particularly serious in view of the fact that the corpse was later handed over to villagers, thereby rendering it impossible to conduct any further analyses including of the bullets lodged in the body. The only exhibits which were taken from the scene for further examination were the weapon and

ammunition allegedly used by the deceased. However, whatever the merits of this initiative as an investigative measure at the time, it is to be noted that the Public Prosecutor issued his decision of non-jurisdiction without awaiting the findings of the ballistics experts (see paragraph 31 above).

The autopsy report provided the sole record of the nature, severity and location of the bullet wounds sustained by the deceased. The Court shares the concern of the Commission about the incompleteness of this report in certain crucial respects, in particular the absence of any observations on the actual number of bullets which struck the deceased and of any estimation of the distance from which the bullets were fired. It cannot be maintained that the perfunctory nature of the autopsy performed or the findings recorded in the report could lay the basis for any effective follow-up investigation or indeed satisfy even the minimum requirements of an investigation into a clear-cut case of lawful killing since it left too many critical questions unanswered.

The Court acknowledges that the on-the-spot post-mortem and forensic examination were conducted in an area prone to terrorist violence, which may have made it extremely difficult to comply with standard practices. Dr Doğru admitted such in his report (see paragraph 29 above). It is therefore surprising that neither the doctor nor the Public Prosecutor requested that the body be flown to a safer location to allow more detailed analyses to be made of the body, the clothing and the bullet wounds.

90. No concrete measures were taken thereafter by the Public Prosecutor to investigate the death of the applicant's brother, for example by verifying whether the deceased was in fact an active member of the PKK or by questioning villagers living in the vicinity of Dolunay whether they heard the sound of a gun battle on the day in question or by summoning members of the security forces involved to his office to take statements. The Public Prosecutor's firm conviction that the deceased was a terrorist killed in an armed clash with the security forces was never in fact tested against any other evidence and the terms of his non-jurisdiction decision effectively excluded any possibility that the security forces may somehow have been culpable, including with respect to the proportionality of the force used in the circumstances of the alleged armed attack. It is also to be noted that the Public Prosecutor attached to the State Security Court did not seek to verify the statement made by Hikmet Aksoy on 17 June 1994, for example by checking the custody records at the Lice gendarmerie headquarters to ascertain whether he had been detained there on or around 25 March 1993 as alleged (see paragraph 20 above).

91. The Court notes that loss of life is a tragic and frequent occurrence in view of the security situation in south-east Turkey (see the above-mentioned Aydın judgment, p. ...,§14). However neither the prevalence of

violent armed clashes nor the high incidence of fatalities can displace the obligation under Article 2 to ensure that an effective, independent investigation is conducted into deaths arising out of clashes involving the security forces, more so in cases such as the present where the circumstances are in many respects unclear.

92. Having regard to the above considerations the Court, like the Commission, concludes that the authorities failed to carry out an effective investigation into the circumstances surrounding the death of the applicant's brother. There has accordingly been a violation of Article 2 of the Convention in that respect.

C. As to the alleged lack of protection in domestic law for the right to life

93. The applicant maintained that the effect of Article 4 (1) of Decree No.285 (see paragraph 46 above) was to entrust the investigation and prosecution of members of the security forces to administrative boards or councils whose decisions are influenced by the attitude taken by the security forces with respect to allegations levelled against them. Thus, the death of his brother was not subjected to any proper investigation; on the contrary, he was deemed to have been lawfully killed on the basis of the untested evidence of the security forces. Given the absence of an independent prosecution system for investigating allegations of unlawful killing by the security forces, it could not be maintained that the right to life was afforded adequate protection in the domestic law of the respondent State.

94. Neither the Government nor the Delegate addressed this complaint.

95. The Court considers that it is not necessary to examine this complaint having regard to its earlier finding that the authorities were in breach of Article 2 of the Convention on account of their failure to carry out an effective investigation into the killing of the applicant's brother.

IV. ALLEGED VIOLATIONS OF ARTICLES 6 § 1 AND 13 OF THE CONVENTION

96. The applicant complained that the inadequacy of the official investigation into his brother's death deprived him and the deceased's next-of-kin from having access to a tribunal to sue for compensation, in breach of the right guaranteed by Article 6 § 1 of the Convention. That provision provides to the extent relevant:

> "In the determination of his civil rights ... everyone is entitled to a ... hearing ... by an independent and impartial tribunal ..."

97. He further complained that there was no effective mechanism which could be invoked by the relatives of the deceased in order to grant them the justice of having a determination on the circumstances surrounding the killing and the truth brought to light. This failing gave rise to a violation of Article 13 of the Convention, which reads:

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

1. Arguments of those before the Court

(a) The Applicant

98. According to the applicant, it would have been impossible to have approached a domestic court, whether civil or administrative, with a claim for damages which had any hope of success on account of the investigating authority's unwavering belief that his brother was a terrorist who lost his life in an armed confrontation with the security forces. The Public Prosecutor's entry in the post-mortem report to that effect coupled with the terms of his non-jurisdiction order that his brother stood accused of involvement in a terrorist attack on the security forces (see paragraph 31 above) effectively precluded the relatives of the deceased from asserting in compensation proceedings that the latter had been unlawfully killed in circumstances which engaged the liability of the authorities.

99. The applicant further alleged that, irrespective of a right to bring a claim for monetary compensation, the relatives of the deceased needed to have access to an effective remedy or system of remedies which would establish independently and for their benefit the truth of what happened on the day in question. The relatives of the deceased had no effective remedy in the circumstances and were in effect victims of the absence of a system of effective remedies in the respondent State with respect to allegations of unlawful killing by the security forces. He highlighted in this respect the serious deficiencies of the official investigation including the attitude adopted by the Public Prosecutor with respect to the circumstances surrounding the killing of his brother and the fact that the file was now within the jurisdiction of an administrative board pursuant to Article 4 (1) of Decree No. 285, the functioning of which he had criticised in his earlier submissions under Article 2 of the Convention (see paragraph 92 above).

(b) The Government

100. The Government replied that the applicant could have sued the Ministry of Defence before an administrative court or brought civil proceedings against the members of the security forces who, he alleged, had

killed his brother. As to a civil claim, he could have sought to adduce evidence to show that his brother had been deliberately killed, for example by identifying the lieutenant who had allegedly issued the order to open fire on his brother (see paragraph 21 above) or the lieutenant who reportedly told Hikmet Aksoy that his brother had been killed by the security forces (see paragraph 21 above). Under Turkish law, a civil court was not precluded from adjudicating on a claim on account of the absence of a criminal investigation; nor was it bound by a decision of a criminal court acquitting an accused of criminal responsibility for acts which subsequently form the basis of a civil action (see paragraphs 47-50 above).

101. However, despite the availability of effective remedies, the applicant at no stage even attempted to bring proceedings to seek compensation or to approach an official authority to complain about his brother's death. He must be considered to have failed to exhaust domestic remedies. Accordingly there was no breach of Article 6 § 1 of the Convention in the circumstances.

(c) The Commission

102. The Commission found a violation of Article 6 § 1 of the Convention on account of the deficiencies of the investigation conducted by the authorities into the events of 25 March 1993. These deficiencies deprived the applicant of any effective access to a tribunal for a determination of his civil right to damages. Having regard to this conclusion, the Commission did not consider it necessary to examine also whether there had been a violation of Article 13 in the circumstances of the case.

103. At the oral hearing the Delegate stated that the Commission did not have at the time of its consideration of the case the benefit of the Court's Aksoy v. Turkey judgment and the approach which had been adopted with respect to that applicant's complaints under Articles 6 and 13 of the Convention.

2. The Court's assessment

(a) Article 6 § 1 of the Convention

104. The Court notes that it has not been disputed that Article 6 § 1 of the Convention applies to a civil claim for compensation by the near relatives of a person who has been killed by agents of the State. The Government maintain that the applicant should have exercised his right to institute proceedings before either the civil or administrative courts, which could have made a determination on the merits of the compensation claim irrespective of the outcome of a domestic criminal investigation or any

finding of guilt by a criminal court. That hypothesis has not however been tested since the applicant has not at any stage pursued a claim for compensation before the domestic courts.

105. In these circumstances the Court considers that it is not possible for it to determine whether the domestic courts would have been able to adjudicate on the applicant's claim had he, for example, brought a tort action against individual members of the security forces. On the other hand, it is to be observed that the applicant's grievance under Article 6 § 1 of the Convention is inextricably bound up with his more general complaint concerning the manner in which the investigating authorities treated the death of his brother and the repercussions which this had on access to effective remedies which would help redress the grievances which he and the deceased's family harboured as a result of the killing. It is accordingly appropriate to examine the applicant's Article 6 complaint in relation to the more general obligation on Contracting States under Article 13 of the Convention to provide an effective remedy in respect of violations of the Convention including Article 2 thereof, which, it is to be noted, cannot be remedied exclusively through an award of compensation to the relatives of the victim (see *mutatis mutandis* the above-mentioned Aksoy judgment, p. ..., §§ 93-94; and the above-mentioned Aydın judgment, p. ..., §§ 100-103).

(b) Article 13 of the Convention

106. The Court recalls that Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or the omissions of the authorities of the respondent State (see the above-mentioned Aksoy judgment, p. ..., § 95; the above-mentioned Aydın judgment, p. ..., § 103; and the above-mentioned Menteş judgment, p. ..., § 89).

107. In the instant case the applicant is complaining that he and the next-of-kin have been denied an "effective" remedy which would have brought to light the true circumstances surrounding the killing of Abdülmenaf Kaya. In the view of the Court the nature of the right which the authorities are alleged to have violated in the instant case, one of the most fundamental in

the scheme of the Convention, must have implications for the nature of the remedies which must be guaranteed for the benefit of the relatives of the victim. In particular, where those relatives have an arguable claim that the victim has been unlawfully killed by agents of the State, the notion of an effective remedy for the purposes of Article 13 entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure (see *mutatis mutandis* the above-mentioned Aksoy and Aydın judgments at p..., § 98 and p. ..., § 103 respectively). Seen in these terms the requirements of Article 13 are broader than a Contracting State's procedural obligation under Article 2 to conduct an effective investigation (see paragraphs 86 and 87 above).

In the case at issue, the relatives had arguable grounds for claiming that Abdülmenaf Kaya was unlawfully killed by the security forces. The applicant had made two statements to that effect based on the accounts supplied to him by villagers who had allegedly witnessed the killing. Furthermore, the statement provided by Hikmet Aksoy was in general consistent with the applicant's allegations. There were, moreover, a number of features of the security forces' version of the events which required independent clarification. It is true that the Court has concluded that it has not been established beyond reasonable doubt that the deceased was indeed unlawfully killed. Nevertheless, the fact the applicant's allegations were not ultimately substantiated does not prevent his claim from being an arguable one for the purposes of Article 13 of the Convention (see *mutatis mutandis* the Boyle and Rice v. the United Kingdom judgment of 27 April 1988, Series A, no.131, pp. 23, § 52). Accordingly, the Court's conclusion on the merits does not dispense with the requirement to conduct an effective investigation into the substance of the allegation.

108. The Court recalls its earlier findings on the serious deficiencies of the autopsy and forensic examination conducted at the scene as well as on the failure of the investigating authorities to consider seriously any alternative options which may have explained the death (see paragraphs 89-92 above). Having regard to the absence of any effective investigation into the circumstances of the killing, it must be concluded that the applicant and the next-of-kin were on that account also denied an effective remedy against the authorities in respect of the death of Abdülmenaf Kaya, in violation of Article 13 of the Convention, and thereby access to any other available remedies at their disposal, including a claim for compensation.

There has accordingly been a breach of Article 13 of the Convention.

V. ALLEGED VIOLATION OF ARTICLES 2, 6 AND 13 OF THE CONVENTION IN CONJUNCTION WITH ARTICLE 14 OF THE CONVENTION

109. The applicant further claimed that his rights and the rights of his deceased brother under Articles 2, 6 and 13 of the Convention were violated in conjunction with Article 14 of the Convention on grounds of ethnic origin. Article 14 provides:

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

110. The applicant submitted that the life of his deceased brother as well as the lives of the Kurdish civilian population in general in south-east Turkey were protected to a lesser extent than the lives of persons of non-Kurdish origin. He argued that the Kurdish population was most adversely affected by military operations conducted in the region and that the security forces failed to take adequate measures to minimise risk to civilian lives. Furthermore, the attitude of the security forces was to treat the Kurdish civilian population as in some way involved with the PKK. No distinction was made between terrorists and ordinary civilians. Thus, although his deceased brother was dressed as a typical villager, he was automatically presumed by the security forces and by the prosecutor to be a PKK terrorist.

111. The Government did not address this allegation other than to deny the factual basis of the applicant's allegations under Article 2 and to assert the availability of remedies at the domestic level to redress his grievances.

112. The Commission concluded that the evidence submitted to it did not substantiate the applicant's complaint under Article 14 in so far as this related to the breaches which it had found to be established.

113. The Court agrees with the conclusion reached by the Commission. The applicant has not produced any evidence which could ground a violation under this head of complaint.

VI. ALLEGED ADMINISTRATIVE PRACTICE OF VIOLATING THE CONVENTION

114. The applicant asserted that there existed an officially tolerated practice in the respondent State of violations of Articles 2 and 13 of the Convention, which increased the gravity of the breaches of which he and his brother were victims. He maintained that there was an administrative practice of conducting inadequate investigations into killings committed by

members of the security forces in south-east Turkey and a pattern of failure to prosecute those responsible.

115. The applicant further maintained that the authorities have adopted a policy of denial of breaches of the Convention, thereby frustrating the rights of victims to effective remedies. As a consequence of this policy, allegations of unlawful killings are either not investigated at all or are processed in a biased and inadequate manner.

116. Neither the Government nor the Commission addressed the substance of these allegations.

117. The Court is of the view that the evidence assembled by the Commission is insufficient to allow it to reach a conclusion on the existence of any administrative practice of the violation of any of the Articles relied on by the applicant.

VII. APPLICATION OF ARTICLE 50 OF THE CONVENTION

118. The applicant claimed just satisfaction under the provisions of Article 50 of the Convention, which provides:

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

A. Non-pecuniary damages

119. The applicant submitted that the intentional and unjustified killing of his brother was a violation of one of the most fundamental provisions of the Convention. Furthermore, his death at the hands of the security forces left his surviving widow and seven children without any means of support or income. He claimed the sum of 30,000 pounds sterling ("GBP") by way of compensation.

He further requested the Court to award the sum of GBP 10,000 to compensate for the failure of the authorities to investigate the killing of his brother as well as for their steadfast assumption that he was a terrorist killed in a clash with the security forces. He also claimed an additional amount of GBP 20,000 in compensation for the violation of Articles 6 and 13, which sum reflected his contention that there existed in the respondent State an administrative practice of violation of Article 13 (see paragraphs 114 and 115 above).

120. The Government contested the applicant's entitlement to any award of just satisfaction. His allegations were unsubstantiated and he had not even attempted to seek redress for his grievances in the domestic courts.

121. The Delegate of the Commission did not comment on the applicant's claims.

122. The Court notes that it has not been established that the applicant's brother was unlawfully killed as alleged. However, having regard to its finding of a violation of Articles 2 and 13 of the Convention, the Court considers that the deceased's surviving widow and children are entitled to some form of just satisfaction by way of compensation for the authorities' failure to conduct an effective investigation into his killing. It notes in this regard that the application was brought by the applicant not only on his and his deceased brother's behalf but also on behalf of the latter's widow and children (see paragraph 1 above). The Court awards the sum of GBP 10,000 in this latter respect. On the other hand it is not convinced of the extent of the applicant's own loss in the circumstances and for this reason makes no award in his favour.

B. Costs and expenses

123. The applicant claimed GBP 19,840.60 by way of legal costs and expenses incurred in the preparation and defence of his case before the Convention institutions. In his revised and supplementary schedules of costs and expenses he itemised his claim as follows: professional fees and costs incurred by (1) his United Kingdom based representatives (15,420.60) and (2) his Turkish representatives (1,000); work conducted by Mr Abdullah Koç and Mr Sedat Aslantaş of the Diyabakır Human Rights Association (250); administrative support costs (1,950); interpretation and translation costs (480); participation costs of a translator at the Delegates' hearing (185); photocopying, postage and telecommunications costs (255); and other administrative costs incurred in Turkey (300).

124. The applicant was not in receipt of legal aid from the Council of Europe. He asserted that all of the itemised costs and expenses were actually and necessarily incurred and were reasonable as to quantum having regard, *inter alia*, to the complexity of the issues raised by his case. He requested that the amount awarded by the Court be paid directly to the applicant's United Kingdom based legal representatives in sterling into a named bank account, and that the rate of default interest be set at 8% per annum.

125. The Government requested the Court to dismiss the claim since the amounts sought had not been properly verified and were unnecessary and excessive having regard to the level of costs and expenses which would be billed for domestic proceedings by lawyers in Turkey.

126. The Delegate of the Commission did not comment on the amounts claimed by the applicant.

127. The Court, deciding on an equitable basis and having regard to the details of the claims submitted by the applicant, awards the applicant's United Kingdom and Turkish-based lawyers the sum of GBP 17,000 together with any Value Added Tax (VAT) that may be chargeable.

C. Default interest

128. According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 8% per annum.

FOR THESE REASONS, THE COURT

1. *Dismisses* by eight votes to one the Government's preliminary objection concerning the applicant's lack of standing;
2. *Holds* unanimously that it has not been established that the applicant's brother was unlawfully killed in breach of Article 2 of the Convention;
3. *Holds* by eight votes to one that there has been a violation of Article 2 of the Convention on account of the failure of the authorities of the respondent State to conduct an effective investigation into the circumstances surrounding the death of the applicant's brother;
4. *Holds* unanimously that it is not necessary to consider the applicant's complaint under Article 2 of the Convention regarding the alleged lack of protection in domestic law for the right to life;
5. *Holds* by eight votes to one that there has been a violation of Article 13 of the Convention;
6. *Holds* unanimously that it is not necessary to consider the applicant's complaint under Article 6 § 1 of the Convention;
7. *Holds* unanimously that there has been no violation of Articles 2, 6 and 13 of the Convention in conjunction with Article 14 of the Convention;
8. *Holds* by eight votes to one
   (a) that the respondent State is to pay the surviving widow and children of Abdülmenaf Kaya, within three months, in respect of compensation for non-pecuniary damage, 10,000 (ten thousand) pounds sterling to be converted into Turkish liras at the exchange rate applicable on the date of settlement;
   (b) that simple interest at an annual rate of 8% shall be payable from the expiry of the above-mentioned three months until settlement;

9. *Holds* unanimously
(a) that the respondent State is to pay the applicant, within three months, in respect of costs and expenses, 17,000 (seventeen thousand) pounds sterling together with any VAT that may be chargeable;
(b) that simple interest at an annual rate of 8% shall be payable from the expiry of the above-mentioned three months until settlement;
10. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English and in French and delivered at a public hearing in the Human Rights Building, Strasbourg, on 19 February 1998.

Signed: Rudolf BERNHARDT
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 § 1 of the Convention and Rule 53 § 2 of Rules of Court A the dissenting opinion of Mr Gölcüklü is annexed to this judgment.

Initialled: R.B.
Initialled: H. P.

DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

(*provisional translation*)

1. To my great regret, I cannot agree with the opinion of the majority in this case, for the following reasons.

2. In this case it has not been proved that Mr Kaya has the status of applicant for the purposes of Article 25 of the Convention because not only did he not apply to any national authority after the death of his brother, but in addition he has not supplied any information about the course of events or the persons involved or witnesses of what took place. Six days after his brother's death he apparently went to the Diyarbakır Human Rights Association and made a statement. The way this statement is worded seems to indicate that it was drafted by another person. It is in indirect speech.

In the present case accepting that there really is a genuine applicant means accepting a mere allegation.

3. At no time, for example, in the entire proceedings, from the time when the application was lodged with the Commission, arriving in Strasbourg from Diyarbakır via London, until the end of the public hearings before the European Court of Human Rights, was the applicant seen or heard either by the national authorities or by the Commission or its Delegates who travelled to Turkey to investigate the facts of the case.

He did not participate in or contribute in any way to consideration of the case, whether before the Commission or before the Court. Nor did the alleged eye-witness (Hihmet Aksoy) of the events which form the subject of the present case, who disappeared from the scene completely immediately after the beginning of the proceedings (see the Commission's report, §§ 86, 87, 148 and 149).

4. In spite of these glaring facts, the Commission declared the application admissible and considered the merits of the case before reaching the conclusion that "Having regard to the standard of proof to be applied ... and on the basis of a general assessment of the written and oral evidence, the Commission cannot find it proved beyond reasonable doubt that the applicant's brother was deliberately killed by soldiers in circumstances such as those alleged by the applicant" (Commission's report, § 161).

5. In my opinion, instead of considering the case, as it did, the Commission should have struck it out of its list in view of the way matters stood.

6. When the Commission finally realised the true facts and the real nature of applications like this one against Turkey, it rightly decided (after dealing with the application of Kaya v. Turkey) in connection with a similar application (Application no. 22057/93, Siyamet Kapan v. Turkey, Decision of 13 January 1997, Decisions and Reports 89, p. 17) as follows:

Article 25 § 1 of the Convention

"a) The system provided for by this provision is based on the right of individual petition, and the Commission may not examine cases of its own motion or by way of actio popularis.

b) Applicants bear the responsibility of co-operating in the procedures flowing from the introduction of their applications, and since the Commission relies on their ability and willingness to maintain and support applications purportedly introduced on their behalf it cannot continue the examination of an application where this is not forthcoming."

Article 30 § 1 (c) of the Convention

"Doubts as to authenticity of application and validity of its introduction by the applicant's representatives. Applicant's duty to co-operate, notwithstanding allegations of intimidation. In view of the applicant's failure to appear before the Commission or its Delegates, and the inability of his representatives to provide a handwritten and signed statement of his intentions, they have not sufficiently shown their competence to act on his behalf. Lack of general interest. Striking out of the list of cases."

7. Moreover, I must emphasise that in the file there is no evidence, except the account drawn up by the Diyarbakır Human Rights Association, that a real applicant exists.

8. In spite of all these uncontested facts, the Court has accepted that Mr Kaya has standing as an applicant for the purposes of Article 25 of the Convention, on the grounds that the Commission considered that the case had been properly referred to it and that the respondent Government were estopped from disputing Mr Kaya's standing because they had not raised this preliminary objection before the Commission (see the present judgment, §§ 55 et seq).

9. It is true that the Government did not raise this issue before the Commission, but that was because they could not have done so as they waited in vain until the last moment of the proceedings in the hope that the alleged applicant would come forward to argue his case.

10. However, the European Court of Human Rights, instead of striking the case out of its list in appliction of Article 45 of the Convention, has taken the view that the case was properly referred to it, despite the fact that it knows more about the true situation and is aware of the Commission's later decision to strike a case out when it was in doubt about the authenticity of an application.

11. Although the above considerations dispense me from going into the merits of the Kaya case, I wish to make it clear, in the alternative, that I also disagree with the conclusion reached by the majority of the Court regarding violation of Article 2 through a breach of the obligation to protect the right to life and violation of Article 13.

12. As regards Article 2, I merely note that in another case (Gündem v. Turkey) the Commission decided that there had been no violation of Articles 3, 5 and 8 of the Convention or of Article 1 of Protocol No. 1 on the ground that the applicant had not appeared before it at any stage of the proceedings (Commission's report, §§ 145, 148, 150, 151 and 152) and accordingly that the facts complained of had not been established beyond all reasonable doubt (report, §§ 152, 163, 180 and 182). I fully agree with that opinion. It is inconceivable (and totally illogical) in my opinion that it can reasonably be concluded that there has been a breach of any of the Convention's provisions when the facts in issue have not been proved beyond a reasonable doubt (especially in connection with Article 6 and/or Article 13). I must add, further, that the respondent Government did what they could to establish the facts of the case as they had actually happened. Is it necessary to reiterate that the positive obligation entered into by States under the Convention is only an obligation as to measures to be taken and not as to results to be achieved.

13. As regards Article 6 and/or Article 13, I will merely cite some of the Commission's decisions.

In the case of Aytekin v. Turkey (Application no. 22880/93, 18 September 1997), the Commission rightly expressed the opinion that there had been a violation of Article 2 of the Convention on the ground that the State concerned had failed to discharge its positive obligation to protect the right to life and that no separate issue arose under Article 13 (twenty-nine votes to one). The Commission reached the same conclusion in the case of Ergi v. Turkey (Application no. 23818/94, 20 May 1997) (twenty-two votes to nine). Likewise, in the Yasa v. Turkey case (Application no. 22495/93, 8 April 1997) the Commission reached the same conclusion, with regard to both Article 13 (thirty votes to two) and Article 6 § 1 (thirty-one votes to one). It should be noted that the above-mentioned decisions were adopted much later than the one in the present case (see also the dissenting opinion of Mr Bratza and Mr Reffi). Considering that the lack of a satisfactory and efficient inquiry into the death lies behind the applicant's complaints concerning Articles 6 and 13 of the Convention, I take the view that no separate issue arises under those Articles.

14. Lastly, I wonder how it is possible to conclude that domestic remedies have been exhausted when the applicant not only failed to contact any competent national authority but also disappeared from the scene immediately after the declarations he is alleged to have made only to the officials of the Diyarbakır Human Rights Association.

15. Is not the fact that the so-called applicant's British representatives have asked for their fees to be paid directly into their accounts in the United Kingdom in pounds sterling yet another indication that in this case there is no real applicant?

16. I strongly disagree with the award of compensation for non-pecuniary damage to the deceased's widow and children; neither they nor the applicant have done anything to argue their case and relieve their alleged distress. Is it not symptomatic that the Commission have not made any comment on this question?

17. As regards the non-exhaustion of domestic remedies, in addition to the conduct of the alleged applicant in this case, I refer to my dissenting opinion in the cases of Akdivar and Others v. Turkey and Menteş and Others v. Turkey, both of which are referred to in the judgment, on the real and adequate existence of the remedies in question.

APPENDIX B: KURT v TURKEY

COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

Or. English

EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 24276/94

Koçeri KURT

against

Turkey

Report of the Commission

(Adopted on 5 December 1996)

EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 24276/94

Koçeri KURT

against

Turkey

REPORT OF THE COMMISSION

(adopted on 5 December 1996)

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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 is a Turkish citizen resident in Bismil and born in 1927. She is represented before the Commission by Professor K. Boyle and Ms. F. Hampson, both lecturers at the University of Essex.

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

4. The applicant complains that her son Üzeyir Kurt has been taken into custody by the security forces and has "disappeared". She invokes Articles 2, 3, 5, 13, 14 and 18 of the Convention. She also complains of intimidation by the authorities contrary to Article 25 para. 1 *in fine* of the Convention.

B. The proceedings

5. The application was introduced on 11 May 1994 and registered on 6 June 1994.

6. On 30 August 1994, the Commission decided, pursuant to Rule 48 para. 2 (b) of its Rules of Procedure, to give notice of the application to the respondent Government and to invite the parties to submit written observations on its admissibility and merits before 11 November 1994. At the Government's request, this time-limit was subsequently extended until 11 December 1994.

7. The Government's observations were received on 27 January 1995. The applicant's observations in reply were submitted on 27 March 1995.

8. Following the receipt of information from the applicant's representatives dated 23 January 1995 and from the Government dated 9 February 1995 raising issues as to intimidation and validity of the exercise of individual petition, the Commission decided on 2 March 1995 to request the parties to respond to specific questions relating to this aspect of the case.

9. Information was provided by the Government on 7 March and 10 April 1995 and by the applicant's representatives on 2 April and 5 May 1995.

10. On 25 May 1995, the Commission declared the application admissible.

11. The text of the Commission's decision on admissibility was sent to the parties on 2 June 1995 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 might wish to put before delegates.

12. The applicant's representatives made submissions on 19 and 25 May and 7 July 1995.

13. On 6 September 1995, the Government made further submissions relating to the authenticity of the application in the context of the applicant's application for legal aid.

14. On 21 October 1995, the Commission decided to take oral evidence in respect of the applicant's allegations. It appointed three delegates for this purpose: Mrs. G.H. Thune, Mr. N. Bratza and Mr. E. Konstantinov. It notified the parties by letter of 26 October 1995, proposing certain witnesses.

15. On 27 October 1995, the Commission granted the applicant legal aid.

16. On 6 November 1995, the Government wrote to the Commission enclosing a statement by the applicant dated 10 August 1995. The applicant's representatives responded by letter dated 4 December 1995, enclosing a statement by the applicant dated 2 December 1995.

17. On 25 January 1996, the Government requested that additional witnesses be added to the Delegates' time-table.

18. Evidence was heard by the delegation of the Commission in Ankara from 8 to 9 February 1996. Before the Delegates the Government were represented by Mr. A. Gündüz, Agent, assisted by Mr. A. Şölen, Mr. A. Kurudal, Ms. N. Nerdim, Mr. A. Kaya, Mr. A. Polat, Mr. Ahmet Kaya, Mr. C. Aydin, Ms. T. Toros, Ms. M. Gülşen and Ms. A. Emüler. The applicant was represented by Ms. F. Hampson and Mr. O. Baydemir, as counsel, assisted by Ms. A. Reidy and Ms. D. Deniz (interpreter). Further documentary material was submitted by the Government during the hearing. At the conclusion of the hearing, and later confirmed by letter of 14 February 1996, the Delegates requested the Government to provide a certain document arising out of the hearing and for confirmation in writing of the explanation for the absence of certain witnesses.

19. On 2 March 1996, the Commission decided to invite the parties to present their written conclusions on the merits of the case by 20 May 1996.

20. On 17 April 1996, the Government submitted a document, a copy of which the Commission already had in its file.

21. At the request of the applicant, the time-limit was extended to 31 May 1996. Following a request by the Government, a further extension was granted until 1 July 1996.

22. On 31 May 1996, the applicant submitted her final observations on the merits. The Government's final observations were submitted on 20 June 1996.

23. By letter dated 19 September 1996, the Secretariat again asked the Government to provide a copy of the document which the Delegates had previously requested.

24. 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

25. 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:

Mr. S. TRECHSEL, President
Mrs. G.H. THUNE
Mrs. J. LIDDY
MM. E. BUSUTTIL
C.A. NØRGAARD
G. JÖRUNDSSON
J.-C. SOYER
H. DANELIUS
F. MARTINEZ
J.-C. GEUS
M.P. PELLONPÄÄ
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
D. ŠVÁBY
G. RESS
A. PERENIČ
C. BÎRSAN
K. HERNDL
E. BIELIŪNAS
M. VILA AMIGÓ

26. The text of this Report was adopted on 5 December 1996 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.

27. 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.

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

29. 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

30. The facts of the case, particularly concerning events on or about 23 to 25 June 1993, are disputed by the parties. For this reason, pursuant to Article 28 para. 1 (a) of the Convention, the Commission has conducted an investigation, with the assistance of the parties, and has accepted written material, as well as oral testimony, which has been submitted. The Commission first presents a brief outline of the events, as claimed by the parties, and then a summary of the evidence submitted to it.

A. The particular circumstances of the case

1. Facts as presented by the applicant

31. The various accounts of events as submitted in written and oral statements by the applicant and other members of her family are summarised in Section B: "The evidence before the Commission". The version as presented in the applicant's final observations on the merits is summarised briefly here.

a. concerning the disappearance of the applicant's son

32. From 23 to 25 November 1993, security forces, made up of gendarmes and a number of village guards carried out an operation in Ağıllı village. On 23 November 1993 pursuant to intelligence reports that three terrorists would visit the village, the security forces took up positions around the village. Two clashes followed. During the two days in the village they had conducted a search of each house. A number of houses, 10-12, were burnt down during the operation, including that of Koçeri Kurt and Mevlüde and Ali Kurt. Only three of the houses were near the clashes. Other houses were burnt down on a second, later occasion. However, it is established that many of the houses in the village were burnt down about this time and the villagers were told that they had a week to evacuate the village. The villagers fled to Bismil, many as they were homeless and those who were not being too scared to remain.

33. According to the applicant, around noon on 24 November 1993, when the villagers had been gathered together by the soldiers in the schoolyard, the soldiers were looking for herson Üzeyir who was not in the schoolyard. He was hiding in the house of his aunt Mevlüde Kurt. When the soldiers asked Aynur Kurt, his daughter, where her father was, Aynur told them he was at his aunt's house. The soldiers went to Mevlüde's house with Davut Kurt, another son of the applicant, and took Üzeyir from the house. Üzeyir spent the night with soldiers in the house of Hasan Kiliç. On the morning of 25 November 1993, the applicant received a message from a child that Üzeyir wanted some cigarettes. The applicant took cigarettes and found Üzeyir in front of Hasan Kiliç's house surrounded by about 10 soldiers and 5-6 village guards. She saw bruises and swelling on his face as though he had been beaten. Üzeyir told her that he was cold. She returned with his jacket and socks. The soldiers did not allow her to stay so she left. This was the last time on which she saw Üzeyir. There is no evidence that he was seen elsewhere after this time.

34. On 30 November 1993, the applicant applied to the Bismil public prosecutor to find out information on the whereabouts of her son Üzeyir. On the same day, she received a response from Captain Cural at the provincial gendarme headquarters stating that it was supposed that Üzeyir had been kidnapped by the PKK (the Kurdish Workers' Party). He made an identical reply on 4 December 1993. The district gendarme command noted on the bottom of the applicant's petition of 30 November that Üzeyir had not been taken into custody and that he had been kidnapped by the PKK.

35. On 14 December 1993, the applicant applied to the State Security Court in Diyarbakır which replied that he was not in their custody records. On 15 December 1993, she tried the Bismil public prosecutor again but was referred to the gendarmerie. Finally on 24 December 1993, the applicant approached the Human Rights Association in Diyarbakır for help.

36. On 28 February 1994, Davut Kurt, Arap Kurt and Mehmet Kurt were taken to the gendarme command and questioned about what they knew of "Üzeyir Kurt who was abducted by representatives of the PKK terrorist organisation". On 21 March 1994, the Bismil public prosecutor issued a decision of non-jurisdiction on the grounds that a crime had been committed by the PKK.

b. <u>concerning alleged intimidation and interference with the exercise of the right of individual petition</u>

i. in respect of the applicant

37. Since the applicant has submitted her application, she has been the target of an extraordinarily concerted campaign by the State authorities to make her withdraw her application.

38. On 19 November 1994, the applicant was called to give a statement on the instructions of the Diyarbakır Chief State Prosecutor. In this statement she was questioned about the statement made to the Human Rights Association and her application to the European Commission of Human Rights. The applicant's representatives make reference to a statement by Mr. Tim Otty that the Diyarbakır Chief State Prosecutor considers it an offence to make ill-founded and unwarranted applications to the European Commission of Human Rights.

39. On 9 December 1994, the applicant signed a statement which said that her petitions were written by the PKK terrorist organisation and her petitions were being used for propaganda. A copy was sent to the Human Rights Association.

40. On 6 January 1995, the applicant was called by the State authorities to go to a notary, and was accompanied there by a soldier. She did not pay the notary. The statement which was signed was identical to that of 9 December 1994 with the addition of a paragraph purporting to say that she had withdrawn her application.

41. On 25 January 1995, a statement was taken by the Chief State Prosecutor's office, as part of a file prepared by the authorities for the purpose of bringing a complaint against the applicant's lawyer, Mr. Mahmut Sakar.

42. On 8 August 1995, the applicant made another statement before a notary which purported to withdraw her application. While she was not forced to say anything to the notary and she told them what she wanted to be written, the statements do not represent her wishes and she had no opportunity to verify the contents of the statements.

ii. actions taken against the applicant's lawyer Mr. Sakar

43. The applicant states that the authorities have taken steps with a view to prosecuting Mr. Mahmut Sakar for his involvement in her petition to the European Commission of Human Rights. She refers to a request made in a document dated 12 January 1995 by Mr. Özkarol of the Foreign Ministry Human Rights directorate that an investigation be opened against Mr. Sakar, who was suspected of exploiting the applicant and had made a petition against Turkey.

2. Facts as presented by the Government

44. Ağıllı is a thirty-six household village. From this village and its surroundings, about fifteen men and women have joined the PKK, which is a high ratio for such a small village. These include Turkan Kurt, the daughter of Musa Kurt, one of the applicant's sons.

45. While an operation did take place in the village and clashes occurred between the security forces and suspected terrorists, Üzeyir Kurt was not taken into custody by the security forces. He had no history of previous detention or problems with the authorities and there was no reason for him to be taken into custody.

46. The Government submit that there are strong grounds for believing that Üzeyir Kurt has in fact joined or been kidnapped by the PKK. They refer to the fact that the family allege that his brother died in gendarme custody several years before; the fact that the applicant stated that he hid when the security forces arrived in the village; and the fact that his house was burnt down following the clash in the village. Further, some members of the family had already joined the PKK and several months after the operation in the village a shelter was found outside the village which it was said that Üzeyir Kurt had used in his contacts with the PKK. Villagers have also stated that they heard that he had been kidnapped by the PKK.

47. The Government submit that Üzeyir could have hidden in the village at the commencement of the operation and then, under cover of darkness and poor weather, slipped through the security forces blockade. Mehmet Karabulut stated that in the night following the first clash Üzeyir was in Mevlüde's home sleeping but that when he woke in the morning Üzeyir was no longer there. The only person who claims to have seen Üzeyir after that is the applicant, whose accounts are inconsistent, contradictory and unsubstantiated. In particular, it is pointed out that she stated that persons in the schoolyard were blindfolded, which was not true; her statements to the HRA (Human Rights Association) and to the Commission in her application refer to one visit to her son to give cigarettes, whereas in her oral testimony she referred to two visits; her descriptions of how she received a message from her son vary and she could not identify the alleged child

involved in delivering the message. In addition, her account of making two visits passing through the village when the security forces stated they were keeping people in their houses for security reasons is implausible.

48. The Government also point to the allegations originally made in the applicant's application to the Commission in which it was stated that the soldiers killed the livestock and pillaged goods as well as beating the villagers. These matters were denied orally by the applicant before the Delegates.

49. The Government submit that the applicant was not subjected to any pressure not to give evidence before the Delegates as was alleged in strong terms by the applicant's representatives before and at the beginning of the proceedings.

50. The Government submit that the applicant has clearly stated that she does not wish to make a complaint against the State. Her only concern is to find her son and it was for that purpose she went to the HRA. She had never been subject to pressure to make any statement; no soldiers were around her when she made statements; there was an interpreter and her statement was read out to her before she fingerprinted it.

3. Proceedings before the domestic authorities

51. On 30 November 1993, the applicant submitted a thumbprinted petition to the Bismil prosecutor. It stated that her son had been taken into custody following a clash between the gendarmes and the PKK at her village and she was doubtful as to his fate. She requested that she be informed of his fate. On the same date the prosecutor passed the petition to the district gendarme command with a handwritten request for the information to be provided. The district gendarme command noted in handwriting on the petition the same day that it was not true that Üzeyir Kurt had been taken into custody - it was supposed that he may have been kidnapped by the PKK.

52. By letter dated 30 November 1993, Captain Izzet Cural, under heading of the provincial gendarme command, informed the Bismil Chief State prosecution in answer to their unnumbered letter that Üzeyir Kurt had not been taken into custody and it was thought that he had probably been kidnapped by terrorists.

53. By letter dated 4 December 1993, Captain Cural, district gendarme commander, under heading of the district gendarme command at Bismil, informed the Bismil Chief State prosecution that Üzeyir Kurt had not been taken into custody and it was thought that he had probably been kidnapped by terrorists (identical terms to the letter of 30 November in the preceding paragraph).

54. On 14 December 1993, the applicant submitted a fingerprinted petition to the Chief Prosecutor at the State Security Court at Diyarbakır. She stated that her son Üzeyir had been taken into custody 20 days previously by gendarmes and since they had had no news, they were concerned for his life. She requested that information be given to her as regarded his whereabouts. On the bottom of the petition, the Chief State Prosecutor noted in handwriting the same day that the name Üzeyir Kurt was not in their custody records.

55. On 15 December 1993, the applicant submitted a second written petition to the Bismil public prosecutor which repeated the terms of her petition of 14 December. The prosecutor wrote on the petition an instruction to gendarme regional command to provide her with the information requested.

56. On 21 March 1994, the Bismil public prosecutor, Ridvan Yildirim, issued a decision of dismissal. The document identifies the complainant as the applicant and the victim as Üzeyir Kurt. The crime was identified as membership of an outlawed organisation and kidnapping and the suspects as members of the PKK. The text of the decision stated that following a clash between the PKK and the security forces, PKK members escaped from the village, kidnapping the said victim. Since this crime fell with the jurisdiction of the State Security Courts, the case was dismissed and referred, with the file, to the Diyarbakır State Security Court.

B. The evidence before the Commission

1) Documentary evidence

57. The parties submitted various documents to the Commission. The documents included reports about Turkey (including extracts on Turkey from the Report of the United Nations Working Group on Enforced or Involuntary Disappearances (E/CN.4/1995/36)) and statements from the applicant and witnesses concerning their version of the events in issue in this case.

58. The Commission had particular regard to the following documents:

a) Statements by the applicant

Statement of 24 December 1993 taken by the HRA (Diyarbakır)

59. On 23 November 1993, at about 18.00 hours, a clash broke out at Ağıllı village, during which three houses were set on fire and two people were killed, one of whom was Mahmut Cakmak. The following morning, the soldiers collected all the villagers in the village school, separating the men from the women. The men were ill-treated, being forced to lie on the ground. During the three days that the villagers were kept in the school grounds during the day, and in places like stables at night, the soldiers burned down all the houses with all their contents and slaughtered the livestock.

60. When the clash broke out, the applicant's son Üzeyir Kurt was at the home of his aunt Mevlüde where he remained during the first night. The following day, when the villagers were collected together, he hid in his aunt's house. He was afraid since two years previously his brother Abdulkadir Kurt had died from ill-treatment in custody. When the soldiers asked Aynur Kurt (15 years old) where her father Üzeyir Kurt was, she told them. The soldiers went to Mevlüde's house with the applicant's son Davut and Üzeyir was brought out. He was taken to the house of Hasan Kiliç and held there during the night. In the morning, a child told Hasan Kiliç's wife that Üzeyir wanted cigarettes and clothes. The wife came to the applicant with this message at about 07.00 hours. The applicant obtained half a packet of cigarettes from a soldier and a jacket and jumper from one of the burnt houses and took these to Hasan Kiliç's house. She found her son in the yard, with 8-9

soldiers around him. He had swellings round his eyes and had been tortured. She gave the things to her son and was told to go away by the soldiers before she was able to talk to him. She has not seen her son since that time.

61. The applicant went to stay with her sister in Bismil since her house had been burned down. She applied to many places concerning her son's whereabouts but was told that he was not in custody but that he might have been killed by the PKK. She saw him in custody with her own eyes and suspects that he has been killed under torture.

Statement of 19 November 1994 taken by the Bismil public prosecutor

62. The applicant was asked about her complaint and shown her petitions. She said that she had petitioned the State Security Court and Bismil prosecutors and had given a petition to the HRA. She was an old person and could not remember if all the fingerprints she was shown belonged to her. The contents of the petition letters to the prosecutors were true. The letter to the HRA was written by someone else since she was illiterate. While it was true as stated in that letter that there was a conflict, that some houses were burnt and the villagers gathered by the security forces, she denied that they were tortured, the livestock slaughtered or the villagers' possessions plundered. She had not said anything like that. There was an armed conflict in the evening and the escaping terrorist was shot in the early morning. Later the villagers were assembled together. The soldiers told her that her son wanted cigarettes and clothing. She got cigarettes from a soldier, collected clothing from home and delivered them to her son. It was not true that her son had been tortured, only that his face looked like it was swollen. When she gave the clothing to her son, he said that the State would do nothing to him. She did not see him being taken away by the soldiers. Since one of her other sons had died in custody, she was suspicious that Üzeyir would also die in custody. This was why she made the petitions.

Statement of 7 December 1994 taken by gendarmes

63. On the evening of 23 November 1993 there were sounds of shooting. She did not leave her house, which she lived in with the family of her deceased son Abdulkadir. After sunrise, the security forces gathered everyone in the schoolyard, separating men and women. After identities had been checked they were released. Her son Üzeyir was with the soldiers - the place which he was in was crowded and there were other villagers. She heard some villagers were taken but according to them Üzeyir was not with them. He was not in the village and they made enquiries. The gendarmerie said that he was not in custody. She would very much like an investigation to be carried as to her son's whereabouts, whether he was dead or alive.

Statement of 9 December 1994 addressed to the HRA (Diyarbakır)

64. The applicant stated that she had made many applications to find out news of her son's fate. She was illiterate and she had learned that certain institutions and individuals had made use of her for propaganda. The PKK is named as using incorrect petitions made in her name and with her fingerprint. Her intentions, that her son was missing and that she wanted the security forces to look for him, had been distorted and for this reason, she revoked all petitions written and sent off in her name. She did not want her son to be used as propaganda material for any terrorist organisation. She wanted his whereabouts to be investigated by the State, which she trusted and which would shed light on the matter.

Statement of 9 December 1994 addressed to the Foreign Ministry, Ankara

65. This statement is identical to that made to the HRA above.

Statement of 6 January 1995 taken before the Bismil notary

66. After the confrontation between the terrorists and soldiers on 23 November 1993, the applicant's son was placed in custody by the soldiers and since then she had had no news of him. She had applied to several places, including the European Commission of Human Rights and Amnesty International. She had learned that an ill-founded petition had been made in her name and using her thumbprint by the PKK terrorist organisation, accusing the security forces of her son's disappearance. She had applied to the HRA for her son to be found which was her only aim. She rejected the application made to the European Commission of Human Rights in her name and did not wish to pursue it. Her only desire was for the State to find her son and she had trust in the State which would resolve the matter.

Statement of 25 January 1995 taken by the Chief Prosecutor's office at Diyarbakır

67. On 23 November 1993, village guards and soldiers came to the village, searched it and burned several of the houses. They interrogated 10-15 persons who were released but took her son with them and left, since which time she had had no news of him. She had given petitions to Bismil, Tepe station, the State of Emergency Governor' office, the Chief Prosecutor's offices in Bismil and Diyarbakır; to the Diyarbakır State Security Court Chief Prosecutor's office. The Regional Governor's office and the Bismil battalion command sent replies saying that her son had been kidnapped by the terrorists. Ismail Sarı was also taken from the village at the same time as her son. He came back to the village having been 15 days with village guards. He said he had not seen her son. She did not believe her son had been kidnapped by the terrorists. If her son had gone to the mountains, she would not have asked the State. She only wanted to see her son again dead or alive. The soldiers were constantly questioning her about this matter. She had no complaint against anyone.

Statement of 10 August 1995 taken by the Bismil notary

68. The applicant stated that she had approached the HRA not in order to file a complaint but intending only to seek help in an effort to locate her son. The statement taken down at the HRA, which she could not read as she was illiterate, was beyond her request or aim. She did not think that the State or security forces had any intentions concerning the disappearance of her son and such complaints were put into her statement without her agreement.

Statement of 2 December 1995 addressed to the HRA (Diyarbakır)

69. Following her application to the Commission, the security forces have asked her many times to make statements. Each time she mentioned that she had seen her son Üzeyir behind the village under the surveillance of soldiers, that his face was bruised, that she had brought him cigarettes and then a coat as he said that he was cold. When she asked him what was happening, he had told her "Mother this is the State. Nothing will happen." As regarded her statement to the Bismil notary, she was summoned through the village mayor to file a statement. However, she did not deny her application or the statements which she made to the Commission. She would like to continue with her case. She was worried about the safety of her two sons Musa and Davut. She wanted her son to be found, whether dead or alive.

Statement of 7 February 1996 taken by Bismil public prosecutor

70. The applicant stated that she had already given long statements about this matter. She did not want to go to Ankara. Neither the administrative authorities, nor the gendarmes nor the police had put pressure on her not to go to Ankara. She had not declared that she was being prevented from doing so. It was her own wish not to go.

b) Statements by other persons

Arap Kurt, mayor of Ağıllı village

Statement of 23 February 1994 taken by gendarmes

71. In this statement, the witness was asked for "his knowledge and observations that following a clash between the PKK and the security forces, PKK members escaped from the village, kidnapping the said victim". In response, the witness stated that he was the uncle of Üzeyir Kurt. Since he was kidnapped by the terrorists, they had had no news. Üzeyir had been missing since 25 November 1993 and he guessed that he had been kidnapped and kept by the terrorists.

Statement of 7 December 1994

72. On 23 November 1993, there was an armed conflict in the village. Afterwards, he learned that two members of the PKK and Senior Sergeant Uysal, Tepe station commander, had been killed. Following the clash, the security forces thoroughly searched the village and assembled the villagers in the schoolyard to check their identities. Twelve persons including himself and Mehmet Karabulut were taken into custody for one night at the gendarme command. Üzeyir Kurt was not with them. They were released after being interrogated.

Davut Karakoç

Statement of 28 February 1994 taken by gendarmes

73. In this statement, the witness was asked for "his knowledge and observations about the hostage Üzeyir Kurt, taken by the PKK terrorist organisation". In response, the witness stated that he was the cousin of Üzeyir Kurt, who had been kidnapped by the PKK, since when they had had no news. They did not know his whereabouts, which mountain he was in or what he was doing. He had only heard that his cousin had been kidnapped by the PKK but did not know how. That was all he knew about the matter.

Mehmet Kurt

Statement of 28 February 1994 taken by gendarmes

74. In this statement, the witness was asked for "his knowledge and observations about the hostage Üzeyir Kurt, taken by the PKK terrorist organisation". In response, the witness stated that he was the cousin of Üzeyir Kurt, who had been kidnapped by the PKK, since when they had had no news. They did not know his whereabouts, which mountain he was in or what he was doing. He had only heard that his cousin had been kidnapped by the PKK. That was all he knew about the matter.

Hasan Kiliç

Statement of 7 December 1994 taken by gendarmes

75. On the evening of 23 November 1993, there was an armed conflict between the PKK and the security forces as a result of which many houses were burnt. Towards midnight, at the beginning of 24 November, Üzeyir appeared at his house. The security forces who were carrying out a search of the village arrived at his house and because it was very cold, the commanding officer, a first lieutenant, asked if they could sit down. The witness made them welcome and they had tea and talked until morning. The applicant came to his house and talked to Üzeyir by the door and then they both left together. The soldiers who were his guests also left that morning. He did not hear or see Üzeyir ask children for cigarettes or a pullover and it was not true that his children asked the applicant for these things. The soldiers definitely did not leave with Üzeyir.

Aynur Kurt

Statement of 7 December 1994 taken by gendarmes

76. Aynur Kurt said that she was the daughter of Üzeyir. There was a conflict at the village on 23 November 1993.She was sitting at home with her father. The security forces arrived and evacuated the house. Her father hid himself in the house. They were taken to the school, identities were checked and afterwards they dispersed. She did not see her father being caught by the security forces.

Mevlüde Kurt

Statement of 7 December 1994 taken by gendarmes

77. The witness stated that she was the step-sister of Üzeyir Kurt. On the night of 23 November 1993 she was at home. There was an armed conflict and they heard shooting. In the morning they were all gathered at the school where there was a brief identity check. The houses were searched. There was a fire in the village as a result of the conflict. She did not see anyone being taken into custody.

Musa Kurt

Statement of 7 December 1994 taken by gendarmes

78. The witness was Üzeyir Kurt's elder brother. On the evening of 23 November 1993, he was in his house and heard sounds of shooting. In the morning the security forces gathered the villagers, men and women separately, in the school yard. They carried out an identity check and searched the houses. He did not see his brother Üzeyir Kurt among the gathered people in the yard nor during the search. He did not see anyone being taken into custody. He heard that some villagers had been taken and when these persons were released he asked them, but they said that they had not seen his brother. All he asked was that the State investigated whether his brother was dead or alive and, if alive, notify of his whereabouts.

Hazal Karakoç

Statement of 7 December 1994 taken by gendarmes

79. The witness was Üzeyir Kurt's elder sister. On the evening of 23 November 1993, she was in his house and heard sounds of shooting. In the morning the security forces gathered the villagers, men and women separately, in the school yard. They carried out an identity check and searched the houses. She did not see her brother Üzeyir Kurt among the gathered people in the yard nor during the search. Later they dispersed and everyone went to their houses. She heard that some villagers had been taken but did not know whether Üzeyir was amongst them. Some 3-4 days passed and they realised that he was not in the village. The people who were released said that he had not been with them. She did not see her brother being taken into custody.

Mekdeni Goktaş

Statement of 7 December 1994 taken by gendarmes

80. The witness was elected mayor of Bashan village and a village guard. He said that five days after the armed conflict in Ağıllı village, one of the villagers returned with Ismail Sarı whom he was intending to hire as a shepherd with the agreement of the village. Since Sarı demanded too much money, however, no agreement was reached. Sarı stayed in the village two days. He asked also to be employed as a village guard but there was no post available. His mother came to the village and they left together. There was no-one called Üzeyir Kurt with Sarı.

Mehmet Aydin

Statement of 7 December 1994 taken by gendarmes

81. The witness was a village guard from Bashan. About five-six days after the conflict at Ağıllı, he saw Ismail Sarı in front of the Bismil gendarme station. Sarı said that he was afraid to go back to the village because of the PKK. The witness took him back to Bashan in order for him to take the job of village shepherd but they could not agree on the salary. Sarı stayed in the village two days then left with his mother. There was no-one called Üzeyir Kurt with Sarı.

Sadun Sarı

Statement of 7 December 1994 taken by gendarmes

82. The witness from Ağıllı village was the father of Ismail Sarı. He said that Ismail had been in the village during the conflict and afterwards was afraid of staying there. He went to Bismil alone with the security forces. From there he went to Bashan to become a shepherd. Üzeyir Kurt was not with him. A few days later he came back from Bashan.

Şemsettin Güneş

Statement of 7 December 1994 taken by gendarmes

83. The witness was elected mayor of Tepecik village and a village guard. During the conflict of 23 November 1993 at Ağıllı, he was at Tepe gendarme station. They learned that the commanding officer of the station, Senior Sergeant Uysal, had died during the conflict. Since there were insufficient security forces, he and the village guards went to Ağıllı on the morning of 24 November 1993 to fetch the body and return it to Tepe. They did not take Ismail Sarı or Üzeyir Kurt with them.

c) Official decisions and reports

Incident report by security forces dated 24 November 1993

84. Pursuant to intelligence information that three members of the PKK were to arrive at Ağıllı village to make propaganda and collect money, an operation was organised whereby the security forces arrived at the village on 23 November 1993 and the entrances and exits were surrounded. A tractor was observed approaching with its headlights off. A Senior Sergeant, Mehmet Uysal, called a warning "halt" to the tractor which was responded to by a burst of fire from three PKK members. Uysal was killed. In the conflict which followed, one terrorist ran to the yard of Muhuttin Kurt's house. He was killed by the security forces. The other two terrorists ran into the village. They fired tracer bullets which resulted in the burning of the tractor, haystacks and some of the houses. The two terrorists were later traced to the haystack belonging to Mahmut Cakmak. Firing started which led to the deaths of a terrorist, codename "Siar", and Mahmut Cakmak. A grenade exploded when Cakmak tried to booby trap himself and the haystack was burned.

Report dated 19 November 1994 from Bismil prosecutor to Diyarbakır Office of the Attorney-General

85. The prosecutor reported that, following the incident at Ağıllı, the applicant's claim that her son had been taken into custody by the security forces was investigated. The investigation established evidence suggesting that he had been kidnapped by members of the PKK on their escape route following the clash on 23 November 1993.

Report dated 8 December 1994 by Colonel Esref Hatipoğlu, Gendarme General Command, Diyarbakır

86. On evaluation of information concerning the imminent arrival of a group of terrorists at Ağıllı for the purposes of gathering money and supplies, Bismil District Gendarme Command launched an operation.

87. A group of terrorists were discovered inside the village. Another group of terrorists attempted to enter the village to join the others. Firing began when the security forces ordered the terrorists to halt. An armed conflict ensued, continuing through the night in places. A fire started in some of the haystacks and this spread to some houses. Senior Sergeant Uysal and one terrorist were killed in the first outbreak of shooting. During the conflict every effort was made to avoid damage to villagers' property or injury to their persons. On 24 November all suspicious persons were brought to the school for identities to be checked. During the search of the village, an incident occurred at the haystack of Mahmut Cakmak who was found to be collaborating with the PKK terrorist, Siar. Both were shot when they fired on the security forces.

88. While the search was concluded by the evening of 24 November, some security forces remained to provide security and protection to the villagers whose houses were burnt. Twelve suspicious persons were taken into custody on 24 November 1993 but released on 25 November 1993 after their interrogation had been completed. On 25 November the operation was concluded and the security forces left the village.

89. The applicant made an application a long time after this incident inquiring whether her son was in custody and stating her concern about his life. She was informed that the person was not in custody. The claim had also suggested that Ismail Sarı of the same village was in custody. This was investigated. Sarı's brother had been killed by the PKK and he and his mother had taken refuge in the village of Bashan. He later started, and was still doing, his military service.

90. Following this incident, the PKK held the village responsible for the loss of their members and after concentrated pressure from them, the villagers evacuated their homes, settling into surrounding secure settlements.

d) Materials relating to the enquiry into the conduct of the applicant's lawyer Mr. Mahmut Sakar

Document dated 12 January 1995 from the Ministry of Foreign Affairs (Deputy General Directorate of the Council of Europe and Human Rights) to the Ministry of Justice (General Directorate of International Law and Foreign Relations) signed by Mr. Özkarol on behalf of the Minister.

91. This document refers to the applicant's petition letter of 24 December 1993 taken by the HRA. It states that in her statement to the Bismil public prosecutor the applicant stated that the allegations in the petition were untrue in that the villagers were not tortured and the soldiers did not settle in the houses, kill livestock or loot. She also denied the claim that her son was tortured and stated that she did not see her son being taken away by the soldiers. It concluded that if this statement was true it disclosed an abuse of the applicant's rights and, combined with the applicant's letter to the Ministry, cast suspicion on the credibility of the application. It requested an investigation.

Document dated 19 January 1995 from the Ministry of Justice (General Directorate of International Law and Foreign Relations) to the General Directorate of Penal Affairs

92. This document refers to the letter and documents sent by the Ministry of Foreign Affairs and also to the applicant's statement sent to the Ministry of Foreign Affairs dated 9 December 1994. It stated that in view of Article 58 of Law No. 1136 legal proceedings were considered and requested information.

Document dated 17 April 1995 from Mr. Ibrahim Akbas, Attorney General to the Ministry of Justice (General Directorate of Penal Affairs)

93. This document refers to an investigation order of 6 February 1995 from the Ministry of Justice and a letter from the International Law and Foreign Relations General Directorate of 19 January 1995 and states that the matter is to be investigated and an opinion and evaluation summary report be dispatched. This refers to suspicions that Mr. Sakar had fabricated statements in the applicant's petition letter but states that since the applicant had made hesitant statements to the Bismil public prosecutor on the content of the petition and as to whether she had signed it or not and had made totally different claims in another context, it had been concluded that in the case of an investigation securing evidence would be difficult.

Document dated 14 July 1995 by Judge Akcin for the Ministry of Justice

94. This refers to a petition made on behalf of the applicant by Mr. Sakar, which included allegations that village residents were tortured and soldiers settled in the houses and slaughtered the livestock and looted their possessions. The judge noted that an investigation revealed that the statement had been taken by Mr. Sakar in his capacity as administrator of the Diyarbakır HRA and that accordingly the general rules were applicable. He considered that the documentation be referred to the Diyarbakır Attorney General for the application of those rules.

Letter dated 9 August 1995 from the Attorney General, Diyarbakır, to the Chairmanship of the Bar, Diyarbakır

95. This refers to an enclosed file of documents from the Ministry of Justice, with the note that it was to be discussed with the Advocate M. Sakar.

2) Oral evidence

96. The evidence of the six witnesses heard by the Commission's Delegates may be summarised as follows:

(1) Koçeri Kurt

97. In November 1993, the applicant lived in Ağıllı village (Birik). Her son Üzeyir lived in the next door house with his family (7 children). A tractor had come to the village in the evening when it was surrounded by soldiers. There was an incident at about 20.00 hours when a non-commissioned officer was killed. In the morning, the soldiers assembled the villagers and took them to the schoolhouse. The young were separated from the old. At one point she said that they were blindfolded while at another that only the young people were blindfolded. The soldiers set fire to the village. Three houses had burned during the night, and she saw smoke and flames from others during the day. They burned about ten houses, including those of her son Mahmut. The soldiers did not touch the animals but on previous occasions when they had visited they had killed chickens. They did not ill-treat the villagers. The villagers were released at about 16.00 hours and then collected again the following morning.

98. Her son Üzeyir had been at his aunt Mevlüde's house and spent the night there. He was not in the schoolyard. The soldiers were looking and asking for him. When they asked Aynur where her father was, she told the soldiers that he was at the aunt's house. She had seen the soldiers ask Aynur. At about 16.00 hours, the soldiers brought him out and took him away. She did not see that, but her aunt and one of her other sons had been taken there by the soldiers when they went to search for Üzeyir. Mevlüde said that after they took Üzeyir they burned her house. The soldiers asked him why he had been hiding and he replied that he was frightened as one of his brothers had been killed under torture. He had never been in trouble previously with the authorities.

99. The next day, at around 9.00 hours, a child told Üzeyir's wife, Saliha, who told the applicant that Üzeyir wanted cigarettes. Hasan had told her that Üzeyir was at his house with the soldiers. She got cigarettes from a soldier and took them to Hasan's house where she found her son in front of the house with about 10 soldiers and 5-6 village guards. His face was black and blue. He had been tortured. He was in the custody of the soldiers. He told her that "it's the State that did this to me." He asked her for a jacket. She fetched a jacket and after she had given it to Üzeyir the soldiers told her to go away. That was the last that she saw of him. Hasan said that they took Üzeyir away from the house later that morning.

100. About 15-20 villagers were taken away from the village by the gendarmes. When they returned two days later, Üzeyir was not with them. A soldier told them to leave the village in a week.

101. The applicant took a petition to the prosecutor's office. He told her to go to the gendarmerie. She took her petition to the gendarme station. Since she thought her son had been with Ismail Sarı, she asked where they both were. The gendarmes said that Ismail Sarı had joined the village guards. They said, "We haven't seen your son. We lost your son in the village. He ran away." But she had seen with her own eyes that her son was in their hands. She did not know if they killed him

or let him go. She went there about ten times. She was told his name was not in the records. She also made a petition in Diyarbakır, which was sent to the gendarmerie command. They said that they did not know the whereabouts of her son. The father of Ismail Sarı went to find him with the village guards. She did not trust the village guards: the State could ask the village guards but they did not give the order to find her son. Whatever was done was done by the soldiers and village guards.

102. When she was called to give a statement to the public prosecutor in November 1994, he asked her if she had made a complaint to the Commission. She was not taken into custody. The gendarmes came to take people to make statements. They asked her if she had gone to the Human Rights and made a petition. It was the State who told her to go to the notary. A soldier came to take her. She did not pay the notary. She made a statement alone with the notary and fingerprinted it. On the second occasion, it was again the State who told her to go. The police came and told her. A soldier in uniform accompanied her to the notary but he waited outside. She was not told what to say but was told to put her fingerprint on the paper. When the notary asked her why she made these petitions, she said that she wanted her son's body. She did not tell the notary that she did not want to continue with her petitions. There were interpreters present at the notary on both occasions and they read her statement back to her. She did want to pursue the case. She went to the HRA of her own free will to fight for her son's rights. She found her own way there by herself.

103. No-one had told her not to come to Ankara. She had said that she would not go because she had no money. The public prosecutor told her that they were waiting for her to give a statement but he did not pressurise her. The HRA did not pressurise her either. She received a message from her lawyer saying that she absolutely must go.

104. The applicant also went to the HRA. She told them that the State had taken her son away and that she wanted her son's body. They wrote it down. When she was referred to her statements to the notary which said that she did not want to pursue her application, she said that maybe she had said that. She wanted the State to give her her son's body. Even if they had killed him, they should tell her where he was.

105. When counsel for the Government asked her whether she filed a complaint against the State because they lost her son or whether she wanted the State to find her son, she said that the State had taken her son away. Maybe she had said things to the notary but she was at her wit's end. She wanted her son. She saw with her own eyes that he was in their custody. She wished that they would admit that they have killed him and say where his body was. She rejected the possibility that her son had joined the PKK. If he had gone to the mountains, she would not be asking the State.

(2) Arap Kurt

106. Arap Kurt said that he was born in 1942 and lives in Bismil. He used to live in the village of Ağıllı. He was there during the incident in November 1993. He was and still is mayor of the village. Koçeri Kurt is his sister-in-law.

107. Terrorists and soldiers used to come to the village from time to time. The village had no village guards, though there were such guards in villages further away. On 23 November 1993 between about 19.00 and 20.00 hours he heard firing from a clash. After ten minutes soldiers came to his house. The captain wanted explanations from him. He told the witness to stay with him that night. The security forces surrounded the village, told the villagers to stay in their houses since there were terrorists in the village and said that they intended to search it in the morning.

108. At about 7-8.00 hours in the morning, there was another clash behind the village where a terrorist was hiding. He did not see what happened. Houses were burned as they caught fire from sparks in the clashes in the evening and the next day. These included the houses of Üzeyir and the applicant. He did not see any houses being set on fire by soldiers or village guards. In the morning, the villagers were all gathered in the garden of the school, with the men on one side and the women on the other. They were kept there 7-8 hours. No-one had been blindfolded.

109. There were many village guards around the village. He did not know them or where they were from.

110. He had last seen Üzeyir Kurt two days before the incident. Since the incident he had not seen him. He did not know what had happened to Üzeyir. He had not seen anything. On 24 November 1994, he was taken into custody with eleven others. He had been taken to stand near the security forces vehicles. They were taken to Bismil in the evening about 17.00 hours and kept for two nights before being released. He spent a third night in Bismil and then returned to the village. There were no soldiers there then. All the villagers were packing their belongings: they told him they were leaving. When he saw that they were all leaving for Bismil, he decided to leave also. A few families remained in the village but they moved to Bismil later and the village was empty. After this, the houses were all burned down by someone.

111. He had no information concerning the disappearance of Üzeyir Kurt. He had not seen him and did not know what had happened to him. Some said that he had gone to the terrorists or had gone away, others said that the State had taken him. Üzeyir had not had any problems with the State and had not been taken into custody before. He had never seen any PKK sympathisers or militants visit Üzeyir.

112. As regarded his statements to the gendarmerie, he had made them of his own free will. He had not told them that he guessed that Üzeyir had been kidnapped by the PKK. He did not know. He had asked the gendarme where Üzeyir was, but they said they had not seen him and that he had probably joined the terrorists. He guessed that the PKK had taken Üzeyir but he did not know. He had not seen him with the soldiers, village guards or terrorists.

113. He had accompanied the applicant on the first occasion to the notary as she had asked him. She had said that her son had disappeared three years ago, that she was fed up and now she wanted to give up the case. The gendarmes were not pressurising her but she was pulled from all sides. There were no gendarmes when they went to the notary. He had not gone inside when she made the statement, he had gone to pray in the mosque.

(3) Ridvan Yildirim

114. The witness was born in 1966. In November 1993 he was one of the two Bismil public prosecutors. He knew the village of Ağilli and had been there once concerning another criminal case four to five months later. On the day of the clash he was in Diyarbakır and it was the next day he learned of what happened from his fellow prosecutor who had carried out the three autopsies on the persons killed in the clash. When he asked about the circumstances of the incident, he noticed that everyone's morale was low. The gendarmes returned from the operation in low spirits because of the death of the non-commissioned officer.

115. He met the applicant four times. The first time she made a petition requesting information about her son's whereabouts. He told her to contact the public prosecutor at the State Security Court since his office determined the length of custody. She returned the same evening, with the comment on the bottom of her petition that her son had not been taken into custody. Considering the possibility that her son had been taken into custody by the Bismil gendarmerie which might not have informed the State Security Court, he wrote on another petition that information should be given to the applicant and sent it over to the gendarmerie. He did these things to help allay the applicant's anxiety - there was nothing else that he could do. The document was returned with a comment to the effect that terrorists were suspected of kidnapping the applicant's son. This was recorded as a crime in the preliminary investigation books and an investigation was opened by the public prosecutor's office. A letter was sent to the gendarmerie asking on what evidence they had based their assessment of a kidnapping. The gendarmes sent back the same response. He was not aware that Captain Izzet Cural who signed the responses to the enquiries was the commander of the operation in the village. The prosecutor's office proceeded to conduct an investigation during which three witnesses stated on oath in statements to the gendarmerie that the applicant's son had been kidnapped by the PKK and taken to the mountains. Based on these declarations, and having regard to the opinion that some of the relatives of the Kurt family were in the mountains, the prosecutor's office came to the conclusion that the applicant's son had been kidnapped by the PKK and on 21 March 1994 they took a decision of lack of jurisdiction and the case was sent to the State Security Court.

116. As regarded the finding in the decision of lack of jurisdiction that PKK members escaping from the village had taken the applicant's son, the witness explained that in his opinion the three terrorists killed by the security forces had gone to Ağıllı village with the intention of establishing contact with others. In his experience, in almost every village in every house there was a good chance that a shelter for hiding terrorists existed. He also referred to the fact that a member of the applicant's family had died under torture and citizens in the area tended to overreact to actions by the security forces by going to the mountains. The witness' memorandum of 19 November 1994 was based on the same material as the decision of lack of jurisdiction. It was because of the allegations of kidnapping that the case was recorded in the preliminary investigation books, not because of allegations that the applicant's son was in custody. Only in the first two interviews did the applicant tell him that her son could have been taken into custody and that therefore she was asking for his help.

117. Villagers were unable to report what they saw concerning the terrorists or to state that the PKK had kidnapped someone.

118. The witness saw the applicant on two further occasions in order to clarify her petition. She was summoned via the muhtar in order that she would not feel pressurised. He listened to her himself. He called her to make a statement following the request of the Ministry of Justice to clarify her real demands. He did not regard her statement as calling into question his decision on lack of jurisdiction. He sent the statement to the Ministry and did not send a copy to the State Security Court. It was the State Security Court which had the responsibility for investigating the matter: if it decided that the matter fell outside its jurisdiction it would remit it to Bismil public prosecutors or to the District Administrative Council.

(4) Izzet Cural

119. The witness was born in 1962. In 1993, he was commander of the Bismil district gendarmerie. The PKK terrorists were active in the region of Ağıllı village. Intelligence information was received that an unspecified number of terrorists were going to Ağıllı village to gather the villagers and conduct activities. An operation was planned with about 150 soldiers. He proposed the plan for the operation, which received approval from his superior and the operation was conducted under his command.

120. The operation started at about 19.00 hours. One terrorist was killed that evening and two others the next morning. He was present when this occurred. At the time of the first clash, the security forces were in key positions round the village and had partially entered the village. During the night, the soldiers, who were appropriately equipped stayed outside the village. No village guard would have been able to enter the village without the risk of being fired on by soldiers or terrorists.

121. Pursuant to his orders, village guards (about 10-20) were used in the operation to guard the vehicles which were stuck in mud on the road leading to the village. They were present outside the village throughout the operation. They were not directly involved otherwise. No records would be made of a passive role of such a kind. Generally village guards were used in operations in the open country, and to ensure the security outside but not inside other villages. In his experience, village guards had not been used to detain people.

122. The villagers were told to stay in their houses when the firing first started. They were later gathered in the school for their protection. He did not recall if all the houses or only some houses were searched. Some houses near the clashes with the terrorists were burned. He was there throughout the operation, save for a period of 1-2 hours when he went to notify the family of the non-commissioned officer who had been killed. He received no report during the operation that any villager had escaped from custody in the village.

123. He became aware of the allegations that Üzeyir Kurt had been detained after the applicant's petition to the public prosecutor. In response, he ordered the appropriate subordinates to gather information. They reported to him orally that they could not obtain any information or concrete evidence regarding this person. He checked

their own custody ledger personally and contacted other units to have their ledgers checked. They verified the detainees whom they had in custody. This did not require much time. He also spoke to his subordinates, taking their statements informally and orally.

124. As regards his written comments to the effect that Üzeyir Kurt had been kidnapped, he explained that the PKK used certain tactics to oppress and use the locals to their advantage, seeking to create enmity between the locals and the security forces. There were many examples of the PKK kidnapping people from inside villages, from their homes. Even if villagers saw a person kidnapped, they would not say it since it would mean certain death. He thought that the applicant would share this fear. In respect of the present incident, where there were many soldiers present in the village at the time, he suggested that when it was dark, the village being unlit, terrorists wearing military clothes could have slipped in. It was not possible with 150 soldiers, which was not a great number, to entirely surround the village - the way in which the tractor with the terrorists entered the village illustrated that. Someone, disguised in military clothing, or taking advantage of darkness, could also have slipped out of the village: Üzeyir Kurt could have met up with terrorists while he was escaping. There were many scenarios. He also referred to the indicator that about 15 people from the village had joined the PKK, including some of Üzeyir Kurt's relatives.

125. A month or so after the incident, a shelter was discovered south of the village following information from someone who confessed: this person, Ismail, said that Üzeyir Kurt knew the location of this shelter, which had existed a long time before the incident, and brought food to the terrorists when they stayed there. This was one of the elements which led them to the view that it was a strong possibility that Üzeyir Kurt had gone to the PKK: but this was just one of the possibilities.

(5) Muharram Kupeli

126. The witness was born in 1961. During the events in November 1993 he had been in the Bismil district working as commander of the commando unit. The village of Ağıllı was within his jurisdiction. He knew the muhtar well and had gone there from time to time in connection with his various administrative duties.

127. There were problems with terrorists in and around Ağilli, in fact in the whole of his region. Terrorists used to threaten the villagers, taking supplies, money and food from them and abducting young people to the mountains.

128. On 23 November 1993, the security forces had received information that an unspecified number of terrorists were to go to Ağilli to collect money and food. His unit commander, Captain Cural, organised an operation to take place in the evening. His commando unit was located in the same building as the district gendarmerie. The operation used about 150 members of the security forces. A major portion of his own unit of 170 men were used and some men from the district gendarmerie.

129. At the commencement of the operation, the security forces parked their vehicles about two kilometres from the village and surrounded the village with men from the commando unit to ensure security and prevent anyone entering or leaving. They then entered the village to assess the situation. Once in the village, the security forces split into two groups, one commanded by the captain and the other by himself. He went to a house where they thought the terrorists would meet, while the captain went to a house 20-30 metres away. While he was conducting a search in a house, he heard firing and ran to rejoin the captain. He found that their non-commissioned officer had been shot dead and that the soldiers were firing at a terrorist who was trying to escape. This was at about 19.00-19.30 hours. The terrorists had entered the village on a tractor: he did not think that there could have been more than three.

130. They began searching houses along the escape route of fleeing terrorists but due, to the fact that it was dark and wishing to avoid further casualties, they decided to maintain their positions round the village and wait until morning. He did not sleep and the soldiers in the fields around the village were not meant to sleep. Shortly before dawn, they started the search again to locate the terrorists whom they knew to be in the village. They told the villagers to gather in the schoolyard, then they divided into groups and continued the search, in the presence of the relevant house owner. He was working towards the west side of the first incident and the captain was searching on the south side. At one point he heard firing to the south. He went there and saw a hay barn burning with two terrorists dead on the ground.

131. They were in the village over a period of two days and searched every house. The villagers were kept in the schoolyard during the day. Some of the houses burned down during the clashes, including Üzeyir Kurt's house which burned during the second incident. No houses were burned by the security forces.

132. The witness had not made the incident report or drawn the map. He was the commander of a commando unit and was not involved with judicial matters. The station commander would normally have done it, but as this person had been shot someone else must have done it. Even though he was responsible for the soldiers, he had not been consulted about the drawing up of the report. He did not remember whether he had been asked anything about the operation or not.

133. He had become aware of the allegation of the disappearance of Üzeyir Kurt 1 week to 10 days after the incident when the applicant came to petition the public prosecutor's office which sent the petition on to the district gendarmerie. It was the district gendarmerie who answered the petition, and while he heard about it in the station, he was not informed directly or formally requested to give information. The district gendarmerie commander had asked if Üzeyir was still in custody, but it was confirmed that he had not been detained. People taken into custody are not his responsibility. Any persons whom he is ordered to take into custody are delivered to the district gendarmerie command.

134. Some villagers had been taken into custody during the operation because their names had been found on documents carried by the dead terrorists and because there was intelligence information.

135. On the second day village guards had come from the surrounding villages and had guarded the military vehicles which could not be moved because of the bad weather. Perhaps they had been summoned by the district commander, perhaps some had come because they heard about the death of their local station commander. They would not have come into the village.

136. The whole operation had lasted from 23 November in the evening until sunset on 25 November, when he left with his men.

137. He remembered an occasion when the applicant had come to the gendarmerie and she had asked him where her son was and if he had taken him into custody. Based on discussions with his colleagues, he told her that her son might have gone to the mountains. While they had searched every house, the PKK-built shelters were very hard to find and he would not say that there were no terrorists left in the village after three had been shot. To his knowledge however there had only been three. He was certain that, after the security forces left, the PKK would have returned to the village to recruit people and turn the incident to their advantage.

138. On the second day of the operation, he was told that a villager Ismail Sarı had told the captain that there were other terrorists in the village and that there was a shelter. They searched for the shelter but could not find it. Because he was afraid, Sarı did not want to remain in the village; he wanted to go to a village with village guards and to become a shepherd. The captain sent him to such a village but he apparently could not reach any agreement and left. One and a half or two months later, a terrorist, Ismail, who had been caught in the Savur district, told them of a shelter and showed them the location in a field to the west of the village. The terrorist said that this had been built and used by Üzeyir Kurt.

(6) Mehmet Karabulut

139. The witness said that he had been born in 1933 and had lived in Ağıllı at the time of the incident in November 1993. On 23 November 1993 his wife had been taken ill and he had accompanied her to hospital in Diyarbakır, returning that evening. The incident took place that evening with a clash between soldiers and PKK terrorists.

140. He knew Üzeyir Kurt. He had seen him for the last time at the house of Üzeyir's uncle and aunt, Ali and Mevlüde. They had been sitting together in Ali Kurt's house on the evening of the incident when they heard the clash. Because of the clash he and others had had to stay at Ali's house and around 2.30-3.00 hours he had gone to bed in the same room as Üzeyir and Musa. After half an hour or an hour he got up and saw that Üzeyir Kurt had gone. He had never seen him since. They had been sleeping in the same room, but Üzeyir was not anywhere in the house. He had never been asked by anyone about the whereabouts of Üzeyir and did not know what had happened to him.

141. On the second day of the incident the villagers were collected together in the schoolyard and there was another small clash. He had been one of the 12 people, including the muhtar, who had been taken into custody around 6 or 7 in the evening. Üzeyir was not amongst them. He had stayed two days and two nights in custody. On his release he had returned to the village; there were rumours that Üzeyir

had disappeared. Since he found his house had been destroyed and there was nothing left in the village, he went to Bismil. The PKK used to come from time to time but no-one had been kidnapped.

C. Relevant domestic law and practice

142. The parties have made no separate, detailed submissions with regard to domestic law and practice applicable in this case. The Commission has incorporated relevant extracts derived from, inter alia, its summary of the relevant domestic law and practice as submitted by the parties in the case of Aksoy v. Turkey (No. 21987/93, Comm. Rep. 23.10.95 pending before the Court).

143. The Government submit that the following provisions are relevant.

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."

144. 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 unknown or terrorist authors when the State may be said to have failed in its duty to maintain public order and safety, or in its duty to safeguard individual life and property.

145. 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."

146. The Turkish Criminal Code makes it a criminal offence

- to deprive someone unlawfully of his or her liberty (Article 179 generally, Article 181 in respect of civil servants),
- to issue threats (Article 191),
- to subject someone to torture or ill-treatment (Articles 243 and 245)

147. For all these offences 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 crimes 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.

148. Generally, if the alleged author of a crime 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. If the offender is a member of the armed forces, he would fall under the jurisdiction of the military courts and would be tried in accordance with the provisions of Article 152 of the Military Criminal Code.

149. Any illegal act by civil servants, be it a crime or a tort, which causes material or moral damage may be the subject of a claim for compensation before the ordinary civil courts. Pursuant to Article 41 of the Civil Code, an injured person may file a claim for compensation against an alleged perpetrator, who had caused damage in an unlawful manner whether wilfully, negligently or imprudently. Pecuniary loss may be compensated by the civil courts pursuant to Article 46 and non-pecuniary or moral damages awarded under Article 47.

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

151. The applicant points to certain legal provisions which in themselves weaken the protection of the individual which might otherwise have been afforded by the above general scheme. 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.

D. Relevant international material

152. The phenomenon of forced or involuntary disappearance has been the concern of a number of other international judicial and human rights investigatory bodies. Extracts and summaries of materials from the Inter-American system and the United Nations are included in Annex II to the Report.

III. OPINION OF THE COMMISSION

A. Complaints declared admissible

153. The Commission has declared admissible the applicant's complaints that her son was taken into custody and has disappeared and that she has no remedy available to her in respect of this.

B. Points at issue

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

- whether there is a valid application pursuant to Article 25 of the Convention;

- whether there has been a violation of Article 2 and/or Article 3 of the Convention in respect of the applicant's son;

- whether there has been a violation of Article 5 of the Convention by reason of the circumstances in which the applicant's son has disappeared;

- whether there has been a violation of Article 3 of the Convention in respect of the applicant;

- whether there has been a violation of Article 13 of the Convention by reason of the applicant's alleged lack of effective remedy before a national authority in respect of her complaints;

- whether there has been a violation of Article 14 of the Convention;

- whether there has been a violation of Article 18 of the Convention;

- whether Turkey has failed to comply with its obligations under Article 25 para. 1 of the Convention.

C. Concerning the existence of a valid application

155. There are conflicting written statements fingerprinted by the applicant concerning her application to the Commission. There are two notarised statements and two identical statements of 9 December 1994, which respectively state that her petition to the Commission is being misused and manipulated for propaganda purposes, that it does not reflect her true intention which is to obtain help in locating her son and that she revokes all petitions. In a further, subsequent statement of 2 December 1995, it is stated that the applicant wishes to pursue her case.

156. Before the Delegates, the applicant stated that she wanted to pursue her case. While the Government submit that the tenor of the applicant's testimony was that in fact she had not intended, and did not intend, to complain against the State but to locate her son, the Commission considers that, in view of her oral statements, there is no ground for finding that she did not freely go to the Human Rights Association or that the basis of the application submitted on her

behalf to the Commission - that her son disappeared while in the custody of the security forces and that she holds the State authorities accountable - does not validly reflect her complaints.

157. The Commission finds that the application before it is a genuine and valid exercise of the applicant's right of individual petition under Article 25 of the Convention and that she does not wish to withdraw it. As regards the circumstances which led to the contradictory statements being made as to the applicant's intentions, the Commission has examined these elements in the context of the allegations of intimidation and interference with the right of individual petition contrary to Article 25 para. 1 in fine.

Decision

158. The Commission decides, unanimously, to pursue the examination of the application introduced on behalf of the applicant.

D. The evaluation of the evidence

159. Before dealing with the applicant's allegations under specific Articles of the Convention, the Commission considers it appropriate first to assess the evidence and attempt to establish the facts, pursuant to Article 28 para. 1 (a) of the Convention. It would make a number of preliminary observations in this respect:

i. There have been no findings of fact made by domestic courts as regards the subject-matter of the applicant's complaints. The Commission has accordingly based its findings on the evidence given orally before its Delegates or submitted in writing in the course of the proceedings; in this assessment the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact and, in addition, the conduct of the parties when evidence is being obtained may be taken into account (mutatis mutandis, Eur. Court H.R., Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 65, para. 161).

ii. In relation to the oral evidence, the Commission has been aware of the difficulties attached to assessing evidence obtained orally through interpreters (in some cases via Kurdish and Turkish into English): it has therefore paid careful and cautious attention to the meaning and significance which should be attributed to the statements made by witnesses appearing before its Delegates;

iii. The Government have adverted to the vulnerable position of villagers from the South-East and drawn attention to the testimony of the two gendarme witnesses before the Commission's Delegates as regards the reluctance, even fear, of villagers admitting to any information about the PKK. The Commission, in light of its own increasing experience of the pressure exerted on villagers, who face often conflicting demands from terrorists and State authorities, sees no reason to doubt that this factor is a relevant concern and has taken it into account in its assessment of the evidence;

iv. In a case where there are contradictory and conflicting factual accounts of events, the Commission particularly regrets the absence of a thorough domestic judicial examination or other independent investigation of the events in question. It is acutely aware of its own shortcomings as a first instance tribunal of fact. The problems of language are adverted to above; there is also an inevitable lack of detailed and direct familiarity with the conditions pertaining in the region. In addition, the Commission has no powers of compulsion as regards the attendance of witnesses. In the present case, while 13 witnesses were summoned to appear, only 6 in fact gave evidence before the Commission's Delegates (1 witness was released from the necessity of attending: no explanation for the absence of the others was forthcoming). The Commission has therefore been faced with the difficult task of determining events in the absence of potentially significant testimony. It acknowledges the unsatisfactory nature of these elements which highlights forcefully the importance of Contracting States' primary undertaking in Article 1 to secure the rights guaranteed under the Convention, including the provision of effective remedies as under Article 13.

1. the operation in Ağıllı village 23-25 November 1993

160. The evidence before the Commission, derived from documents and oral evidence of two gendarme officers and two villagers, Arap Kurt and the applicant, is largely consistent as regards the general course of events during the operation.

161. Following the receipt of intelligence information that members of the PKK were to visit Ağıllı to spread propaganda and collect money, the district gendarme commander, Captain Cural, proposed an operation at the village. While the incident report of 24 November 1993 makes reference to intelligence relating to "some three members" as does the letter dated 19 November 1994 from Ridvan Yildirim, Bismil public prosecutor, the report of Colonel Esref Hatipoğlu dated 8 December 1994, refers to intelligence about "a group" of terrorists and the oral evidence of the gendarme officers was that to their recollection the number of terrorists was unspecified in their information. The Commission considers that it cannot be excluded that the reference to "three" terrorists in some documents is based on hindsight, since three were in fact killed in the clashes in the village. It does not therefore consider it established that the security forces were in fact expecting only three terrorists to be present.

162. On 23 November 1993, at about 19.00 hours, a force commanded by Captain Cural commenced an operation at Ağıllı, leaving their vehicles at some two kilometres from the village. Under Captain Cural's direction, 10-20 village guards were used to guard the vehicles. There were approximately 150 gendarmes, some from the district gendarmerie and the majority of the commando unit under the command of Lieutenant Kupeli. The security forces surrounded the village. Units, including Captain Cural and Lieutenant Kupeli, entered the village to conduct a search. Shortly after the search began, a tractor with three suspected terrorists, entered the village unseen. On being seen inside the village, it was challenged and firing broke out. A non-commissioned officer, Mehmet Uysal, commander of the local Tepe station, was killed, as was one of the terrorist suspects. The two other terrorists ran into

the village. Fires were started by, inter alia, tracer bullets causing the tractor, haystacks and some houses to burn. Following the clash, Captain Cural went to the house of the muhtar, Arap Kurt, and told him that he was to accompany them as they carried out their searches. The security forces pursued the two suspects, searching houses along their escape route for a short while; then, due to the darkness and risk of further casualties, they withdrew to positions surrounding the village where they were under orders to keep watch. The villagers stayed in their houses during the shooting. The applicant at this time was at her house.

163. On the morning of 24 November 1993, the security forces commenced searching the village. As part of this process, they gathered all the villagers in the schoolyard, the men on one side and the women on the other. The gendarmes began to conduct searches of the houses. Firing broke out around the barn of Mahmut Cakmak. Two terrorist suspects who had entered on the tractor, Mahmut Cakmak and another terrorist suspect, code-named "Siar", were killed. During this confrontation, more houses were damaged by fire. The houses of Üzeyir Kurt and the applicant were amongst those destroyed during the course of the operation.

164. The soldiers continued the searches of the houses in the presence of the respective owners. During the course of the day, twelve villagers, including Arap Kurt and Mehmet Karabulut, were taken aside. They were held for a time near the vehicles and towards the evening were taken to Bismil. After questioning, the twelve villagers were released on 26 November 1993. Also, on the morning of 24 November 1993, village guards arrived from Tepecik, having heard news of the death of the Sergeant of their local station and with the intention of taking his body. At night the remaining villagers were allowed to return to their homes. On 25 November 1993 the villagers were again gathered in the morning in the schoolyard. Gendarmes remained in the village until late that day and then they left.

2. the alleged taking into custody of the applicant's son Üzeyir Kurt

165. It is not contested that Üzeyir Kurt was present in the village of Ağıllı on the evening of 23 November 1993. According to the written statement of the applicant and the oral testimony of Mehmut Karabulut, he was at the house of his uncle and aunt, Ali and Mevlüde, at the time the shooting started between the security forces and alleged PKK suspects - this was 19.00-19.30 hours according to the general testimony of witnesses. He and the others in the house were obliged to remain where they were because of the clash between the PKK and the security forces.

166. Mehmet Karabulut stated however that by 02.30-03.00 hours on 24 November, Üzeyir was no longer present in the room in Ali's house where both had been sleeping. It was his view that Üzeyir had no longer been in the house from that time.

167. When the villagers were gathered in the school by the security forces on the morning of 24 November 1993, Üzeyir Kurt was not amongst them (statements by his brother Musa and his sister Hazal Karakoç, taken by gendarmes).

168. Statements concerning the whereabouts of Üzeyir Kurt after the night of 23-24 November 1993 include the written statement by Aynur Kurt, his daughter, that when the security forces arrived to evacuate the house her father hid himself while the others went to the school. This appears to refer to the morning of 24 November 1993 when the gendarmes gathered the people together: however the time is unspecified and is preceded by a statement that she was sitting at home with her father, again at an unspecified time. There is also a written statement by the villager Hasan Kiliç that Üzeyir Kurt arrived in his house towards midnight at the beginning of 24 November 1994 (presumably an error for 1993) as the security forces were carrying out a search of the village and just before a first lieutenant and his men arrived at the house. According to this statement, Üzeyir left with his mother when she arrived at the house in the morning.

169. The applicant in her written statements has however consistently stated that her son was with the soldiers after the villagers had been gathered during the day in the schoolyard. The last time she saw him was when she took him cigarettes and clothing (statement of 24 December 1993 to the HRA, statement of 19 November 1994 to Bismil public prosecutor and statement of 2 December 1995). Other statements refer more briefly to his being in the custody of the soldiers (notarised statement of 6 January 1995) or with the soldiers (statement of 7 December 1994 to the gendarmes) and that the soldiers took him and left with him (statement of 25 January 1995 to Chief Prosecutor at Diyarbakır).

170. As regards the applicant's oral evidence, insofar as it concerned the allegation about her son, it is largely consistent with her original statement of 24 December 1993 taken by the HRA. The Government have pointed out that allegations in that statement with regard to the slaughtering of the village's livestock and ill-treating of the men in the village have been shown to be false, the applicant denying in later statements and orally that this occurred. The Commission has had cause in a previous case to criticise the accuracy of statements taken by the HRA (Mentes v. Turkey, No. 23186/93 Comm. Rep. 7.3.96 para. 145). There appears to be a tendency to embroider allegations or, in seeking to draw out applicants' complaints, insufficient care appears to be taken to avoid suggesting to applicants possible details which are then adopted by applicants or taken in the wrong context. It appears, for example, from the oral testimony of the applicant that while the security forces did not slaughter livestock during the operation in November 1993 there had been an earlier occasion on which the applicant recalled that the soldiers had caught and killed chickens. While treating the statement with caution therefore and with careful reference to other sources of evidence, the Commission nonetheless considers that it has evidential value insofar as it is corroborated by the applicant's account to the Delegates.

171. The Commission notes that the applicant in her oral evidence specified with some detail the circumstances in which her son was taken into custody and held by the soldiers. It appears that she did not witness the taking into custody herself but was present in the schoolyard when the soldiers asked Aynur where her father was. She stated that Üzeyir's aunt and one of her sons had been present when the soldiers went to the aunt's house and took Üzeyir out. She herself then saw her son in front of Hasan Kiliç's house on the morning of 25 November 1993 when she went to take him cigarettes, then a jacket. He

was surrounded by soldiers and village guards and, when asked, she was clear that he was in their custody and that his face was black and blue because of ill-treatment by the security forces.

172. The Government have submitted that this oral testimony is characterised by inconsistencies and contradictions, both standing alone and in conjunction with other evidence. For example, the applicant said that the people in the schoolyard were blindfolded whereas Arap Kurt, the muhtar, said that they were not. Her story of finding cigarettes and a jacket is not credible, since on her account their houses had been burned and in the prevailing security situation she could hardly have wandered around the village obtaining what she wanted from other houses. The Government also refer to the applicant's repeated accusations against the village guards and her apparent belief that Ismail Sarı was somehow connected with her son's disappearance. It is, the Government argue, hardly possible that village guards could take any action against a person whom the security forces were allegedly detaining and the other available evidence indicates that her accusations in relation to Ismail Sarı are completely misconceived.

173. The Commission notes that the applicant's reference to blindfolding is confused: she appears to state first in general terms that villagers were blindfolded, then that only the young people were blindfolded. She also refers to young people being taken away. It is possible that this is a reference to the twelve persons who were removed from the schoolyard and taken into custody for questioning in Bismil. Having regard to the substantiated allegations made as to the use of blindfolds on persons taken into custody (see eg. Aydin v. Turkey No. 23178/94 Comm. Rep. 7.3.94 and Aksoy v. Turkey, No. 21987/93 Comm. Rep. 23.10.95 pending before the Court), the Commission does not find this element of the applicant's oral testimony is of such a nature as to detract from her credibility.

174. As regards the applicant's account of finding cigarettes and a jacket, the Commission sees no particular significance in her omission to specify from where she obtained the jacket: the question was never directly put to her. Further, if as appears from her oral evidence this took place on the morning of 25 November 1993, no clash had taken place since the previous morning when two terrorists were killed and there is nothing in the gendarmes' testimony to indicate that villagers were not able, if they wished, to move briefly from house to house in the period in the early morning before they were gathered for the day in the schoolyard. The officer, Captain Cural, when agreeing that it was dangerous for people to go out of their houses expressly referred back to what he had said earlier: previously his evidence as regarded danger had related to the first night in the village, when there were known to be terrorists in hiding and the soldiers surrounding the village were waiting till morning to embark on the search.

175. In relation to the village guards, the Commission notes that Captain Cural accepted that 10-20 were present in the vicinity of the village during the operation. He insisted that their role was to guard the vehicles outside the village and that they would not have entered the village. The other officer, Lieutenant Kupeli, also stated that village guards would not have entered the village, but also mentioned the possibility that some village guards might have arrived when they heard that the commander of their local station had been killed. The statement of Şemsettin Güneş accords with this, to the effect that he

and his village guards came to the village on 24 November 1993 to fetch the body of the deceased non-commissioned officer. Arap Kurt, the mayor, who was at the village until he was taken to Bismil in the afternoon or evening of 24 November stated in his oral evidence that there were many village guards present. The Commission does not find it excluded on the evidence therefore that village guards were in the village at some time during the operation and that the apparent operational practice whereby the role of village guards should be restricted to areas outside villages other than their own was not in fact scrupulously enforced by the security forces who were occupied on other duties.

176. That said, the Commission does not consider that the applicant's complaints can be interpreted as a specific allegation that it was the village guards themselves who took her son into custody and out of the village rather than the security forces. From her oral testimony it appeared that she had particular suspicions concerning the village guards - reflecting the fact that their role can attract a certain unpopularity and notoriety in the area of South-Eastern Turkey - but her evidence was that when she saw him her son was surrounded by village guards and soldiers and that she did not see who took him away. Her statements with regard to Ismail Sarı were based on the fact that he left the village at the same time that her son disappeared and that she guessed, or hoped, that he would know or have seen something of her son. This does not contradict the evidence, written and oral of other witnesses, from which it appears that Ismail Sarı gave assistance to the gendarmes in the village and, fearing repercussions, left the village with the gendarmes and stayed near the station for a while before seeking employment, as a shepherd or village guard, somewhere he considered to be safer.

177. The Commission finds therefore that the applicant's evidence to the Commission is not significantly flawed in the manner alleged by the Government. It considers that the core of her complaints with regard to her son has been consistently maintained from the time of her petitions made shortly after the incident to the time of her appearance to give evidence before the Delegates. The principal obstacle to accepting her account of the circumstances in which she saw her son in custody is the written statement of Hasan Kiliç, the owner of the house in which her son was allegedly held over the night of 24-25 November 1993. The Commission regrets that, while Hasan Kiliç was summoned to give evidence before the Delegates, he failed to appear. His statement taken by gendarmes contradicts the applicant's account in fundamental areas. It appears to time the arrival of Üzeyir in his house on the night of the first clash rather than on the second night, after the terrorists were killed. It also states that his presence there was voluntary and coincidental to that of the soldiers and that he left with the applicant the following morning. The statement however also conflicts with the evidence of other witnesses. The gendarme officers denied that they or any other officer took shelter in any villager's house on the first night. Their evidence was also that while a search began on that night it was abandoned due to the risk posed by the darkness, whereas the statement of Hasan Kiliç gives the impression that the soldiers arrived at his house, shortly after midnight as part of an ongoing search situation. Mehmet Karabulut in his oral evidence was categorical that Üzeyir Kurt was present in Ali's house until an hour or so after 2.30-3.00 hours on 24 November, whereas Hasan Kiliç's statement places Üzeyir Kurt as arriving at his house at midnight. It

is perhaps possible to reconcile the timing if Hasan Kiliç's statement has cited the date of 24 November in error for 25 November 1993 - the year is clearly wrongly written as 1994. On that basis, the accounts of the applicant and Hasan Kiliç would tally insofar as her son was in the house overnight in the company of soldiers. However this involves speculation and does not reconcile in any event Hasan Kiliç's denial that Üzeyir Kurt was under any constraint and left his house freely with the applicant. The applicant's representatives argue that since the applicant spoke to her son outside Hasan Kiliç's house when Hasan was not present, Hasan Kiliç may only have assumed when Üzeyir Kurt was taken away that he had left with his mother: but this again is an interpretation of the statement which is speculative in the absence of explanation from the witness himself. In conclusion, the Commission finds that the statement of Hasan Kiliç presents indications of inaccuracies and is open to differing interpretations. Where his written statement appears to conflict with the account of the applicant who gave oral evidence before the Commission's Delegates, the Commission prefers the evidence of the applicant, who was found to by the Delegates to be credible and convincing.

178. The Commission finds that it is her genuine and honestly-held belief that her son was taken into custody by the security forces after which he "disappeared". Taking into consideration the possible impact on villagers' statements of their fear of PKK reprisals, the Commission has noted the applicant's reply to the Government Agent at the taking of evidence before the Delegates: if her son had gone to the mountains, why would she be asking the State for him and what right would she have to do so? Given that in the same testimony, the applicant evinced the opinion that people who went to the mountains should be shot, the Commission finds no basis for inferring that the applicant's testimony was influenced by a reluctance to accord blame to the PKK or to acknowledge their involvement.

179. Consequently, the Commission accepts her evidence that she saw him surrounded by soldiers and village guards outside Hasan Kiliç's house on the morning of 25 November 1993. It finds that this was the last time he was seen by any member of his family or person from the village.

3. other aspects of the conduct of the operation

180. In the statement of 24 December 1993 taken by the HRA, it is stated that the soldiers during the raid ill-treated the men, settled in the houses, slaughtered livestock and looted villagers' possessions. The applicant in her oral testimony stated that the villagers were not ill-treated and that the soldiers did not touch the animals. She made no allegation of looting. The Commission accepts the oral evidence of the applicant (see para. 170 above).

181. As regards allegations that houses in the village were burned by the security forces, the Commission notes that the gendarme witnesses before the Delegates described village houses burning as a result of sparks from the clashes between the gendarmes and terrorists. This was supported by Arap Kurt, who stated that he did not see soldiers deliberately burning the houses. The applicant stated that about ten houses were burned during the operation by the soldiers but she did not witness herself her house or that of her son being set fire to. There is no express complaint about this matter by or on behalf of the

applicant, whose main concern is the disappearance of her son. The Commission therefore finds it unnecessary to proceed to any findings as to the cause of the burning of the applicant's house. Similarly, as regards the evacuation of the village after the soldiers left, while the applicant said that a soldier told them to leave, Arap Kurt stated that the villagers started to leave after the operation because their houses were burned, a few remaining but leaving later on. The Commission finds it unnecessary to make any finding as to the role, if any, played by the security forces in the decision of the villagers to abandon the village.

182. On the basis of its findings above, the Commission will now proceed to examine the applicant's complaints under the various Articles of the Convention.

E. As regards the disappearance of the applicant's son

183. The applicant has invoked a number of provisions in respect of the disappearance of her son.

1. As regards Article 2 of the Convention

184. Article 2 of the Convention provides:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 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."

185. The applicant submits that the State is responsible for the fate of her son, who was last seen in the hands of soldiers and who on all accounts disappeared during a military operation conducted by security forces which had assumed control of his village. They have failed however to provide a plausible explanation for his "disappearance" and there is accordingly a serious violation of Article 2. Further the applicant submits that the lack of accountability of the security forces in the conduct of their operations represents a threat to the right to life. In this context, she points to clear deficiencies in the control and conduct of the military operation, in particular, the lack of proper records of military operations as regards the participation of village guards. In addition, the absence of an effective official investigation into the disappearance constitutes a separate violation of the State's obligation under Article 2 to provide an effective system of protection for the right to life.

186. The Government deny that the applicant's son was detained by security forces and contend that the applicant's allegations that his "disappearance" occurred in custody is unsubstantiated. They further submit that the State authorities have done their best to find out his whereabouts.

187. The Commission recalls that, while it has found that the applicant's son was last seen in the custody of security forces on 25 November 1993, there is no evidence as regards his subsequent fate (see para. 179 above). The cases examined by the Commission under Article 2 have hitherto related to instances where an individual has in fact lost his life or suffered known injury or illness. There is as yet no precedent for finding a violation of this provision where it is alleged that a situation is such as to place a person's life at risk or to disclose a lack of respect for the right to life. In the only comparable published report, Cyprus v. Turkey case (No. 8007/77 Comm. rep. 4.10.93 D.R. 72 p.5), the finding of a violation of Article 2 centred on the established fact that 12 individuals had been shot by soldiers at Elia. No express finding was made in respect of the disappearances of missing persons, though in view of the detailed evidence before it the Commission concluded that killings had happened on a larger scale than at Elia.

188. Where there is a "disappearance" in State custody, the strong inference may be that this has been fatal to the individual concerned. The Commission notes that in the Inter-American cases dealing with disappearances, where a person had been missing for a long period, the Inter-American Court found violations of the right to life where the length of time elapsed and the context in which the victim disappeared created a reasonable presumption that he had been killed (eg. the cases of Velasquez Rodriguez and Caballero-Delgado and Santana, Annex II). The Inter-American Court noted that circumstantial evidence is especially valid in cases of disappearances which are characterised by efforts to conceal what has occurred. However the Commission observes that in the Velasquez Rodriguez case the Inter-American Court had found a systematic practice of disappearances associated with ill-treatment and extra-judicial executions, whereas in the Caballero-Delgado and Santana case, there was some evidence of an execution having been carried out.

189. There is no material before the Commission which would entitle it to reach any finding as regards a practice of disappearances in Turkey. In the absence of such practice or any evidential indication as to the ultimate fate of a person last seen in custody, the Commission considers it inappropriate to draw the inference that such person has been killed. The Commission is of the opinion that in such circumstances allegations as to an apparent forced disappearance, and any alleged failure of the Government to take reasonable steps to safeguard against such disappearances, fall rather to be dealt with under Article 5 which guarantees the right to liberty and security of the person. Consequently, the Commission will examine the substance of the points raised by the applicant in the context of Article 5.

2. As regards Article 3 of the Convention

190. Article 3 of the Convention provides as follows:

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

191. The applicant adopts her submissions above in relation to Article 3, claiming separate violations of Article 3 in relation to Üzeyir Kurt's treatment while in custody and also as a victim of an enforced disappearance.

192. The Government submit that the applicant's allegations are unfounded.

193. The Commission recalls that the applicant states that when she saw her son on the morning of 25 November 1993 his face was black and blue and he stated that it was the State that had done this to him. She was of the view that he had been tortured by the security forces. The Commission finds that this is insufficient evidential basis for a finding of responsibility of the State for treatment falling within the scope of Article 3.

194. As regards the applicant's contention that the "disappearance" constitutes inhuman treatment of her son, the Commission observes that the United Nations has classified both the systematic practice of disappearances and the forced disappearance of an individual as a crime against humanity (see Annex II at p. 65). It notes also the findings of the Inter-American Court of Human Rights in the Velasquez Rodriguez case that the disappearance of Velasquez, even in the absence of any direct indication that he had been physically tortured, infringed Article 5 of the American Convention which guarantees the right to integrity of the person and prohibits torture, cruel, inhuman or degrading punishment or treatment (see Annex II at pp. 69-70). This was having regard in particular to the isolation involved in incommunicado detention and an established practice of ill-treatment by officials. The Commission observes however that the Inter-American Court was not prepared to make such a finding in the absence of an evidential basis in the Caballero-Delgado and Santana case, where it appeared probable that the victims had been subject to prompt execution.

195. The Commission has had regard to the strict standards applied in the interpretation of Article 3 of the Convention, according to which ill-treatment must attain a certain minimum level of severity to fall within the provision's scope. The practice of the Convention organs has been to require compliance with a standard of proof "beyond reasonable doubt" that ill-treatment of such severity has occurred (see Eur. Court H.R., Ireland v. United Kingdom judgment, loc. cit, p. 65 paras. 161-162). The Commission is not satisfied that the disappearance of the applicant's son in the circumstances of this case can be categorised in terms of this provision. There is no evidence before the Commission of a systematic practice of disappearances combined with systematic ill-treatment and execution of detainees, with subsequent concealment of their bodies in order to avoid punishment, which was presumed in the Velasquez Rodriguez case. The Commission does not consider that such presumptions can be made in the present case.

196. Where an apparent forced disappearance is characterised by a total lack of information, it is speculation as to whether the person is alive or dead and as to the treatment which he or she may have suffered. As found above in respect of the alleged risk to life in the context of Article 2 of the Convention, the acute concern which must arise in relation to the treatment of a person apparently held without official recognition and excluded from the requisite judicial guarantees is an added and aggravated aspect of the issues arising under Article 5.

197. The Commission does not therefore consider it appropriate to examine the complaints further under Article 3 as regards the applicant's son.

3. As regards Article 5 of the Convention

198. Article 5 of the Convention provides, as relevant:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> a. the lawful detention of a person after conviction by a competent court;
>
> b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> ...
>
> 2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
>
> 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.
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

199. The applicant submits that her son was detained by the security forces on 24 November 1993 and last seen while in custody on 25 November 1993. This detention was in violation of his right to liberty and not justified on any of the grounds specified under Article 5 para. 1. The time that has elapsed since the arrest discloses

a breach of the requirements of Article 5 para. 3, since he has never been brought before a judicial officer. Further the refusal to acknowledge the detention makes it impossible for its lawfulness to be challenged, undermining the fundamental safeguard against arbitrary detention provided by Article 5 para. 4. While it is acknowledged that Turkey has lodged a derogation in relation to Article 5, the applicant submits that no emergency can ever justify an unacknowledged detention. There is furthermore a practice of unacknowledged detentions and disappearances in Turkey, referring to, inter alia, the concern of the UN Working Group on disappearances and the case of Aydin v. Turkey, where the Commission found that three individuals had been held in custody without their detention being acknowledged or recorded by the authorities (No. 23178/94 Comm. Rep. 7.3.96)

200. The Government deny that the applicant's son was ever in the custody of the security forces. They have fulfilled any obligation as regards the taking of steps to discover his whereabouts. While maintaining the validity of their derogation under Article 5, they submit that there is no basis on which it comes into play since the applicant's allegations are factually and jurisprudentially unfounded.

201. The Commission is of the view that the disappearance of the applicant's son raises fundamental and grave issues under Article 5 of the Convention. While it notes that the Inter-American Court has held that the forced disappearance of human beings is a multiple and continuous violation of many rights under the American Convention, in the absence of more concrete indicators, the Commission considers that the disappearance of a person while in official custody concerns primarily issues of deprivation of liberty and security of person. Article 5 aims to provide a framework of guarantees against abuse of power in relation to persons taken into custody. Such persons are vulnerable to a wide range of arbitrary treatment and infringements of their personal integrity and dignity. Article 5 plays an essential role in the system of protection under the Convention in effectively preventing the risk of treatment contrary to Article 3 and extra-judicial execution contrary to Article 2 and in holding State authorities accountable to independent judicial control for the detention of persons taken into custody.

202. The Commission has found above (para. 179) that the applicant's son was in the custody of the security forces which had taken control of Ağıllı village during their operation. This creates a presumption of responsibility of the Turkish Government for his fate (Cyprus v. Turkey, Nos. 6780/74 and 6950/75 Rep. 10.7.76 para. 351) In order to discharge this responsibility, the Government must provide a credible and substantiated explanation of what has happened and show that they have taken effective steps to investigate the occurrence and ascertain the fate of the individual concerned. In this assessment, it is of relevance to ascertain what safeguards, if any, exist within domestic law and practice to protect against involuntary disappearances. In this context, the Commission recalls that the United Nations Human Rights Committee, which has considerable experience in examining complaints of disappearances, has emphasised the importance that State parties should take specific and effective measures to prevent disappearances and establish effective facilities and procedures to investigate thoroughly, by an appropriate and impartial body, cases of disappeared persons in circumstances that may involve a violation of the right to life (see Annex II at p. 73).

203. In the present case, beyond denying that the applicant's son was ever in custody, the Government have submitted that it is probable that he was either kidnapped by the PKK or fled the village to join them of his own accord. They refer to the testimony of the gendarmes to the effect that they were informed of, and found, a secret shelter built by the applicant's son for illicit purposes. They also refer to the high proportion of villagers from Ağıllı who have gone to the mountains to join the terrorists, including one of the applicant's granddaughters. The applicant submits that there is no evidence as to when and how any alleged "kidnapping" took place and that it is implausible, given that three PKK suspects were killed in the early clashes in the village and that the search of the village disclosed the presence of no other PKK terrorists. There is also no evidence, the applicant argues, to support the contention that he voluntarily left the village while it was occupied by the security forces in order to join the PKK.

204. The Commission recalls that the applicant's allegations that her son was in custody were brought to the attention of the Bismil public prosecutor, the gendarme command and the Diyarbakır State Security Court prosecutors' office. The district gendarme commander, when asked to respond to the allegation on 30 November 1993, gave the view that it was probable that the applicant's son had been kidnapped. There is no documentary material nor oral testimony indicating any factual basis for this view, which was given within hours of the enquiry.

205. The conclusion reached by the Bismil public prosecutor in his decision of lack of jurisdiction of 21 March 1994 was that, following a clash between the PKK and the security forces, PKK members escaped from the village, kidnapping the applicant's son. This conclusion appears to have been based on three statements taken by gendarmes on 23 and 28 February 1994. These statements are introduced by the indication that the witness was asked for "his knowledge and observations that following a clash between the PKK and the security forces, PKK members escaped from the village, kidnapping the said victim". Of the three witnesses, Arap Kurt "guessed" that this was the case and the two others had "heard" that this was so. They did not know how or the circumstances. In his oral testimony, Arap Kurt when referred to his statement appeared clear that he had no knowledge of what had happened to Üzeyir Kurt beyond that the fact that some people said that he had gone to the terrorists or gone away, while others said that the State had taken him. He stated that the gendarmes who took his statement had told him that Üzeyir had probably joined the terrorists.

206. The existence of the shelter outside the village attributed to the applicant's son is cited by the Government as further proof of the likely PKK link. This was referred to for the first time by Captain Cural and Lieutenant Kupeli before the Delegates. Strangely, it was not brought to the attention of the public prosecutor or used as a relevant element in the investigation. It does not, in the Commission's view, lend support to the Government's contention.

207. From their oral testimony, when requested to specify the evidential basis for their conclusions, the Bismil public prosecutor and Captain Cural, the gendarme commander, took the view that the kidnapping was the type of tactic that the PKK undertook. The Commission notes that it was an assumption on their part, rather than being based on any concrete fact. They also appeared to expect no firm

evidence to exist, since they alleged that villagers would refuse to admit to any knowledge of PKK activities. However even Captain Cural admitted that this was only one possibility.

208. At most therefore, the material before the Commission allows for the possibility that the applicant's son went to or was taken by the PKK but there is in fact no evidence that this is what occurred. Moreover, it also fails to account for the fact found by the Commission that the applicant's son was held by security forces when they took the village. In respect of this element, there appears to have been little or no investigation in response to the applicant's petitions to the domestic authorities. The Commission notes that the investigation undertaken later in response to the communication of the application to the Government was undertaken, insofar as it concerned the taking of statements from possible witnesses, by Captain Cural, who was the gendarme commander responsible for the operation which was the subject of the complaint.

209. The Commission considers that the investigation by the public prosecutor was perfunctory and based on preconceived assumptions. The subsequent enquiries by the authorities were flawed by the participation of officers implicated in the complaints.

210. As regards the existence of adequate safeguards against the possibility of involuntary disappearances, the Commission observes that there is no practice of accounting by written report or order for the participation of village guards in operations by the security forces. The participation of armed civilians in security operations, where citizens may be subject to measures of detention and the use of force, calls for careful control and strict accountability in order to prevent abuse of power. While it has not been established that the village guards were directly responsible for the disappearance in this case, the Commission has found that, contrary to the alleged official policy of not employing village guards inside other villages[1], village guards were present in the village during the operation and it has accepted the evidence that village guards were in the group who were holding the applicant's son. The absence of records of the nature and extent of the village guards' role in events in Ağıllı must therefore be of concern and constitutes a disturbing element.

211. The Commission finds that the Government has failed to provide a satisfactory explanation for the "disappearance" of the applicant's son after last being seen by the applicant in the hands of the security forces. In light of this finding, together with the shortcomings in relation to village guards and the nature of the investigation into the applicant's allegations identified above, the Commission is of the opinion that the responsibility of the Government is engaged.

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[1] See eg. the evidence of the applicant and her father in the Aydin case that village guards from outside their village were used to carry out an arrest in the village and the evidence of the gendarme officer that village guards would be used in villages which did not have their own guards, though these would not effect the arrest, would act only as area security and would be supervised by a non-commissioned officer (loc. cit. para. 127).

212. The Commission concludes that the applicant's son has been arbitrarily deprived of his liberty contrary to Article 5 and in disregard of the guarantees of that provision concerning the legal justification for such deprivation and requisite judicial control. Further the circumstances in which he has since "disappeared" disclose a violation of his right to security of person, raising, as it does, grave doubts as to the treatment which he received and as to whether he is still alive. Such unaccounted disappearance of a detained person must be considered as a particularly serious violation of Article 5 of the Convention taken as a whole.

213. The Commission finds it unnecessary to decide whether or not there is a practice of unacknowledged detention and disappearances as alleged by the applicant.

214. As regards the derogation of 5 May 1992 under Article 15 of the Convention in relation to Article 5, the Commission recalls that the Government has placed no reliance on it in their observations on the merits. While they referred to it in their observations on admissibility, they stated that its application did not come into play since Üzeyir Kurt had never been in detention. The Commission finds that, in the case of unacknowledged detention, a derogation which provides for measures relating to detention pursuant to criminal procedures provided for in law can have no application.

CONCLUSIONS

215. The Commission concludes, unanimously, that there has been a violation of Article 5 of the Convention in relation to Üzeyir Kurt.

216. The Commission concludes, unanimously, that it is not necessary to examine separately the complaints made under Articles 2 and 3 of the Convention in relation to Üzeyir Kurt.

F. <u>As regards violation alleged by the applicant on her own behalf under Article 3 of the Convention</u>

217. The applicant has also complained that the "disappearance" of her son constitutes inhuman and degrading treatment contrary to Article 3 in respect of herself(see above para. 190).

218. The Government have not addressed any submissions to this issue, beyond their denials that State authorities were responsible for the disappearance of the applicant's son.

219. The case-law of the Convention organs establishes that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention. Further, the Court has held that the suffering occasioned must attain a certain level before treatment can be classified as inhuman. The assessment of that minimum is relative and depends on all the circumstances of the case, such as the duration of the treatment and its physical or mental effects (see eg. Eur. Court H.R., Ireland v. the United Kingdom, judgment of 18 January 1978, Series A no. 25, p. 65, para. 162).

220. The Commission recalls that the applicant has had no news of her son for almost three years. From her evidence before the Commission, she fears that he is dead and has made appeals that she should at least

be given his body. The Commission considers that the uncertainty, doubt and apprehension suffered by the applicant over a prolonged and continuing period of time has caused her severe mental distress and anguish. It has found above that the responsibility of the Government is engaged as regards the disappearance and their failure to account satisfactorily for what has happened to him. The Commission finds as a result that the applicant has been subjected to inhuman and degrading treatment within the meaning of Article 3 of the Convention.

CONCLUSION

221. The Commission concludes, by 19 votes to 5, that there has been a violation of Article 3 of the Convention in respect of the applicant.

G. As regards Article 13 of the Convention

222. Article 13 of the Convention provides as follows:

> "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."

223. The applicant submits that, despite repeated requests, the authorities failed to carry out a proper investigation into the disappearance of her son. She refers to the biased attitude of the prosecutor and gendarmes who acted on the assumption that the security forces were not responsible and that the PKK must be involved. She points, inter alia, to the fact that only three statements were taken from purported witnesses before the Bismil public prosecutor reached his decision of lack of jurisdiction and that there was no indication that Captain Cural had undertaken any investigation at all before replying to the prosecutor that it seemed likely that the PKK had kidnapped Üzeyir Kurt. The applicant also contends that the applicant's experience is typical of the practice of ineffective remedies in the South-East Turkey. The evidence from a series of cases examined by the Commission establishes, in the applicant's view, an administrative practice of failure to hold the security services accountable for their actions and a failure to provide a remedy for persons harmed by the armed forces (see eg. over fifty admissible cases from applicants from the South-East where the Commission found that the applicants had no effective remedy in the context of Article 26 of the Convention, including Akdivar and others v. Turkey, in which the Court has recently given judgment, Eur. Court HR judgment of 16 September 1996 to be published in Reports 1996).

224. The Government submit that the authorities carried out a proper investigation of the applicant's complaints. The applicant had unimpeded access to the courts and was treated respectfully in all official contacts. The public prosecutor responded appropriately to the applicant's petitions, bearing in mind that her allegation that her son was in custody did not in itself disclose any crime.

225. The Commission has examined whether the applicant had available to her an effective remedy in respect of her complaint that her son had "disappeared" in custody. It considers that the substance of the applicant's complaint - that her son had been in custody and that in

the absence of information as to his whereabouts she feared for his well-being - was brought to the attention of the relevant and competent authority, the Bismil public prosecutor within a short time of his going missing. The Commission does not accept the Government's submission that the public prosecutor had no reason to take any action or conduct any further enquiry in relation to the applicant's approach. Where there is evidence from an alleged eye-witness that a person has been taken into custody which conflicts with a denial by officials allegedly responsible for the arrest and detention, this should, in the Commission's view, give cause for concern and in the present case should have prompted further action.

226. As regards the efficacy of the public prosecutor's response to the applicant's petitions, the Commission recalls that he sent the applicant to the Diyarbakır State Security Court and contacted the district gendarmerie to verify whether the applicant's son was in their custody. This was, according to his testimony, to pacify the applicant and beyond the requirements of his official duty. The same day he received a response that the applicant's son was not in custody and that it was likely that he had been taken by the PKK. This was viewed by the prosecutor as a possible crime and it was in respect of that allegation that an investigation was opened, and not in relation to the applicant's contention that her son was unaccounted for in custody. In answer to the Delegates, the prosecutor stated that he contacted the gendarmes for further details as to the grounds of their suspicion. This letter was requested by the Commission but not in fact provided. It is possible that it was in relation to this enquiry that the gendarmes took the step of obtaining statements from three villagers, including the mayor and two others. The Commission observes that the statements were taken expressly to discover the person's knowledge and observations as to the fact that Üzeyir Kurt had been kidnapped by the PKK terrorist organisation. These statements revealed no direct knowledge of the "disappearance". Davut Karakoç and Mehmet Kurt had "heard" that he had been taken by the terrorists and Arap Kurt "guessed" that he had. As far as the Commission can discover, it was on the basis of these statements, the suspicion that others from the village, including those of the name of "Kurt", had gone to the mountains and his own knowledge of the region, that the public prosecutor reached the conclusion that the applicant's son had been kidnapped following a clash between the PKK and the security forces, when PKK members escaped from the village. The Commission finds that this conclusion, apparently stated as an established fact, is based, to very large extent, on supposition, in particular the theory that there were undetected PKK members in the village who escaped through the security forces blockade, no such incident being adverted to by the gendarmes themselves.

227. As regards the other possibility for which there was the direct eye-witness evidence of the applicant, the Commission notes that no steps were taken by the public prosecutor to investigate the applicant's assertion that her son was last seen by her in the custody of the security forces. He accepted, without more, the report by the gendarme commander in charge of the operation that the applicant's son was not in detention. No written statement was taken from the applicant by him in response to her complaint. No enquiries were apparently made to locate any other witnesses who might have seen the applicant's son in custody in the village, nor were further enquiries pursued with the gendarmes or village guards who participated in the operation.

228. The Commission is not persuaded that the applicant's concerns received any serious attention by the authorities, her evidence being ignored or discounted in favour of vague, unsubstantiated possibilities of PKK involvement. The attitude disclosed by the officials concerned and the nature of their response to the applicant's repeated complaints amounts to a denial of any effective investigative process.

229. There is no evidence before the Commission to indicate that, in the absence of an effective investigation of the circumstances of the case by the public prosecution authorities, any other remedy would have offered the applicant a possibility of obtaining redress for a disappearance resulting from an unacknowledged detention.

230. The Commission concludes that the applicant did not have an effective remedy available to her in respect of her complaints about the disappearance of her son.

CONCLUSION

231. The Commission concludes, unanimously, that there has been a violation of Article 13 of the Convention.

H. As regards Articles 14 and 18 of the Convention

232. Articles 14 and 18 of the Convention provide as follows:

Article 14

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

Article 18

"The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

233. The applicant maintains that because of her Kurdish origin the various alleged violations of her Convention rights were discriminatory, in breach of Article 14 of the Convention. She also claims that her experiences represented an authorised practice by the State in breach of Article 18 of the Convention.

234. The Government have not addressed these allegations beyond denying the factual basis of the substantive complaints.

235. The Commission has examined the applicant's allegations in the light of the evidence submitted to it, but considers them unsubstantiated.

CONCLUSIONS

236. The Commission concludes, unanimously, that there has been no violation of Article 14 of the Convention.

237. The Commission concludes, unanimously, that there has been no violation of Article 18 of the Convention.

I. As regards Article 25 of the Convention

238. Article 25 para. 1 of the Convention provides:

> "The Commission may receive petitions addressed to the Secretary General of the Council of Europe from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognises the competence of the Commission to receive such petitions. Those of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right."

239. The Commission recalls that Article 25 para. 1 imposes an obligation on a Contracting State not to hinder the right of the individual effectively to present and pursue a complaint with the Commission. While the obligation imposed is of a procedural nature distinguishable from the substantive rights set out in the Convention and Protocols, it flows from the very essence of this procedural right that it is open to individuals to complain of alleged infringements of it in Convention proceedings. In this respect, as in others, the Convention must be interpreted as guaranteeing rights which are practical and effective as opposed to theoretical and illusory (see Eur. Court H.R. Cruz Varas and others judgment of 20 March 1991, Series A no. 201, p. 36, para. 99).

240. The Commission would further emphasise that the right of individual petition guaranteed under Article 25 of the Convention is of fundamental importance to the effective protection of the substantive rights and freedoms provided for in the Convention and its Protocols. Deliberate or repeated interferences with the free exercise of that right must be regarded, in the Commission's view, with the gravest concern. Interference may also result from indirect pressure on applicants from State authorities. In particular, approaches by domestic authorities to applicants to question them about their applications in circumstances which may be construed as attempts to discourage or penalise the pursuit of complaints may lead to a finding that a Contracting State has failed to comply with its obligations under Article 25 para. 1 of the Convention. In this context, the Court having regard to the vulnerable position of applicant villagers and the reality that in South-East Turkey complaints against the authorities might well give rise to a legitimate fear of reprisals, has found that the questioning of applicants about their applications to the Commission amounts to a form of illicit and unacceptable pressure, which hinders the exercise of the right of individual petition in breach of Article 25 of the Convention (see Eur. Court HR Akdivar and others v. Turkey judgment of 16 September 1996, to be published in Reports 1996).

1. Alleged intimidation of the applicant

241. The applicant's representatives submit that she has been the target of an extraordinarily concerted campaign on behalf of the State authorities. They refer to the way in which the applicant has been called to give statements, in which context she has been questioned about her application to the Commission, and to the taking of statements before a notary on two occasions, in respect of which it appears that she was called to go by the State authorities, escorted by an officer and payment for whose services she was not required to meet. They refer further to the statement dated 25 January 1995 taken by the Chief State Prosecutor at Diyarbakır in the context of a complaint raised against her lawyer Mr. Sakar, in which she is recorded as saying that the soldiers are constantly questioning her about her complaint. They submit that it can be inferred that the authorities informed the applicant that her petition to Strasbourg was being used as PKK propaganda, that the authorities called the applicant to go to the notary where she would not have gone on her own initiative, and that the State paid for notarised statements. While the applicant states that she was not forced to say anything at the notary and was able to tell him what she wanted, it is clear that she disagrees with the contents of these statements insofar as they purport to withdraw her application and that since she is illiterate, she was unable to verify the contents of the statements for herself. The applicant's representatives also allege that the applicant has been subject to surveillance, in support of which they rely on a question put to the applicant by the Government Agent at the taking of evidence, from which it can be implied that the authorities were aware of the persons visiting the applicant's house.

242. The Government deny that any pressure was put on the applicant to withdraw her application. They submit that the contents of the statements to the notary are consistent with her evidence before the Delegates to the effect that she did not want to complain against the State and that she only wanted her son's body to be found. They refer to the evidence of Arap Kurt who stated, inter alia, that the applicant had told him that she wanted to give up the case and to the fact that when she gave her statement to the notary, she confirmed that no soldier was present, that there was an interpreter and that the statement was read back to her before she fingerprinted it. The Government note the statement by Arap Kurt that the applicant had said that she was being pulled from all sides. They submit that she was being exploited by the PKK people, who have been endeavouring to fabricate a picture of persecution. In that context, the Government refer to the interventions by the applicant's legal representatives at the taking of evidence, in which allegations were made that the applicant was being prevented from attending the hearing in Ankara, which allegations were contradicted when the applicant attended the hearing later in the week.

243. The Commission observes that the applicant has made numerous written statements to State authorities concerning matters related to the present application (see above paras. 62-63, 65-68 and 70) - statement of 19 November 94 to the Bismil public prosecutor, statement of 7 December 1994 taken by gendarmes (at the same time as other members of her family and villagers), statement of 9 December 1994 to Foreign Ministry (identical to one sent to HRA dated the same day), notarised statement 6 January 1995, statement of 25 January 1995 taken by the Chief State Prosecutor's office Diyarbakır, notarised statement

of 10 August 1995 and statement of 7 February 1996 to Bismil public prosecutor).

244. The first taking of her statement by the Bismil public prosecutor appears to have been in response to the Commission's communication of her application to the Government. From the text of this statement (see para. 62), it appears that she was questioned as to the subject-matter of the application. It appears, impliedly, that she was questioned as to whether the petition was indeed hers and as to whether the allegations made in it were true. The statement of the applicant to the gendarmes seems to have been part of a general attempt to obtain evidence concerning the events in issue in the application (see statement para. 63). The applicant did not state that she was under any pressure or ill-treatment on these occasions.

245. More difficult to assess are the two identical statements dated 9 December 1994 and the two notarised statements. When asked by the Delegates whether she had ever said that she did not want to pursue the application, she stated that maybe she had. Arap Kurt who accompanied her to the notary gave evidence that she had gone of her own free will and that she had told him that she was fed up, that the matter had been going on for three years and that they should stop the case. There is therefore a possibility, notwithstanding her expression of intention before the Delegates, that the applicant may have wavered in her determination at about this time. The Commission is nonetheless not persuaded that the initiative for these four statements came from the applicant. It also appears that the statements which refer to her petition having been used for PKK purposes did not derive from the applicant but are likely to have been suggested to her by the State authorities and included in the statements at their initiative. On her evidence, she was called by the State to come to the notary and was taken there by an officer in uniform. The Commission agrees with the applicant's representatives that there is a strong implication that the State authorities paid for the notarised statements to be taken. The Commission notes that the Government have not indicated on whose initiative steps were taken to obtain notarised statements.

246. Even though no coercion appears to have been exerted on her to retract her petition and there is no evidence of any threats having been made against her, the Commission considers that the State authorities have subjected the applicant at the very least to significant indirect pressure. It recalls Arap Kurt's description of the applicant being pulled in every direction. It considers that this is an accurate reflection of the applicant's situation.

247. The Commission would emphasise that it is not for the Government to take steps to investigate by means of personal contact with applicants whether an application is a genuine or accurate reflection of their complaints. If a Government entertains doubts as to the authenticity of an application, it is a matter to be raised with the Commission, within whose competence it lies to take any necessary steps procedurally to verify the existence of a valid application and to establish the extent to which complaints are well-founded. This does not exclude the competent State authorities from taking appropriate steps to investigate allegations of criminal offences which may be brought to their attention as a result of an application to the Commission. Where this reasonably necessitates contact with an applicant, the Commission has asserted the importance that such questioning be carried out in the presence of his or her lawyers given

the vulnerability of applicants who have made serious allegations against State authorities (see No. 21883/93, Comm. Rep. 26.10.95 para. 253 to be published with the Akdivar and others v. Turkey judgment loc. cit.). However this should not in any event include questioning of applicants which concerns the circumstances in which they decided to bring an application, their motivation or the allegations they intended to make in that application. Nor should the questioning be designed or calculated to test the accuracy of the submissions made on their behalf or include any expression of disapproval or suspicion as to the alleged political uses to which an application might be put.

248. The Commission finds that in the circumstances of this case the State authorities have acted inappropriately in their contacts with the applicant in their apparent efforts to determine whether or not she wished to pursue her complaints. In doing so they exerted improper pressure on her to make statements concerning her application which is incompatible with the free exercise of the right of individual petition guaranteed under Article 25 para. 1 of the Convention.

2. Alleged interference with the applicant's lawyer

249. The applicant's representatives submit that the authorities have sought to prosecute Mr. Sakar for making false allegations against the State of Turkey in the context of the applicant's application to the Commission. They submit that the interference with lawyers assisting applicants before the Commission strikes at the substance of the freedom of exercise of the right of individual petition, in that it is clearly intimidatory and designed to dissuade people from helping applicants in applications under the Convention.

250. The Government have not commented on these matters which were raised by the applicant's representatives in their final submission on the merits.

251. The Commission notes that at the instigation of a senior official at the Ministry of Foreign Affairs, Mr. Özkarol, who in fact attended the taking of evidence before the Commission, an enquiry was apparently commenced into whether the applicant's lawyer, Mr. Mahmut Sakar, who had presented her application to the Commission, was responsible for making false allegations in the context of that application. It seems that the applicant was summoned to give a statement to the Diyarbakır Chief Prosecutor's office as part of that investigation. The opinion of that office was however that evidence supporting a charge would be difficult to obtain. Although the applicant's representatives referred in oral submissions to an indictment having been drawn up against Mr. Sakar, no such document has been provided. It is therefore not established that criminal proceedings have in fact commenced. It is clear however that an investigation was commenced with a view to contemplated proceedings.

252. The Commission views with considerable concern the steps taken by the Government to prosecute a lawyer acting on behalf of an applicant in connection with allegedly false allegations made in the presentation of that case before the Commission. This is particularly so where the application is pending before the Commission who, following the admissibility of the case, has the task under the Convention of establishing the facts of the case. Having taken oral evidence in the case, the Commission has noted that the allegations concerning ill-treatment of villagers and slaughtering of livestock

originally made in the petition taken by the HRA were not upheld by the applicant in her oral testimony (see para. 170 above). It has had occasion to regret the lack of accuracy in this and other statements submitted on behalf of applicants (see para. 170 and references therein). Whether or not this is a ground for disciplinary action in a Contracting State for negligence or other professional fault by a lawyer once the shortcoming is identified at the conclusion of the Convention proceedings is not a question that the Commission is called upon to decide in the present case. Though it appears that materials have been sent to the Chairman of the Bar, it is not apparent that disciplinary proceedings have been instituted. The Commission would however express doubts as to whether such proceedings would be compatible the effective functioning of the Convention system (see Article 2 of the European Agreement relating to persons participating in proceedings of the European Commission and Court of Human Rights, which confers immunity from legal process in respect of lawyers assisting applicants before the Commission).

253. In any event, the institution of criminal proceedings against a lawyer in respect of an application before the Commission would have the potential to interfere with the free exercise of the right of individual petition, since it is calculated to dissuade an applicant or his or her lawyer from pursuing a case or to place significant obstacles to the continued pursuit of the case in question and to the submission of future applications.

254. The Commission finds that, even though no criminal proceedings have apparently commenced, the steps taken by the authorities with a view to instituting criminal proceedings against Mr. Sakar in relation to submissions made by him in an application to the Commission are not compatible with the Government's obligations not to hinder the effective exercise of the right of individual petition under Article 25 of the Convention.

CONCLUSION

255. The Commission concludes, unanimously, that Turkey has failed to comply with its obligations under Article 25 para. 1 of the Convention in relation to the pressure exerted on the applicant and and her lawyer by State authorities.

J. Recapitulation

256. The Commission decides, unanimously, to pursue the examination of the complaints introduced on behalf of the applicant (para. 158).

257. The Commission concludes, unanimously, that there has been a violation of Article 5 of the Convention in respect of the disappearance of the applicant's son (para. 215 above).

258. The Commission concludes, unanimously, that it is not necessary to examine separately the complaints made under Articles 2 and 3 of the Convention in relation to the applicant's son (para. 216 above).

259. The Commission concludes, by 19 votes to 5, that there has been a violation of Article 3 of the Convention in respect of the applicant (para. 221 above).

260. The Commission concludes, unanimously, that there has been a violation of Article 13 of the Convention (para. 231 above).

261. The Commission concludes, unanimously, that there has been no violation of Article 14 of the Convention (para. 236 above).

262. The Commission concludes, unanimously, that there has been no violation of Article 18 of the Convention (para. 237 above).

263. The Commission concludes, unanimously, that Turkey has failed to comply with its obligations under Article 25 para. 1 of the Convention (para. 255 above).

H.C. KRÜGER
Secretary
to the Commission

S. TRECHSEL
President
of the Commission

(Or. English)

DISSENTING OPINION OF MM. S. TRECHSEL, C.A. NØRGAARD, F. MARTINEZ, G. RESS AND K. HERNDL

We regret that we are unable to share the view of the majority of the Commission that there has been a violation of Article 3 of the Convention in respect of the applicant. The majority's view is based on the assumption that the disappearance of her son could constitute inhuman and degrading treatment in respect of herself. Certainly, the applicant has had no news of her son for almost three years. She fears that he is dead and has made appeals that she should at least be given his body. While the uncertainty, doubt and apprehension suffered by the applicant must undoubtedly have caused her considerable mental distress, this must be regarded as an indirect consequence of the fate of her son which the Commission considers to constitute a violation of Article 5 (see para. 215 of the Report). In addition the applicant's own sufferings are taken into account in connection with the allegations of a lack of an effective redress for the disappearance examined in the context of Article 13 of the Convention (see paras. 220-230 of the report). We therefore believe that no separate issue arises in the circumstances of this case.

EUROPEAN COMMISSION OF HUMAN RIGHTS

DECISION

AS TO THE ADMISSIBILITY OF

Application No. 24276/94
by Koçeri KURT
against Turkey

The European Commission of Human Rights sitting in private on 22 May 1995, the following members being present:

MM. C.A. NØRGAARD, President
H. DANELIUS
C.L. ROZAKIS
E. BUSUTTIL
G. JÖRUNDSSON
S. TRECHSEL
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
Mrs. G.H. THUNE
Mr. F. MARTINEZ
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
M.A. NOWICKI
I. CABRAL BARRETO
N. BRATZA
I. BÉKÉS
J. MUCHA
E. KONSTANTINOV
D. ŠVÁBY
G. RESS
A. PERENIČ
C. BÎRSAN

Mr. H.C. KRÜGER, Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 11 May 1994 by Koçeri KURT against Turkey and registered on 6 June 1994 under file No. 24276/94;

Having regard to:

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations and information submitted by the respondent Government on 23 January, 9 February, 7 March and 10 April 1995 and the observations in reply and information submitted by the applicant on 23 January, 27 March, 2 April and 5 May 1995;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Turkish citizen of Kurdish origin, born in 1927 and resident at the Ağıllı village. She is represented before the Commission by Professor Kevin Boyle and Ms. Françoise Hampson, both of the University of Essex, England.

The facts as submitted by the parties may be summarised as follows.

A. Particular circumstances of the case

1. **Events relating to the alleged disappearance of the applicant's son**

The applicant submits as follows.

The applicant is the mother of Üzeyir Kurt, aged 35, who has disappeared after being taken into custody by soldiers on 24 November 1993. Eyewitness accounts received by Amnesty International and confirmed by the applicant indicate that the disappearance occurred in the following circumstances.

At approximately 18.00h on the evening prior to the disappearance, soldiers surrounded the village of Ağıllı near Dicle in Diyarbakır province. They opened fire on the village with small arms and rocket launchers and then entered the village the following morning. All houses in the village were burnt down save for a few which were kept for use by the soldiers.

When the soldiers had entered the village, Üzeyir Kurt was staying at the home of his aunt, Mevlüde, along with three other members of his family. That morning the soldiers stood outside the house and ordered everyone to leave it. All did so except Üzeyir Kurt. He remained inside since his elder brother, Abdulkadir Kurt, had been killed by torture two years previously while in the custody of the authorities.

The soldiers then asked Üzeyir's eldest child Aynur, aged 15, where her father was, and she told them where he was. They then returned to the house with members of the applicant's family, including Üzeyir's brother Davut. The soldiers told Davut to get his brother from the house, and one of the soldiers added that "if your brother has a firearm, I'm going to kill him, if not I'll let him go".

Davut persuaded Üzeyir to leave the house with his hands up. He was taken to the house of Hasan Kiliç, where he was detained that night. The following morning, 25 November 1993, the applicant went to see her son, bringing to him clothing and a packet of cigarettes that one of the soldiers had given her for him. She continues:

> "When I got to Hasan Kiliç's house, my son Üzeyir was in the yard. Eight to nine soldiers were keeping guard on him. ... I saw swellings around my son's eyes, they had tortured him. He was also shivering from the cold. ... The soldiers drove me away ... saying 'Go away from here before the Commander comes'. I have not seen my son Üzeyir since that day."

On 29 November 1993, the applicant wrote to the State Prosecutor of Bismil that her son had been taken into custody by officers and applied for information. The request was referred to the Bismil District Gendarme Unit Command for information about his whereabouts. On 30 November 1993 they replied that he had not been taken into custody by themselves and that "it is supposed that the individual in question may have been kidnapped by the PKK". She then received a letter from the Bismil Provincial Gendarme Command saying the same.

On 14 December 1993 the applicant wrote to the Office of the Chief Prosecutor of the State Security Court, asking for information about her son's whereabouts following his being taken into custody by gendarmes. The reply from the office of the same day was that they had no information regarding him in their custody records.

Finally, on 15 December 1993 the applicant wrote to the Bismil State Prosecutor's Office asking for information about her son's whereabouts. On the same day that office wrote to the Gendarme Unit Command, authorising such information to be given, but nothing has been forthcoming.

The Government state as follows.

Following the receipt of information on 23 November 1993 by the Bismil Gendarmerie to the effect that PKK terrorists had arrived in the village of Ağıllı (Birik) to extort money and supplies, an operation was carried out in the village. An armed confrontation began during the search of the village when the security forces came under fire from terrorists hidden in the village and from persons outside the village. The conflict continued into the night and several houses and barns were hit by fire, some of which caught fire. A sergeant had died in the opening shot of the incident and a terrorist was also killed.

On 24 November 1993, persons suspected of involvement were gathered by the security forces in the village school for identification but all were released. A number of arms were found and confiscated and a further two terrorists were found dead in a barn.

After the completion of the search, a contingent of the security forces remained behind in the village to protect the villagers. Twelve persons detained for questioning, including the applicant's son, were released on 25 November 1993.

On 25 November 1993, the security forces left the village. Following intensified pressure by the PKK, which blamed the villagers for the death of their members, the villagers left their village but continued to work their fields under the protection of the security forces.

When, a considerable time after the events, the applicant applied for information about her son to the commander of the gendarmerie, investigations disclosed that there was no record that her son had continued to be held in custody. The Government refer to statements made by members of the applicant's family and other villagers as, inter alia, refuting the allegation that the applicant's son was taken away by the security forces.

The Government state that the evidence indicates that the applicant's son had been taken away from the village by the PKK.

2. **Events subsequent to the introduction of the application**

On 23 January 1995, the applicant's representatives wrote to the Commission stating that on 7 December 1994 two relatives of the applicant, the 16 year old sister of Üzeyir and his sister-in-law, had been taken into custody as had two other persons named in the applicant's statement to the Commission. Raids were carried out on the homes of Hasan Kiliç (named in the application) and Üzeyir's elder brother. The applicant's representatives stated that following these events the applicant sent a new statement to the Human Rights Association, dated 9 December 1994, revoking all petitions and complaints which she made. They stated that they were very concerned for the safety of the applicant and her relatives and asked the Commission to give these serious developments its most urgent attention. They submitted a statement from Mr. Mahmut Sakar, a lawyer in the Human Rights Association in Diyarbakır, who stated that he had spoken to the applicant who said that she had withdrawn her petition since the gendarmes had threatened that her two other sons would face the same fate as Üzeyir, and that her new house would be burned down.

By letter dated 9 February 1995, the Turkish Government enclosed a deposition made by the applicant before a notary dated 6 January 1995, which expressed the applicant's wish to revoke all petitions made in her name to the Commission and complaining that her requests for information concerning the fate of her son had been distorted and exploited without her knowledge or consent for the purposes of PKK propaganda. They submitted a letter by the applicant dated 9 December 1994 to the Ministry of Foreign Affairs to the same effect.

By letter submitted on 10 April 1995, the Government denied that the persons referred to by the applicant's representatives had been detained by the gendarmerie in Bismil and stated that 11 persons, including the applicant, members of her family and villagers, had given their statements at the gendarmerie on 7 December 1994 and had afterwards left the building. The Government explained that these persons had been summoned to give their statements pursuant to the request made by the Ministry of Justice and gendarme authorities for the applicant's allegations to the Commission to be investigated.

The applicant's representatives by letter dated 5 May 1995 submitted two statements dated 12 April 1995 by persons who had talked to the applicant. One statement alleged two further raids had been carried out on the applicant's house in April and the second reported that the applicant was being intimidated by State forces but wished her application to continue.

B. Relevant domestic law and practice

Civil and administrative procedures

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."

The Government assert that 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 unknown or terrorist authors when the State may be said to have failed in its duty to maintain public order and safety, or in its duty to safeguard individual life and property.

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."

Article 8 of Decree 430 of 16 December 1990, which was promulgated pursuant to powers granted under the state of emergency, 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 damages suffered by them without justification."

Any illegal act by civil servants, be it a crime or tort, which causes material or moral damage may be the subject of a claim for compensation before the ordinary civil courts and the administrative courts.

Criminal procedures

The Turkish Criminal Code makes it a criminal offence:

- to deprive someone unlawfully of his or her liberty (Article 179 generally, Article 181 in respect of civil servants),
- to oblige someone through force or threats to commit or not to commit an act (Article 188),
- to issue threats (Article 191),
- 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).

As regards unlawful killings, there are provisions dealing with intentional homicide (Articles 456 et seq.).

In general, in respect of criminal offences, 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 crimes 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.

If the suspected authors of the contested acts are military personnel, they may also be prosecuted for causing extensive damage, endangering human lives or damaging property, if they have not followed orders in conformity with Articles 86 and 87 of the Military Code. Proceedings in these circumstances may be initiated by the persons concerned (non-military) before the competent authority under the Code of Criminal Procedure, or before the suspected persons' hierarchical superior (Articles 93 and 95 of Law 353 on the Constitution and the Procedure of Military Courts).

COMPLAINTS

The applicant complains of violations of Articles 2, 3, 5, 13, 14 and 18 of the Convention.

As to Article 2 she refers to the life-threatening nature of the unacknowledged detention in the hands of the State in South-East Turkey, such detention amounting to a life-threatening act on account of the administrative practice of torture and the high incidence of deaths in custody. She further refers to the lack of any effective system for ensuring protection of the right to life and to the inadequate protection of the right to life in domestic law.

As to Article 3 she refers to her inability to discover what has happened to her son and to discrimination against both her and her son on grounds of race or ethnic origin. She also refers to evidence showing that her son had been beaten while in custody which, like his disappearance, constitutes inhuman treatment. She also refers to the suffering to which she has been exposed as a result of her son's disappearance and her fruitless search for him.

As to Article 5 she complains of her son's unlawful detention, of her son not being informed of the reasons for his arrest, not being brought before a judicial authority within a reasonable time and not being able to bring proceedings to determine the lawfulness of his detention, these being violations which result in a complete lack of security of the person.

As to Article 13 she complains of the lack of any independent national authority before which these complaints can be brought with any prospect of success.

As to Article 14 in conjunction with Articles 2, 3 and 5 she complains of an administrative practice of discrimination on grounds of race or ethnic origin.

As to Article 18 she alleges that the interferences in the exercise of the Convention rights were not designed to secure the ends permitted under the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 11 May 1994 and registered on 6 June 1994.

On 30 August 1994, the Commission decided to communicate the application to the Government and to ask for written observations on the admissibility and merits of the case.

The Government's observations were submitted on 23 January 1995, after the expiry on 11 December 1994 of an extension in the time-limit. The applicant submitted her observations in reply on 27 March 1995.

Following the receipt of further information from the applicant dated 23 January 1995 and the Government dated 9 February 1995, the Commission on 2 March 1995 considered the state of proceedings in the application. It decided to request the parties to answer specific questions concerning developments in the case.

Further information was provided by the Government on 7 March and 10 April 1995, and by the applicant on 2 April and 5 May 1995.

THE LAW

The applicant complains that her son was taken into detention and that he has now disappeared. She invokes Article 2 (the right to life), Article 3 (prohibition on inhuman and degrading treatment), Article 5 (right of liberty and security of person), Article 13 (the right to effective national remedies for Convention breaches), Article 14 (prohibition on discrimination) and Article 18 (prohibition on using authorised Convention restrictions for ulterior purposes) of the Convention.

Article 25: existence of a valid petition

The Government contend that the applicant in her letter of 9 December 1994 and statement of 6 January 1995 to a notary public has clearly expressed her rejection of the complaints made in her name and has withdrawn the application. The Commission therefore should discontinue its examination of the case, the application being a nullity from the beginning.

The applicant's representatives submit that the applicant and her family have been subject to intimidation by the authorities. They submit that, given the cost involved, it is unlikely that the applicant would go of her own accord to a notary and they rely on the reports from persons who have spoken to the applicant that she wishes her application to continue.

The Commission notes that the application submitted to it contains a power of attorney in favour of the applicant's representatives and a statement of facts and complaints, both of which have the applicant's thumbprint as signature. It further notes that the applicant does not deny that she signed these documents. While the statement to the notary and the letters relied on by the Government refer in general terms to misuse of her petition for the purposes of propaganda there is no clear retraction as regards the central factual elements of the application, namely, that her son was taken into custody by security forces and has since disappeared. The Commission accordingly concludes that the application lodged in her name by her authorised representatives is a valid exercise of the right of individual petition under Article 25 of the Convention and that the Commission has competence to examine it.

Article 30: as to the continued examination of the application

The Commission has also considered whether, notwithstanding the above finding, the statements which refer to the applicant's wish to discontinue the application disclose a ground on which the application should be struck from its list of cases. It recalls that pursuant to Article 30 para. 1 (a) of the Convention it may proceed to strike a case from its list where circumstances lead to the conclusion that the applicant does not wish to pursue his or her petition.

The Commission has had regard to the serious nature of the complaints made in this application with regard to the disappearance of the applicant's son. It has also examined with concern the grave allegations made by the applicant's representatives in regard to intimidation of the applicant and members of her family. It notes the Government's denial of these allegations. It considers however that where there exists a doubt as to the voluntariness of a withdrawal of an application it would run counter to the efficacy of the system of protection of human rights set up under the European Convention of Human Rights for the Commission to discontinue its examination of the case. In the current state of the application, the Commission finds that elements exist which raise such a doubt.

Having regard therefore to Article 30 para. 1 in fine, which provides that the Commission shall continue the examination of a petition if respect for human rights as defined in the Convention so require, the Commission does not find it appropriate to strike the case from the list of its cases at the present time.

Exhaustion of domestic remedies

The Government argue that the application is inadmissible since the applicant has failed to exhaust domestic remedies as required by Article 26 of the Convention before lodging an application with the Commission. They contend that she has failed to lodge a complaint with a competent public prosecutor or to apply to the appropriate military authority in respect of any alleged wrongdoers who are subject to military jurisdiction. Further, the applicant has not availed herself of the possibility of filing an action for indemnification before the civil courts.

The applicant maintains that there is no requirement that she pursue domestic remedies. Any purported remedy is illusory, inadequate and ineffective since, inter alia, the operation in question in this case was officially organised, planned and executed by agents of the State. She refers to an administrative practice of ill-treatment and torture and of not respecting the requirement under the Convention of the provision of effective domestic remedies.

Further, the applicant submits that, whether or not there is an administrative practice, domestic remedies are ineffective in this case having regard, inter alia, to the situation in South-East Turkey which is such that potential applicants have a well-founded fear of the consequences and the lack of genuine investigations by public prosecutors and other competent authorities. Alternatively, the applicant has done everything that can reasonably be expected of her in applying to the military and judicial authorities.

The Commission recalls that Article 26 of the Convention only requires the exhaustion of such remedies which relate to the breaches of the Convention alleged and at the same time can provide effective and sufficient redress. An applicant does not need to exercise remedies which, although theoretically of a nature to constitute remedies, do not in reality offer any chance of redressing the alleged breach. It is furthermore established that the burden of proving the existence of available and sufficient domestic remedies lies upon the State invoking the rule (cf. Eur. Court H.R., De Jong, Baljet and Van den Brink judgment of 22 May 1984, Series A no. 77, p. 18, para. 36, and Nos. 14116/88 and 14117/88, Sargin and Yagci v. Turkey, Dec. 11.05.89, D.R. 61 p. 250, 262).

The Commission notes that in the present case the applicant has petitioned a number of authorities, judicial and military, complaining that her son has been taken into custody and applying for information. It notes in particular that, according to the information which she has provided, she has applied twice to the Bismil State Prosecutor who brought the matter to the attention of the District Gendarme Unit Command and the Bismil Provincial Gendarme Command, and that she also applied to the Office of the Chief Prosecutor of the State Security Court.

Further, the Commission considers that it cannot be said at this stage that the applicant's fear of reprisal if she pursues her complaints more vigorously is wholly without foundation.

Consequently, the Commission is satisfied that in the circumstances of this case the applicant can be regarded as having brought her complaints before relevant and competent authorities and that accordingly she is not required under Article 26 of the Convention to pursue any other legal remedy in this regard (cf. Nos. 16311/90, 16312/90 and 16313/90, N.H., G.H. and R.A. v. Turkey, Dec. 11.10.91, unpublished, and No. 19092/91, Yagiz v. Turkey, Dec. 11.10.93, to be published in D.R.75).

The Commission concludes that the applicant may therefore be said to have complied with the domestic remedies' rule laid down in Article 26 of the Convention and, consequently, the application cannot be rejected under Article 27 para. 3 of the Convention.

As regards the merits

The Government deny that the applicant's son was kept in detention after the 25 November 1993 and state that there is evidence suggesting that he was taken away from the village by the PKK.

The applicant maintains her account of events.

The Commission considers, in the light of the parties' submissions, that the case raises complex issues of law and fact under the Convention, the determination of which should depend on an examination of the merits of the application as a whole. The Commission concludes, therefore, that the application is not manifestly ill-founded, within the meaning of Article 27 para. 2 of the Convention. No other grounds for declaring it inadmissible have been established.

For these reasons, the Commission unanimously

DECLARES THE APPLICATION ADMISSIBLE, without prejudging the merits of the case.

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (C.A. NØRGAARD)

APPENDIX II

Relevant international texts and materials

I. Material from the Inter-American system and OAS (Organisation of American States)

Inter-American Convention on Forced Disappearance of Persons
(resolution adopted 7th Plenary session by the General Assembly, June 9, 1994, OEA/Ser.P AG/doc.3114/94rev.1: not yet in force)

Extracts

Preamble:

...Considering that the forced disappearance of persons constitutes an extremely serious form of repression, one that violates basic human rights enshrined in the American Declaration of the Rights and duties of Man, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the American Convention on Human Rights;

Article 2

For the purposes of this Convention, forced disappearance is understood to be the abduction or detention of any person by an agent of a State or by a person acting with the consent or acquiescence of a State in circumstances where, after a reasonable period of time there has been made available no information that would permit the determination of the fate or whereabouts of the person abducted or detained.

Article 4

The forced disappearance of a person is a crime against humanity. Under the terms of this Convention, it engages the personal responsibility of its perpetrators and the responsibility of the state whose authorities executed the disappearance or consented to it.

Article 18

By means of ratification or accession to this Convention the States parties adopt the United Nations Standard Minimum Rules for the Treatment of Prisoners (Resolution 663 C [XXIV] of the Economic and Social Council, of 31 July 1957) as an integral part of their domestic law.

Case-law of the Inter-American Court of Human Rights

VELASQUEZ RODRIGUEZ v. Honduras, Judgment of 29 July 1988

This case concerned the disappearance of Manfredo Velasquez, who was kidnapped by several armed men in civilian clothes in vehicle without licence plates in Tegucigalpa in 1981. The Inter-American

Commission of Human Rights referred the case to the Court, alleging that the kidnapping was carried out by persons connected with State authorities or with their accquiesence.

The Court held, inter alia, as follows:

Re: Burden and Standard of Proof

"130. The practice of international and domestic courts shows that direct evidence, whether testimonial or documentary, is not the only type of evidence that may be considered, so long as they lead to conclusions consistent with the facts.

131. Circumstantial or presumptive evidence is especially important in allegations of disappearances, because this type of repression is characterized by an attempt to suppress all information about the kidnapping or the whereabouts and fate of the victim.

135. In contrast to domestic criminal proceedings, in proceedings to determine human rights violations the State cannot rely on the defense that the complainant has failed to present evidence when it cannot be obtained without the State's cooperation."

Re: the Government's attitude to the applicant involving external human rights enforcement mechanisms

144. ...the insinuation that persons who, for any reason, resort to the inter-American system for the protection of human rights are disloyal to their country is unacceptable and cannot constitute a basis for any penalty or negative consequence. Human rights are higher values that "are not derived from the fact that (an individual) is a national of a certain state, but are based upon attributes of his human personality" (American Declaration of the Rights and Duties of Man, Whereas clauses, and American Convention, Preamble).

Re: Relevant Facts of the case which the Court found to have been proven

"147. d. The disappearances were carried out in a systematic manner, regarding which the Court considers the following circumstances particularly relevant:

> iv. When queried by relatives, lawyers and persons or entities interested in the protection of human rights...the authorities systematically denied any knowledge of the detentions or the whereabouts or fate of the victims. That attitude was seen even in the cases of persons who later reappeared in the hands of the same authorities who had systematically denied holding them or knowing their fate...
>
> v. Military and police officials as well as those from the Executive and Judicial Branches either denied the disappearances or were incapable of investigating them, punishing those responsible, or helping those interested discover the whereabouts and fate of the victims or the location of their remains. The investigative committees

created by the government and the Armed Forces did not produce any results. The judicial proceedings brought were processed slowly with clear lack of interest and some were ultimately dismissed.

h. There is no evidence in the record that Manfredo Velasquez had disappeared to join other subversive groups, other than a letter from the Mayor of Langue, which contained rumours to that effect. The letter itself shows that the Government associated him with activities it considered a threat to national security. However, the Government did not corroborate the view expressed in the letter with any other evidence. Nor is there any evidence that he was kidnapped by common criminals or other persons unrelated to the practice of disappearances existing at that time."

Re: the phenomenon of disappearances

"150. The phenomenon of disappearances is a complex form of human rights violation that must be understood and confronted in an integral fashion.

151. The establishment of a Working Group on Enforced or Involuntary Disappearances by the United Nations Commission on Human Rights, by Resolution 20(XXXVI) of 29 February 1980, is a clear demonstration of general censure and repudiation of the practice of disappearances, which had already received world attention at the UN General Assembly (Resolution 33/173 of 20 December 1978), the Economic and Social Council (Resolution 1979/38 of 10 May 1979) and the Subcommission for the Prevention of Discrimination and Protection of Minorities (Resolution 5B(XXXII) of 5 September 1979). The reports of the rapporteurs or special envoys of the Commission on Human Rights show concern that the practice of disappearances be stopped, the victims reappear and those responsible be punished...

153. International practice and doctrine have often categorised disappearances as a crime against humanity, although there is no treaty in force which is applicable to the State parties to the Convention and which uses this terminology... The General Assembly of the OAS has resolved that it "is an affront to the conscience of the hemisphere and constitutes a crime against humanity" (AG/RES.666 XIII-0/83 18 Nov. 83) and that this "practice is cruel and inhuman, mocks the rule of law, and undermines those norms which guarantee against arbitrary detention and the right to personal security and safety" (AG/RES.742 XIV-0/84 17 Nov. 84)...

155. The forced disappearance of human beings is a multiple and continuous violation of many rights under the Convention that the States Parties are obligated to respect and guarantee. The kidnapping of a person is an arbitrary deprivation of liberty, an infringement of a detainee's right to be taken without delay before a judge and to invoke the appropriate procedures to review the legality of the arrest, all in violation of Article 7 of the Convention which recognises the right to personal liberty...

156. Moreover, the prolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment, harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human being. Such treatment therefore violates Article 5 of the Convention, which recognises the right to the integrity of the person <and prohibits torture, cruel or degrading punishment or treatment>...

In addition, investigations into the practice of disappearances and the testimony of victims who have regained their liberty show that those who are disappeared are often subjected to merciless treatment, including all types of indignities, torture and other cruel, inhuman and degrading treatment, in violation of...Article 5 of the Convention.

157. The practice of disappearances often involves secret execution without trial, followed by concealment of the body to eliminate any material evidence of the crime and to ensure the impunity of those responsible. This is a flagrant violation of the right to life, recognized in Article 4 of the Convention...

158. The practice of disappearances, in addition to directly violating many provisions of the Convention, such as those noted above, constitutes a radical breach of the treaty in that it shows a crass abandonment of the values which emanate from the concept of human dignity and of the most basic principles of the inter-American system and the Convention. The existence of this practice, moreover, evinces a disregard of the duty to organise the State in such a manner as to guarantee the rights recognized in the Convention...

Re: the responsibility of the Government

173. ...For the purposes of analysis, the intent or the motivation of the agent who has violated the rights recognized in the Convention is irrelevant, the violation can be established even if the identity of the individual perpetrator is unknown. What is decisive is whether a violation of the rights recognised by the Convention has occurred with the support or the acquiescence of the government, or whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible. Thus, the Court's task is to determine whether the violation is the result of the State's failure to fulfil its duty to respect and guarantee those rights, as required by Article 1(1) of the Convention.

174. The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation....

176. The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus operates in such a way that the violation goes unpunished and the victim's full rights are not restored as

soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognised by the Convention.

177. In certain circumstances it may be difficult to investigate acts that violate an individual's rights. The duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depend upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government. This is true regardless of what agent is eventually found responsible for the violation. Where acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane...

181. The duty to investigate...continues as long as there is uncertainty about the fate of the person who has disappeared. Even in the hypothetical case that those individually responsible for crimes of this type cannot be legally punished under certain circumstances, the State is obligated to use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains.

Re: the findings of violations

The Court concluded on examination of the facts that the disappearance of Manfredo Velasquez was carried out by agents who acted under cover of public authority and that even had that not been proven the failure of the State apparatus to act was a failure on the part of Honduras Government in the complete inability of the procedures, which were theoretically adequate, to take effective action to ensure respect for human rights within the jurisdiction of the State. The State was accordingly responsible for the disappearance and had violated Articles 7, 5 and 4 of the Convention.

"186. As a result of the disappearance, Manfredo Velasquez was the victim of an arbitrary detention which deprived him of his physical liberty without cause and without a determination of the lawfulness of his detention by a judge or competent tribunal. Those acts directly violate the right to personal liberty recognised by Article 7...

187. The disappearance of Manfredo Velasquez violated the right to personal integrity recognized by Article 5 ... First, the mere subjection of an individual to prolonged isolation and deprivation of communication is in itself cruel and inhuman treatment which harms the psychological and moral integrity of the person and violated the right of every detainee ... to treatment respectful of his dignity. Second, although if has not been directly shown that Manfredo Velasquez was physically

tortured, his kidnapping and imprisonment by governmental authorities, who have been shown to subject detainees to indignities, cruelty and torture, constitute a failure of Honduras to fulfil the duty imposed by <Articles 1 and 5 of the Convention>. The guarantee of physical integrity and the right of detainees to treatment respectful of their human dignity require State Parties to take reasonable steps to prevent situations which are truly harmful to the rights protected.

188. The above reasoning is applicable to the right to life recognised by Article 4... The context in which the disappearance...occurred and the lack of knowledge seven years later about his fate create a reasonable presumption that he was killed. Even if there is a minimal margin of doubt in this respect, it must be presumed that his fate was decided by authorities who systematically executed detainees without trial and concealed their bodies in order to avoid punishment. This, together with the failure to investigate, is a violation of a legal duty under <Articles 1 and 4 of the Convention> That duty is to ensure that every person subject to its jurisdiction the inviolability of the right to life and the right not to have one's life taken arbitrarily. These rights imply an obligation on the part of States to take reasonable steps to prevent situations that could result in the violation of that right."

GODINEZ CRUZ v. Honduras, Judgment, 20 January 1989.

Godinez Cruz, a schoolteacher, disappeared on 22 July 1982 in the State of Honduras. The petition filed with the Inter-American Commission stated that an eyewitness saw a man in a military uniform and two others in civilian clothes arrest a person who looked like Godinez. They placed him and his motorcycle in a double-cabin vehicle without licence plates. According to some neighbours, his house had been under surveillance, presumably by government agents, for some days before his disappearance. The State denied holding Godinez Cruz and set up an investigatory commission to determine his whereabouts. However, no evidence was produced.

On 24 April 1986 the Inter-American Commission asked the inter-American Court to consider whether the State in question had violated Articles 4 (right to life), 5 (right to humane treatment and freedom from torture etc.) and Article 7 (right to personal liberty).

On 20 January 1989 the Court unanimously found that Honduras had violated, in the case of Godinez Cruz, Articles 4, 5 and 7, all read in conjunction with Article 1(1) of the Convention (States' obligation to respect the rights and freedoms contained therein) and that the State of Honduras was obligated to pay fair compensation to the members of the victim's family.

EXTRACTS FROM THE JUDGMENT:

"150. ...some of the Government's objections are unfounded within the context of human rights law. The insinuation that persons who, for any reason, resort to the inter-American system for the protection of human rights are disloyal to their country is unacceptable and cannot constitute a basis for any penalty or negative consequence. Human rights are higher values that "are

not derived from the fact that (an individual) is a national of a certain state, but are based upon attributes of his human personality" (American Declaration of the Rights and Duties of Man, Whereas clauses, and American Convention, Preamble) ...international systems for the protection of human rights are based on the premise that the State is at the service of the community and not the reverse. It is violations of human rights that are subject to punishment: this can never be true for resorting to those systems or for contributing to the application of the law by them.

154. ON THE DISAPPEARANCE OF SAUL GODINEZ

b) v. The only explanation intimated by the Honduran authorities regarding the disappearance of Saul Godinez was the suggestion that he had joined subversive groups or gone to Cuba. This latter explanation was even given by the judge before whom a criminal complaint was brought. No action was taken on that complaint...the same suggestion is found in documents provided to the Commission by the Government...The fact that none of those whose statements appear in these documents was offered as a witness by the Government and that the statements were not corroborated with any other evidence, far from proving the truth of this rumour, rather shows an attempt to link Godinez to activities considered to be dangerous to national security.

vi. Other than the above, there has been no other attempt by the Government to explain the facts nor any statement offered to prove that Saul Godinez had been kidnapped by common criminals or by other persons unrelated to the practice of disappearances existing at that time, or that he had disappeared voluntarily. The defense of the Government rested solely on the lack of direct proof, which, as the Court has already said is inadequate and insufficient in cases such as this;

155. The Court must emphasise in this respect that, in cases of forced disappearances of human beings, circumstantial evidence on which a judicial presumption is based is especially valid. This is evidence which is used in every judicial system and which may be the only means available, when human rights violations imply the use of State power for the destruction of direct evidence in an attempt at total impunity or the crystallization of some sort of perfect crime, to meet the object and purpose of the American Convention and permit the Court to carry out effectively the functions that the Convention assigns it."

The Court reiterated the principles and considerations applicable to disappearance. It also commented that:

"167. In addition, the practice of disappearances itself creates a climate incompatible with the guarantee of human rights by the States Parties in the Convention, in that it relaxes the minimum standards of conduct that should govern security forces and allows such forces to violate those rights with impunity."

Cabellero-Delgado and Santana v. Colombia, Judgment of 8 December 1995

This case concerned allegations that the two victims, a trade unionist and member of the Movement April 19, were captured by a military patrol. Witnesses alleged seeing or hearing that the two persons were in military custody. The military authorities told relatives that they had not been detained. The Inter-American Commission referred the case to the court alleging violations of Articles 4 (right to life), 5 (right to humane treatment), 7 (right to personal liberty); 8 (right to fair trial) and 25 (right to judicial protection).

The Court found that nothwithstanding the fact that much of the testimony received differed as to details as to the timing and place of detention of the victims there existed sufficient evidence to draw the reasonable conclusion that the detention and disappearance of the two persons had been carried out by persons who belonged to the Columbian army and their collaborators. The fact that more than 6 years had passed without news permitted the reasonable conclusion that they were dead. However, it did not find sufficient evidence to demonstrate that they had been subjected to torture or inhuman treatment during their detention, there being only the vague testimony of two witnesses not confirmed by others. State responsibility was engaged under Article 1 of the Convention in respect of the disappearance since, although it had undertaken a prolonged judicial investigation which was still pending:

> "<n>evertheless to fully ensure the rights recognised in the Convention, it is not sufficient that the Government undertake an investigation and try to sanction those guilty; rather its is also necessary that all this Government activity culminate in the reparation of the injured party, which in this case has not occurred".

264. The Court found that, as a result, violations of Articles 4 and 7 could be attributed to Colombia. Given the short time between capture and presumed death (evidence of execution within hours) there had been no opportunity for the application of the judicial guarantees contained in Article 8 and there was no violation of that Article. Due to insufficient evidence that those detained were tortured or subjected to inhuman treatment, no violation of Article 5 had been established.

II. UNITED NATIONS MATERIALS

U.N. Declaration on the Protection of all Persons from Enforced Disappearance. G.A. res. 47/133, 18 December 1992.

> "The systematic practice of disappearance is of the nature of a crime against humanity and constitutes a violation of the right to recognition as a person before the law, the right to liberty and security of the person, the right not to be subjected to torture: it also violates or constitutes a grave threat to the right to life."

Case-law of the United Nations Human Rights Committee (HRC)

QUINTEROS v. URUGUAY (107/1981) Report of the Human Rights Committee, GAOR, 38th Session, Supplement No.40 (1983) Annex XXII, para 14:

265. In this case, the HRC investigated complaints by Maria del Carmen

Almeida de Quinteros in relation to her daughter, who was allegedly arrested at her home, held in military detention and in respect of whom the authorities contended that they had no information as to her whereabouts. The HRC found on the evidence that her daughter had been held in a military detention centre and tortured. This disclosed violations of Articles 7 (prohibition against torture and cruel and inhuman treatment) 9 (right to liberty and security of person) and 10(1) (right of detained persons to be treated with humanity and dignity) of the International Covenant on Civil and Political Rights. With regard to violations alleged by the complainant on her own behalf...

> "The Committee understands the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. The author has the right to know what happened to her daughter. In these respects, she too is a victim of the violations of the Covenant [ICCPR 1966, Articles 7, 9, 10(1)], in particular of Article 7.

MOJICA v. Dominican Republic, decision 15 July 1994, Committee's views under Article 5(4) of the Optional Protocol to the ICCPR concerning communication no. 449/1991: HRLJ Vol. 17 No. 1-2 p. 18

This case was introduced on behalf of Rafael Mojica , a well-known labour leader who disappeared after having received death threats from military personnel. In the absence of explanation or denial from the State party, the Committee found that it had failed to ensure Rafael Mojica's right to liberty and security of person in violation of Article 9 and also found violations of Articles 6 (right to life) and 7:

> 5.5 In respect of the alleged violation of article 6 paragraph 1 the Committee recalls its General Comment 6[16] on article 6 which states, inter alia, that States parties should take specific and effective measures to prevent the disappearance of individuals and establish effective facilities and procedures to investigate thoroughly, by an appropriate and impartial body, cases of missing and disappeared persons in circumstances that may involve a violation of the right to life.
>
> 5.6 The Committee observes that the State Party has not denied that Rajael Mojica (a) has in fact disappeared and remains unaccounted for since the evening of 5 May 1990, and (b) that his disappearance was caused by individuals belonging to the Government's security forces. In these circumstances,the Committee finds that the right to life enshrined in article 6 has not been effectively protected by the Dominican Republic, especially considering that is a case where the victim's life had previously been threatened by military officers.
>
> 5.7 The circumstances surrounding Rafael Mojica's disappearance, including the threats made against him, give rise to a strong inference that he was tortured or subjected to cruel and inhuman treatment. Nothing has been submitted to the Committee by the State Party to dispel or counter this inference. Aware of the

nature of enforced or involuntary disappearances of persons in many countries, the Committee feels confident to conclude that the disappearance of persons is inseparably linked to treatment that amounts to a violation of article 7 .."

BAUTISTA v. Colombia, decision of 27 October 1995,Committee's views under Article 5(4) of the Optional Protocol to the ICCPR concerning communication no. 563/1993 HRLJ Vol. 17 No. 1-2 p. 19

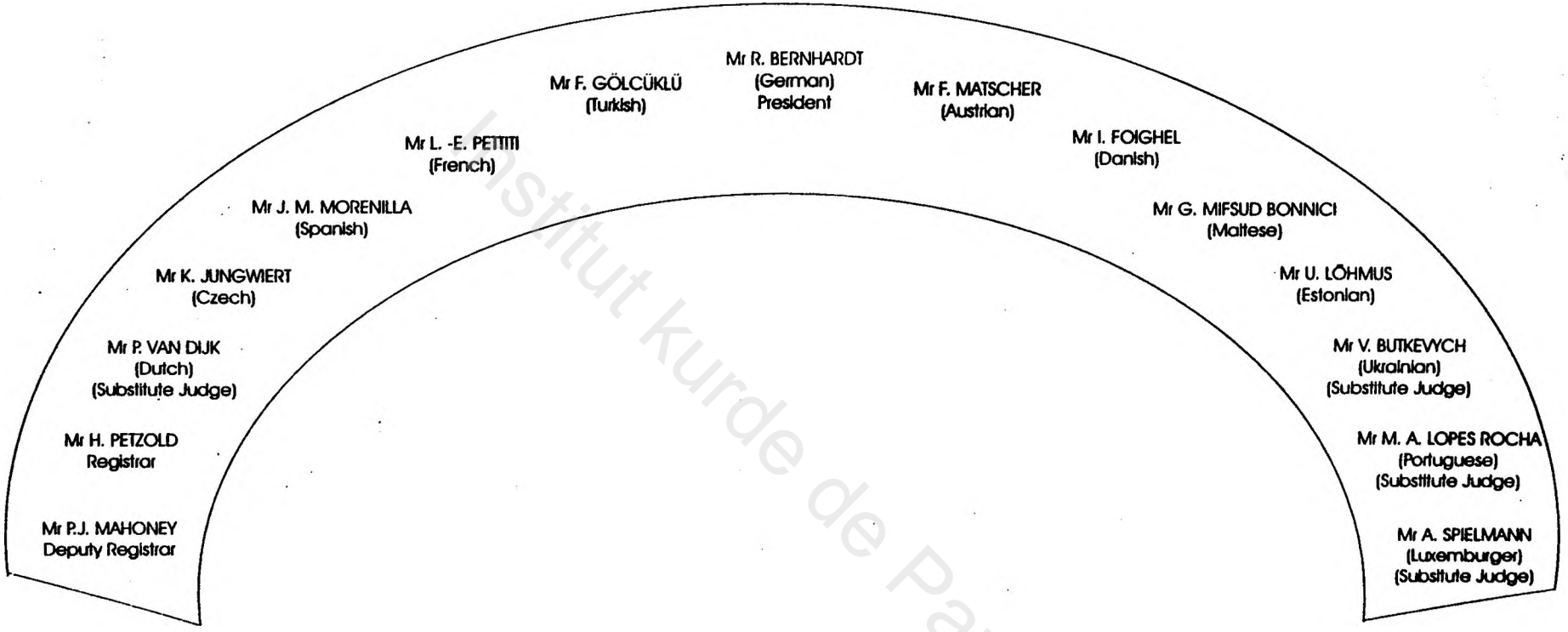
In relation to an abduction where the mutilated body was later found, the committee found on the evidence that the disappearance must be attributed to State agents. It rejected the Government's arguments that disciplinary proceedings and sanctions against two officers (order of dismissal) and an administrative tribunal award of compensation to the family constituted an effective remedy.

"The Committee does not share this view, because purely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies within the meaning of article 2 para. 3 of the Covenant, in the event of particularly serious violations of human rights, notably in the event of an alleged violation of the right to life."

EUROPEAN COURT OF HUMAN RIGHTS

Public hearing on 26 January 1998 at 9.30 a.m.

CASE OF KURT v. TURKEY



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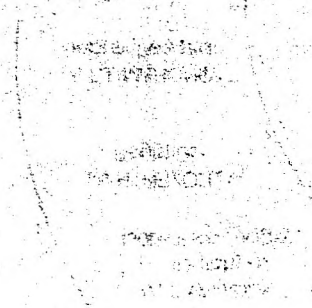
Mr K. ALATAS Adviser



KURT v. TURKEY (Case No. 15/1997/799/1002)

ORAL HEARING MONDAY 26 JANUARY 1998

APPLICANT'S SPEECH

Mr. President, Members of the Court, together with my colleague Osman Baydemir of the Diyarbakir Bar, I represent the applicant, Mrs. Koceri Kurt. Mrs. Kurt herself is with us today and is following the proceedings through translation into Kurdish.

The applicant relies on all the arguments in her memorial but, in this hearing, I shall only focus on three issues. First, since the Government in its memorial continues to challenge the Commission's finding of fact that Uzeyir was last seen in the custody of the security forces, it is necessary to draw attention to obvious inaccuracies and inconsistencies in the Government's memorial. Second, I shall address the legal character of "disappearances". I shall then briefly address the failure of the authorities to comply with their obligations under Article 25 before finally saying a brief word on the application of Article 50 of the Convention.

1. First, then - the inaccuracies in the Government's memorial [NOTE FOR INTERPRETERS: the first section may be shortened, depending on what the Commission representative says]

It is not contested that there was an operation in Agilli village, from 23 to 25 November 1993. The Commission found it to be established that during that period Uzeyir was in the village. In its memorial, the Government makes various assertions that are simply inaccurate. To pick but three examples. First and most importantly, the Government repeatedly asserts that, whilst the military were at Agilli village, no one saw Uzeyir in the village except, allegedly, his mother. Two of the **Government's** own witnesses saw Uzeyir in the village. Mahmut Karabulut told the Commission's delegates that he was in the same house as Uzeyir when they both went to sleep

Government.

Mrs Kurt asks the Court to confirm the finding of the Commission that Uzeyir Kurt was last seen in Agilli village, outside Hasan Kilic's house, on 25 November 1993, at which time he was surrounded by gendarmes and village guards. He has not been seen since then and his mother has not been able to obtain any information as to his whereabouts, notwithstanding her repeated requests to the Bismil Public Prosecutor and the Diyarbakir State Security Court Prosecutor. According to the authorities, it would seem that Uzeyir has simply "disappeared". It was for that reason that, some time later, Mrs Kurt went, on her own, to Diyarbakir and asked the way to the Human Rights Association. There, she submitted a petition to the European Commission of Human Rights.

2. I now turn to consider the legal character of "disappearances" under the European Convention on Human Rights.

A "disappearance" is a technical term in international human rights law. The phenomenon has been addressed by the Inter-American Commission and Court of Human Rights, the Human Rights Committee under the International Covenant on Civil and Political Rights and in 2 texts, the 1992 UN Declaration on the Protection of all Persons from Enforced Disappearances and the 1994 Inter-American Convention on Forced Disappearances of Persons. In 1996, the Inter-American Commission on Human Rights defined a forced disappearance in the case of **Chumbivilcas v. Peru.**

> "The Commission considers that forced disappearance has occurred when a person is arrested by State agents or with the acquiescence of same, with or without orders from a competent authority, and this arrest is then denied and no information is made available as to the destination or whereabouts of the detainee."

This definition, which is consistent with the definitions used by the other bodies and in the other texts, exactly covers the situation in this case.

effect on others. The terrorisation of the population is not consistent with the rule of law, upon which all respect for the Convention is based.

Finally, disappearances are not the work of one person. One or more perons will be involved in the failure to record the detention. Then, when questions are asked by family or friends, there is a cover-up by all those involved in denying the detention. If there was an accidental failure to record a detention, it would be corrected as soon as questions were asked. A "disappearance", however, involves the systematic denial of detention. It necessarily involves a conspiracy.

It is clear that "disappearances" are both a particularly complex and a particulalry serious human rights violation. It is therefore no surprise that both the United Nations Declaration on the Protection of all Persons from Enforced Disappearances and the Inter-American Convention on Forced Disappearances of Persons describe a "disappearance" as a crime against humanity.

I would ask the Court to stop and consider the implications of that for a moment. A crime against humanity. That means action of such an inherently criminal character that the offence is subject to universal jurisdiction. Not every violation of, for example, Article 3 of the European Convention on Human Rights would constitute a crime against humanity; only the most serious. Where the agents of a State are allegedly responsible for committing a crime against humanity, the obligation of the State to take effective action to put an end to the practice and to bring the perpetrators to justice must be all the more onerous.

Without exception, every other international human rights enforcement mechanism which has had to deal with a "disappearance" has analysed it in the context not only of the prohibition of arbitrary detention but also in the context of the obligation to protect the right to life and the prohibition of torture, inhuman and degrading treatment. That is also true of the treaty law. Article 1 paragraph 2 of the UN Declaration

5.4 and 5.5 of the Convention. Furthermore, a "disappearance" which lasts for more than a very short time also necessarily then involves a violation of Articles 5.1 and 5.3.

The Government stated that its derogation was of no application in this case in their observations on admissibility. The Government is therefore estopped from attempting to invoke it now. More importantly, it is submitted that no "public emergency" could **ever** justify unacknowledged detention.

The applicant, in her memorial, submitted evidence of the practice of "disappearances" in South-East Turkey. This constitutes an aggravated violation of Article 5.

The applicant asks the Court to confirm the finding of the Commission that the "disappearance" of her son constitutes a multiple violation of Article 5. She also asks the Court to find that the practice of "disappearances" constitutes an aggravated violation of Article 5.

The applicant asks the Court to examine whether the disappearance of Uzeyir Kurt constitutes a violation of Article 2 of the Convention, the obligation to protect the right to life. The Commission and Court have stated that Article 2 ranks as one of the most fundamental provisions in the Convention, one which, together with Article 3, enshrines one of the most basic values of the democratic societies making up the Council of Europe. In its Report of 5 December 1996, the Commission stated,

> "There is **as yet** no precedent for finding a violation of this provision where it is alleged that a situation is such as to place a person's life at risk or to disclose a lack of respect for the right to life."

Since then, the Commission has stated, at paragraph 94 of its Report in the case of **Osman & Osman v. UK**, adopted on 1 July 1997, that

> ".. while as a general rule for a complaint to fall within the scope of Article 2 there must have been loss of

the case in **Cabellero-Delgado and Santana v. Colombia**;

3. a violation of the obligation may be found, even without specific evidence of the killing of the particular detainee where **the context** suggests the "disappearance" is life-threatening. The context includes the lack of measures to prevent the occurrence of "disappearances", including the lack of a thorough and independent investigatory mechanism and the making of unsubstantiated claims on the part of the authorities, which link the detainee with subversive activities;

   alternatively, a violation of Article 2 can be found where there is evidence of a practice of ill-treatment in detention &/or evidence of extra-judicial killings carried out by the authorities of the State, including of those in detention.

Applying these criteria to the facts of this case, first, the applicability of Article 2 is triggered by the fact that the Commission has found that Uzeyir Kurt was detained by the authorities of the State on 25 November 1993 but those authorities have failed to produce him, alive or dead, for over four years. The Government has provided no explanation, let alone a plausible one, for their failure to produce him beyond simply denying that he was ever detained. The Commission has determined, however, on the basis of a scrupulous examination of the evidence that Uzeyir Kurt **was** detained. In this case, then, the State has failed in its obligation to protect the right to life if it can be shown either that the context was life-threatening or alternatively that there is a practice of ill-treatment &/or extra-judicial killings of those in detention.

The applicant submits, on the facts of this case, that both of those tests are satisfied. On the basis of the case-law, such as **Godinez Cruz v. Honduras**, the context includes the making of unsubstantiated claims linking the detainee with subversive activities. Just such a claim was made in this case. In his decision of non-jurisdiction,the public prosecutor

inadequacy of the investigation. To the best of our knowledge, in every single case from that region pending before the Court, the Commission has concluded that the applicant had no effective remedy on account of the ineffectiveness of the investigation. The applicant asks the Court to find that the context in which her son "disappeared" was life-threatening and, on that basis, to find a violation of the State's obligation to protect the right to life.

Alternatively, the applicant asks the Court to reach the same conclusion on account of the evidence of a high incidence of ill-treatment and extra-judicial killings of those in detention in South-East Turkey. That evidence is referred to at paragraphs 154 and 155 of the memorial. In particular, the applicant would point to the figures submitted in Appendix 3.

The applicant also asks the Court to find that the evidence submitted of a practice of "disappearances" constitutes an aggravated violation of Article 2.

As this Court established in **McCann & others v. UK**, a complaint of the inadequacy of any investigation is a separate head of complaint under Article 2. The investigation needs to be "thorough, prompt and impartial". At paragraphs 226-228 of its Report, the Commission examined the attitude and conduct of the public prosecutor and reached the damning conclusion which I have just quoted. The applicant asks the Court to find that the so-called investigation of her complaint did not satisfy the requirements of Article 2. Furthermore, there is a practice of inadequate investigations, in aggravated violation of Article 2.

Turning to Article 3 of the Convention, similar general issues arise as to those discussed above in the context of Article 2. On the basis of the analysis of the case-law contained at paragraphs 120-130 of the applicant's memorial, the following propositions emerge:

1. the fact of a "disappearance" constitutes inhuman treatment;
2. there is a presumption of torture if either
   - there is evidence of the ill-treatment of the

there is overwhelming evidence of the practice of torture in detention throughout Turkey. The evidence contained in NGO and IGO reports was submitted to the Court in the case of **Aksoy.** This has been further confirmed by the second public statement on Turkey of the European Committee on the Prevention of Torture in December 1996 and the findings of this court in the cases of **Aksoy** and **Aydin.** The ECPT stated, in terms, that it had found

> "...clear evidence of the practice of torture and other forms of severe ill-treatment.."

It concluded,

> "To attempt to characterise this problem as one of isolated acts of the kind which can occur in any country - as some are wont to do - is to fly in the face of the facts."

The applicant requests the Court to determine that her son was tortured either on account of the prolonged period of unacknowledged detention, which constitutes psychological torture, or else on account of the evidence that he was personally ill-treated or on account of the evidence of the practice of torture in Turkey. The evidence at paragraph 156 of the memorial and in the appendices establishes that there is a practice of "disappearances" in South-East Turkey in aggravated violation of Article 3.

The obligation of the State is to **secure** to everyone within the jurisdiction the rights and freedoms in the Convention. That requires effective measures to **prevent** violations of the rights. Compensation alone is not sufficient. In the context of Article 3, and by analogy with Article 2, that requires a thorough, prompt and effective investigation of any alleged violation of Article 3 as an intrinsic part of the obligation. That is the case under the Inter-American Convention on Human Rights, according to the decision of the Court in **Velasquez Rodriguez**, and also under the International Covenant on Civil and Political Rights, according to the General Comment on Article 7. For the reasons given earlier, the so-called

State authorities paid for the notarised statements to be taken. Furthermore, an enquiry was started by the authorities with a view to taking proceedings against her lawyer, Mahmut Sakar. The applicant asks the Court to confirm the Commission's finding that the conduct of the authorities was incompatible with their obligations under Article 25 of the Convention.

In conclusion, the applicant asks the Court to find that her son, Uzeyir, "disappeared" whilst detained by the security forces and that he and she have been the victims of the violations I have outlined. Mrs Kurt also requests just satisfaction.

Her claim under Article 50 is set out in the memorial. She claims non-pecuniary damages on behalf of her son and herself and her legal costs. Those costs are set out in a detailed schedule of costs. By letter of 19 December, those costs were revised. The applicant requests the Court to direct that the sum payable for legal costs should not only be payable in sterling but that it be paid directly to her legal representatives in the UK.

Mr President, members of the Court, I cannot end without saying what the applicant, like the relatives of all "disappeared" persons, wants from these proceedings. Mrs Kurt wants, above all, information about what has happened to her son. If he is dead, she wants his body, so that she can give him a proper burial and begin the process of mourning. She appeals in this Court to the Turkish State for this information.

Thank you.

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

Case of Kurt v. Turkey

(15/1997/799/1002)

Judgment

Strasbourg, 25 May 1998

CONSEIL DE L'EUROPE

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

CASE OF KURT v. TURKEY

(15/1997/799/1002)

JUDGMENT

STRASBOURG

25 May 1998

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SUMMARY[1]

Judgment delivered by a Chamber

Turkey – failure of authorities to account for whereabouts or fate of applicant's son last seen surrounded by members of security forces

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

A. Non-validity of application

Applicant testified before Delegates – confirmed her wish to take part in proceedings before Court and was present at oral hearing in her case – cannot be maintained in circumstances that applicant was not seeking redress in respect of complaint against authorities.

Conclusion: objection dismissed (unanimously).

B. Non-exhaustion of domestic remedies

Government barred on procedural grounds from raising objection – in any event, objection would have been dismissed on merits given that applicant did everything that could be expected of her to exhaust domestic remedies.

Conclusion: objection dismissed (unanimously).

II. ARTICLES 2, 3 AND 5 OF THE CONVENTION IN RESPECT OF THE DISAPPEARANCE OF THE APPLICANT'S SON

A. Establishment of the facts

Commission meticulously examined inconsistencies in applicant's evidence as well as Government's alternative explanations for disappearance of her son – applicant questioned extensively by Delegates of the Commission and Government lawyers at hearing – applicant found credible and consistent on central issue, namely she had seen her son surrounded by soldiers and village guards in village – no exceptional circumstances which would lead Court to depart from Commission's finding that applicant's son detained in village in circumstances alleged and has not been seen since.

B. Article 2

No concrete evidence adduced proving, beyond reasonable doubt, that applicant's son was killed by authorities – neither circumstances in which son detained nor materials relied on by applicant in support of allegation of practice of, *inter alia*, disappearances and

1. This summary by the registry does not bind the Court.

extra-judicial killing of detainees corroborate allegation of unlawful killing – in view of Court, applicant's assertion that authorities failed to protect son's life falls to be assessed under Article 5.

Conclusion: not necessary to decide on complaint (unanimously).

C. Article 3 in respect of the applicant's son

As with Article 2 complaint, no evidence adduced to substantiate allegation of ill-treatment of applicant's son in custody – complaint falls to be considered from angle of Article 5.

Conclusion: not necessary to decide on complaint (unanimously).

D. Article 5

Reiteration of Court's case-law on fundamental importance of Article 5 guarantees for protection of physical liberty and personal security of individuals.

Unacknowledged detention of an individual must be considered a negation of these guarantees – assumption by authorities of control over individual requires them to account for individual's whereabouts – Article 5 requires that authorities take effective measures to safeguard against risk of disappearance and to conduct prompt effective investigation into arguable claim that an individual not been seen since being taken into custody.

In instant case, no record kept of son's detention in village – moreover, authorities failed to carry out any meaningful investigation into applicant's allegation – applicant never interviewed – authorities must be considered in circumstances to have failed to discharge their responsibility to account for whereabouts of applicant's son – can be concluded that son held in unacknowledged detention without protection of safeguards guaranteed by Article 5 – in view of Court, this gives rise to particularly grave violation of that Article.

Conclusion: violation (six votes to three).

III. ARTICLE 3 OF THE CONVENTION IN RESPECT OF THE APPLICANT HERSELF

No serious consideration given by authorities to applicant's complaint – applicant a victim of authorities' complacency in face of her anguish and distress – suffering has endured over prolonged period of time and must be considered in circumstances ill-treatment within scope of Article 3.

Conclusion: violation (six votes to three).

IV. ARTICLE 13 OF CONVENTION

Reiteration of Court's case-law on nature of an effective remedy in cases of alleged serious violations of Convention rights.

In instant case, authorities confronted with an arguable claim that applicant's son detained by security forces in village – authorities obliged in circumstances to conduct, for benefit of relatives, thorough and effective investigation into disappearance – no such investigation conducted for reasons given for finding of violation of Article 5.

Conclusion: violation (seven votes to two).

V. ARTICLES 2, 3 AND 5 IN CONJUNCTION WITH ARTICLE 14 OF THE CONVENTION

Complaints not substantiated.

Conclusion: no violation (unanimously).

VI. ARTICLE 18 OF THE CONVENTION

Complaint not substantiated.

Conclusion: no violation (unanimously).

VII. ARTICLE 25 § 1 OF THE CONVENTION

Reaffirmation of Court's case-law on obligation of Contracting State to ensure that applicants are able to communicate freely with Commission without being subjected to any form of pressure to withdraw or modify their complaints – expression "any form of pressure" covers not only direct coercion and intimidation but also improper indirect acts intended to dissuade or discourage applicants or potential applicants, their families or legal representatives from pursuing a Convention remedy – in instant case, Court satisfied on facts that applicant subjected to indirect and improper pressure to make statements in respect of her application to Commission – furthermore, threat of criminal proceedings against applicant's lawyer, even if not followed up, to be considered an interference with exercise of right of individual petition – allegations against a respondent State, even if proved false, must be tested in accordance with Convention procedures and not by threat of criminal measures against applicant's lawyer.

Conclusion: violation (six votes to three).

VIII. ARTICLE 50 OF THE CONVENTION

A. Non-pecuniary damage

Separate sums awarded to applicant's son and to applicant herself – first sum to be held by applicant for her son and his heirs.

Conclusion: respondent State ordered to pay specified sums (eight votes to one).

B. Costs and expenses

Applicant's claim allowed in part.

Conclusion: respondent State ordered to pay specified sum (eight votes to one).

COURT'S CASE-LAW REFERRED TO

24.3.1988, Olsson v. Sweden (no. 1); 20.3.1991, Cruz Varas and Others v. Sweden; 22.3.1995, Quinn v. France; 27.9.1995, McCann and Others v. the United Kingdom; 16.9.1996, Akdivar and Others v. Turkey; 15.11.1996, Chahal v. the United Kingdom; 18.12.1996, Aksoy v. Turkey; 25.9.1997, Aydın v. Turkey; 28.11.1997, Menteş v. Turkey; 19.2.1998, Kaya v. Turkey

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

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

Mr R. BERNHARDT, *President*,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr L.-E. PETTITI,
Mr I. FOIGHEL,
Mr J.M. MORENILLA,
Mr G. MIFSUD BONNICI,
Mr K. JUNGWIERT,
Mr U. LÕHMUS,

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

Having deliberated in private on 3 February and 27 April 1998,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 22 January 1997, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in an application (no. 24276/94) against the Republic of Turkey lodged with the Commission under Article 25 by Mrs Koçeri Kurt, a Turkish national, on 11 May 1994. The application was brought by the applicant on her own behalf and on behalf of her son.

The Commission's request referred to Articles 44 and 48 and to the declaration whereby Turkey recognised the compulsory jurisdiction of the Court (Article 46). The object of the request was to obtain a decision as to

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Notes by the Registrar

1. The case is numbered 15/1997/799/1002. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

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

whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 2, 3, 5, 13, 14, 18 and 25 § 1 of the Convention.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of Rules of Court A, the applicant stated that she wished to take part in the proceedings and designated the lawyers who would represent her (Rule 30). On 18 March 1997 the President of the Chamber refused the applicant's request to provide for interpretation in an unofficial language at the public hearing having regard to the fact that two of her lawyers used one of the official languages (Rule 27).

3. The Chamber to be constituted included *ex officio* Mr F. Gölcüklü, the elected judge of Turkish nationality (Article 43 of the Convention), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 § 4 (b). On 21 February 1997, in the presence of the Registrar, the President of the Court, Mr R. Ryssdal, drew by lot the names of the other seven members, namely Mr F. Matscher, Mr L.-E. Pettiti, Mr I. Foighel, Mr J.M. Morenilla, Mr G. Mifsud Bonnici, Mr K. Jungwiert and Mr U. Lõhmus (Article 43 *in fine* of the Convention and Rule 21 § 5).

4. As President of the Chamber (Rule 21 § 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the Turkish Government ("the Government"), the applicant's lawyers and the Delegate of the Commission on the organisation of the proceedings (Rules 37 § 1 and 38). Pursuant to the order made in consequence on 17 April 1997, the Registrar received the applicant's memorial on 23 September 1997 and the Government's memorial on 3 November 1997, the Government having been granted leave by the President of the Chamber on 29 May 1997 to extend the deadline for submission of their memorial.

5. On 24 September 1997 the President of the Chamber granted leave pursuant to Rule 37 § 2 to Amnesty International to submit written comments on the case subject to respect for certain conditions. These comments were received at the registry on 7 November 1997 and communicated to the Agent, the applicant's lawyers and the Delegate of the Commission.

6. On 27 September 1997 the Commission produced a number of documents from the file on the proceedings before it, as requested by the Registrar on the President's instructions.

7. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 26 January 1998. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*
Mr M. ÖZMEN,
Ms D. AKÇAY, *Co-Agents*,
Ms A. EMÜLER,
Mr F. POLAT,
Ms A. GÜNYAKTI,
Ms M. ANAYAROĞLU,
Mr A. KAYA,
Mr K. ALATAŞ, *Advisers*;

(b) *for the Commission*
Mr N. BRATZA, *Delegate*;

(c) *for the applicant*
Ms F. HAMPSON, Barrister-at-Law,
Ms A. REIDY, Barrister-at-Law, *Counsel*,
Mr O. BAYDEMIR,
Mr K. YILDIZ, *Advisers*.

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

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

1. The applicant

8. The applicant, Mrs Koçeri Kurt, is a Turkish citizen who was born in 1927 and is at present living in Bismil in south-east Turkey. At the time of the events giving rise to her application to the Commission she was living in the nearby village of Ağıllı. Her application to the Commission was brought on her own behalf and on behalf of her son, Üzeyir Kurt, who, she alleges, has disappeared in circumstances engaging the responsibility of the respondent State.

2. The facts

9. The facts surrounding the disappearance of the applicant's son are disputed.

10. The facts presented by the applicant in her final observations on the merits of her application in the proceedings before the Commission are contained in Section A below. This account of the facts also addresses her allegation that she and her lawyer have been subjected to intimidation by the authorities on account of her decision to lodge an application with the Commission. The applicant did not reconstitute her version of the circumstances surrounding the disappearance of her son in her memorial to the Court, relying rather on the facts as established by the Commission in its report (Article 31) adopted on 5 December 1996.

11. The facts as presented by the Government are set out in Section B.

12. A description of the materials submitted to the Commission is contained in Section C. A description of the proceedings before the domestic authorities regarding the disappearance of the applicant's son, as established by the Commission, is set out in Section D.

13. The Commission, with a view to establishing the facts in the light of the dispute over the circumstances surrounding the disappearance of the applicant's son, conducted its own investigation pursuant to Article 28 § 1 (a) of the Convention. To this end, the Commission examined a series of documents submitted by both the applicant and the Government in support of their respective assertions and appointed three Delegates to take evidence of witnesses at a hearing conducted in Ankara from 8 to 9 February 1996. The Commission's evaluation of the evidence and its findings thereon are summarised in Section E.

A. Facts as presented by the applicant

1. Concerning the disappearance of the applicant's son

14. From 23 to 25 November 1993 security forces, made up of gendarmes and a number of village guards, carried out an operation in Ağıllı village. On 23 November 1993, pursuant to intelligence reports that three terrorists would visit the village, the security forces took up positions around the village. Two clashes followed. During the two days in the village they conducted a search of each house. A number of houses, between ten and twelve, were burnt down during the operation, including those of the applicant and Mevlüde and Ali Kurt, Mevlüde being her son's aunt. Only three of the houses were near the clashes. Other houses were burnt down on a second occasion during the military operation. The villagers were told that

they had a week to evacuate the village. The villagers fled to Bismil, many as they were homeless and those who were not, being too scared to remain.

15. According to the applicant, around noon on 24 November 1993, when the villagers had been gathered together by the soldiers in the schoolyard, the soldiers were looking for her son, Üzeyir, who was not in the schoolyard. He was hiding in the house of his aunt Mevlüde (see paragraph 14 above). When the soldiers asked Aynur Kurt, his daughter, where her father was, Aynur told them he was at his aunt's house. The soldiers went to Mevlüde's house with Davut Kurt, another of the applicant's sons, and took Üzeyir from the house. Üzeyir spent the night of 24-25 November 1993 with soldiers in the house of Hasan Kılıç.

On the morning of 25 November 1993, the applicant received a message from a child that Üzeyir wanted some cigarettes. The applicant took cigarettes and found Üzeyir in front of Hasan Kılıç's house surrounded by about ten soldiers and five to six village guards. She saw bruises and swelling on his face as though he had been beaten. Üzeyir told her that he was cold. She returned with his jacket and socks. The soldiers did not allow her to stay so she left. This was the last time she saw Üzeyir. The applicant maintains that there is no evidence that he was seen elsewhere after this time.

16. On 30 November 1993 the applicant applied to the Bismil public prosecutor, Ridvan Yıldırım, to find out information on the whereabouts of her son. On the same day, she received a response from Captain Izzet Cural at the provincial gendarme headquarters stating that it was supposed that Üzeyir had been kidnapped by the PKK (the Kurdish Workers' Party). Captain Cural, who had proposed the plan for the operation in the village, replied in identical terms on 4 December 1993. The district gendarme command noted on the bottom of the applicant's petition of 30 November that Üzeyir had not been taken into custody and that he had been kidnapped by the PKK.

17. On 14 December 1993 the applicant applied to the State Security Court in Diyarbakır which replied that he was not in their custody records. On 15 December 1993 she contacted the Bismil public prosecutor again but was referred to the gendarmerie. Finally, on 24 December 1993 the applicant approached the Diyarbakır Human Rights Association in Diyarbakır for help and made a statement on the circumstances surrounding her son's disappearance.

18. On 28 February 1994 Davut Karakoç (Üzeyir's cousin), Arap Kurt (Üzeyir's uncle and *muhtar* of the village) and Mehmet Kurt (another of Üzeyir's cousins) were taken to the gendarme command and questioned about what they knew of "Üzeyir Kurt who was abducted by representatives of the PKK terrorist organisation". On 21 March 1994 the Bismil public prosecutor issued a decision of non-jurisdiction on the grounds that a crime had been committed by the PKK.

2. *Concerning alleged intimidation and interference with the exercise of the right of individual petition*

(a) in respect of the applicant

19. The applicant maintains that since submitting her application to the Commission on 11 May 1994 she has been the target of an extraordinarily concerted campaign by the State authorities to make her withdraw her application.

20. On 19 November 1994 the applicant was called to give a statement to the Bismil public prosecutor on the instructions of the Diyarbakır Chief State Prosecutor. In this statement she was questioned about the statement she made to the Diyarbakır Human Rights Association on 24 December 1993 (see paragraph 17 above) as well as about her application to the Commission. She denied in her statement to the public prosecutor that the villagers had been tortured by the security forces as had been alleged in the statement taken down by the Diyarbakır Human Rights Association and rejected the reference in the latter statement to the effect that her son had been tortured. She had simply told the Human Rights Association that her son's face looked like it was swollen.

21. On 9 December 1994 the applicant signed a statement addressed to the Diyarbakır Human Rights Association which said that her petitions were written by the PKK terrorist organisation and were being used for propaganda purposes. A similar statement was addressed the same day to the Foreign Ministry in Ankara.

22. On 6 January 1995 the applicant was called by the State authorities to go to a notary in Bismil and was accompanied there by a soldier. She did not pay the notary. The statement which was signed indicated that her only wish was to find her son and that it was for this reason that she had contacted the Diyarbakır Human Rights Association. She indicated that an ill-founded petition had been made in her name by the PKK accusing the security forces of her son's disappearance. She rejected the application made in her name to the Commission and did not wish to pursue it.

23. On 25 January 1995 a statement was taken by the Chief State Prosecutor's Office, as part of a file prepared by the authorities for the purpose of bringing a complaint against the applicant's lawyer, Mr Mahmut Şakar (see paragraph 25 below).

24. On 10 August 1995 the applicant made another statement before the notary in Bismil which purported to withdraw her application to the Commission. While she was not forced to say anything to the notary and she told him what she wanted to be written, the applicant maintained that the statements do not represent her wishes and she had no opportunity to verify the contents of the statements.

(b) actions taken against the applicant's lawyer, Mr Şakar

25. The applicant states that the authorities have taken steps with a view to prosecuting her lawyer, Mr Mahmut Şakar, for his involvement in her petition to the Commission. She refers to a request made in a document dated 12 January 1995 by Mr Özkarol of the Foreign Ministry's Human Rights Directorate that an investigation be opened against Mr Şakar who was suspected of exploiting the applicant and had made a petition against Turkey.

B. Facts as presented by the Government

1. Concerning the disappearance of the applicant's son

26. Ağıllı is a thirty-six household village. From this village and its surroundings, about fifteen men and women have joined the PKK, which is a high ratio for such a small village. These include Türkan Kurt, the daughter of Musa Kurt, one of the applicant's sons.

27. While an operation did take place in the village and clashes occurred between the security forces and suspected terrorists, Üzeyir Kurt was not taken into custody by the security forces. He had no history of previous detention or problems with the authorities and there was no reason for him to be taken into custody.

28. The Government submit that there are strong grounds for believing that Üzeyir Kurt has in fact joined or been kidnapped by the PKK. They refer to the fact that the family allege that his brother died in gendarme custody several years before; the fact that the applicant stated that he hid when the security forces arrived in the village; and the fact that his house was burnt down following the clash in the village. Further, some members of the family had already joined the PKK and several months after the operation in the village a shelter was found outside the village which it was said was used by Üzeyir Kurt in his contacts with the PKK. There is also a strong tradition of villagers escaping to the mountains at the onset of any military action. Villagers have also stated that they heard that he had been kidnapped by the PKK.

29. The Government submit that Üzeyir could have hidden in the village at the commencement of the operation and then, under cover of darkness and poor weather, slipped through the security forces' blockade. Mehmet Karabulut testified before the Commission's Delegates at the hearing in Ankara that on the night following the first clash Üzeyir was in Mevlüde's home sleeping (see paragraph 15 above) but that when he woke in the morning Üzeyir was no longer there. The Government stress that Mehmet Karabulut testified that he had not seen or heard soldiers in Mevlüde's house, which would confirm that Üzeyir went off of his own accord.

30. The only person who claims to have seen Üzeyir after that is the applicant, whose accounts are inconsistent, contradictory and unsubstantiated. In particular, she affirmed to the Delegates at the hearing in Ankara (see paragraph 13 above) that the villagers assembled in the schoolyard were blindfolded. She subsequently retracted this statement. Furthermore, her statements to the Diyarbakır Human Rights Association and to the Commission in her application refer to one visit to her son to give him cigarettes, whereas in her oral testimony before the Delegates she referred to two visits; her descriptions of how she received a message from her son vary and she could not identify the child who allegedly delivered the message to her that her son wanted cigarettes (see paragraph 15 above). In addition, her account of making two visits passing through the village when the security forces stated they were keeping people in their houses for security reasons is implausible. The Government also maintain that it would have been impossible for the applicant to retrieve her son's jacket and socks from his house on 25 November (see paragraph15 above) since it was alleged by the applicant that it had been burnt down the previous day.

31. The Government place particular emphasis on the fact that Hasan Kılıç (see paragraph 15 above) in his statement to the gendarmes of 7 December 1994 affirmed that the applicant came to his house, talked to her son who had spent the night there and then left with him. The soldiers had not left with Üzeyir. Furthermore, Üzeyir had not asked for cigarettes to be brought to him at the house; nor did he see Üzeyir being detained in front of his house by soldiers and village guards, as alleged. In fact, as Captain Cural told the Delegates at the hearing in Ankara, no village guards had entered the village to back-up the military operation being conducted.

32. In further support of the inconsistencies and contradictions in the applicant's account of the events, the Government also point to the allegations originally made in the applicant's application to the Commission in which it was stated that the soldiers killed the livestock, pillaged goods and beat the villagers. The applicant acknowledged that these allegations were incorrect when giving evidence to the Delegates.

2. *Concerning the alleged intimidation and interference with the exercise of the right of individual petition*

33. The Government submit that the applicant was not subjected to any pressure not to give evidence before the Delegates as was strongly alleged by the applicant's representatives.

34. The Government submit that the applicant has clearly stated that she does not wish to make a complaint against the State. Her only concern was to find her son and it was for that purpose only that she went to the Diyarbakır Human Rights Association. She had never been subjected to pressure by the authorities to withdraw her application to the Commission.

She had freely made statements to a Bismil notary on 6 January and 10 August 1995 (see paragraphs 22 and 24 above) in which she rejected the application to the Commission which the Diyarbakır Human Rights Association had presented in her name. No soldiers were around her when she made these statements, there was an interpreter present and her statements were read out to her before she fingerprinted them.

35. According to the Government, the applicant has been manipulated by the representatives of the Diyarbakır Human Rights Association who distorted the information which she gave them about the disappearance of her son into unfounded allegations that the soldiers *inter alia* slaughtered and ate the villagers' livestock during the operation in the village, looted their goods and tortured the persons kept in the schoolyard (see paragraph 32 above). These and other serious allegations were later shown to be fabrications and the applicant has herself denied that she made them. She had never been put under pressure by the authorities not to attend the Delegate's hearing in Ankara. In fact, she had been minded not to attend since she was anxious to discontinue the application. It was in fact her lawyers who put pressure on her to appear since they discovered that she in fact did not want to attend.

36. As to the prosecution of the applicant's lawyer, Mahmut Şakar, the Government state that he has been instrumental in the manipulation of the application to the Commission and has exploited the Convention system for propaganda purposes. The Government's decision to take proceedings against him was justified.

C. Materials submitted by the applicant and the Government to the Commission in support of their respective assertions

37. In the proceedings before the Commission the applicant and the Government submitted a number of statements which she had made between 24 December 1993 and 7 February 1996 to the Diyarbakır Human Rights Association, the Bismil public prosecutor, the gendarmes, the Chief Prosecutor's Office at Diyarbakir and to the notary in Bismil. The applicant also submitted official documents concerning the enquiry into the conduct of her lawyer, Mahmut Şakar. These materials were studied by the Commission when assessing the merits of the applicant's allegations as regards both the disappearance of her son and the intimidation of both her and her lawyer.

38. Statements were taken by gendarmes from twelve villagers between 23 February and 7 December 1994. On 23 February 1994 Arap Kurt, the *muhtar* of Ağıllı village at the relevant time, Davut Karakoç and Mehmet Kurt (both cousins of Üzeyir Kurt) were interviewed by gendarme officers and asked about "their knowledge and observations about the hostage Üzeyir Kurt who had been kidnapped by the PKK." Hasan Kılıç (see

paragraph 15 above), Mevlüde Kurt (see paragraph 15 above) and other villagers present at the time of the military operation were questioned by gendarme officers on 7 December 1994. None of the villagers questioned saw Üzeyir Kurt being taken into custody. Hasan Kılıç affirmed in his statement that Üzeyir Kurt had arrived at his house at the beginning of 24 November, spent the night there and left the following morning when his mother arrived. While there had been soldiers staying in the house overnight, Kilic maintained that the applicant and her son left the house together and the soldiers definitely did not leave with Üzeyir Kurt.

All the above statements were studied by the Commission when assessing the evidence before it. The Government rely on these statements to support their contention that the applicant's son had not been detained in the village by the security forces as alleged and that there was a reasonable likelihood that he had either been kidnapped by the PKK or left to join the PKK.

The Government also produced in the proceedings before the Commission the incident report drawn up by security forces on 24 November 1993; a report dated 19 November 1994 from the Bismil prosecutor to the Diyarbakır Office of the Attorney-General suggesting that the evidence pointed to the applicant's son having been kidnapped by the PKK following the clash on 23 November 1993; and a report dated 8 December 1994 prepared by Colonel Eşref Hatipoğlu of the Gendarme General Command, Diyarbakır, on the conduct of the operation in Ağıllı village and confirming, *inter alia*, that the applicant's son had not been taken into custody.

D. Proceedings before the domestic authorities

39. On 30 November 1993 the applicant submitted a thumb-printed petition to the Bismil public prosecutor, Ridvan Yıldırım. It stated that her son had been taken into custody following a clash between the gendarmes and the PKK at her village and she was concerned about his fate. She requested that she be informed of his fate. On the same date the public prosecutor passed the petition to the district gendarme command with a hand-written request for the information to be provided. The district gendarme command noted in handwriting on the petition the same day that it was not true that Üzeyir Kurt had been taken into custody and that it was supposed that he may have been kidnapped by the PKK.

40. By letter dated 30 November 1993 Captain Cural, under heading of the provincial gendarme command, informed the Bismil Chief State prosecution service in answer to their unnumbered letter that Üzeyir Kurt had not been taken into custody and it was thought that he had probably been kidnapped by terrorists.

41. By letter dated 4 December 1993 Captain Cural, district gendarme commander, under heading of the district gendarme command at Bismil, informed the Bismil Chief State prosecution service that Üzeyir Kurt had not been taken into custody and it was thought that he had probably been kidnapped by terrorists (identical terms to the letter of 30 November in the preceding paragraph).

42. On 14 December 1993 the applicant submitted a fingerprinted petition to the Chief Prosecutor at the State Security Court at Diyarbakır. She stated that her son Üzeyir had been taken into custody twenty days previously by gendarmes and since they had had no news, they were concerned for his life. She requested that information be given to her concerning his whereabouts. On the bottom of the petition, the Chief State Prosecutor noted in handwriting the same day that the name Üzeyir Kurt was not in their custody records.

43. On 15 December 1993 the applicant submitted a second written petition to the Bismil public prosecutor which repeated the terms of her petition of 14 December. The prosecutor wrote on the petition an instruction to gendarme regional command to provide her with the information requested.

44. On 21 March 1994 the Bismil public prosecutor, Ridvan Yıldırım, issued a decision of dismissal. The document identifies the complainant as the applicant and the victim as Üzeyir Kurt. The crime was identified as membership of an outlawed organisation and kidnapping and the suspects as members of the PKK. The text of the decision stated that following a clash between the PKK and the security forces, PKK members escaped from the village, kidnapping the said victim. Since this crime fell with the jurisdiction of the State Security courts, the case was dismissed and referred, with the file, to the Diyarbakır State Security Court.

E. The Commission's evaluation of the evidence and its findings of fact

1. The written and oral evidence

45. The Commission had regard to the documentary evidence submitted by the applicant and the Government in support of their respective assertions (see paragraphs 37 and 38 above). Furthermore, at a hearing held in Ankara from 8 to 9 February 1996 the Commission's Delegates heard the oral testimony of the following witnesses: the applicant; Arap Kurt, the *muhtar* of Ağıllı village and brother-in-law of the applicant; Ridvan Yıldırım, the public prosecutor in Bismil who had been first approached by the applicant about her son's disappearance (see paragraph 16 above); Izzet Cural, commander of the Bismil district gendarmerie, who had proposed the plan for the military operation in Ağıllı village (see paragraph 31 above);

Muharram Küpeli, a commander of a commando unit which was deployed during the military operation in the village; and Mehmet Karabulut, who had seen the applicant's son for the last time at Ali and Mevlüde Kurt's house when the military operation began (see paragraph 29 above).

While thirteen witnesses had been summoned to give evidence, only the above six witnesses actually appeared at the hearing and testified.

2. The approach to the evaluation of the evidence

46. The Commission approached its task in the absence of any findings of fact made by domestic courts and of any thorough judicial examination or other independent investigation of the events in question. In so proceeding, it assessed the evidence before it having regard *inter alia* to the conduct of the witnesses who were heard by the Delegates at the hearing in Ankara and to the need to take into account when reaching its conclusions the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. The Commission also made due allowance for the difficulties attached to assessing evidence obtained at the Delegates' hearing through interpreters and to the vulnerable position of villagers from south-east Turkey when giving evidence about incidents involving the PKK and the security forces.

3. The Commission's findings of fact

(a) The military operation in Ağıllı village

47. The Commission found that the written and oral evidence was largely consistent as regards the general course of events during the operation. It was established that the villagers were gathered together in the schoolyard on the morning of 24 November and searches were then carried out of the villagers' houses. During the clashes between the security forces and the terrorists who had entered the village the previous evening a number of houses including those of the applicant and her son were burned down. The villagers were again assembled in the schoolyard on 25 November. Three terrorists and one member of the security forces were killed in the clashes which occurred during the operation. Twelve villagers were taken into custody on 24 November and were released on 26 November. The security forces left the village late on 25 November.

(b) The alleged taking into custody of the applicant's son Üzeyir Kurt

48. The Commission noted that it was established that Üzeyir Kurt was present in the village of Ağıllı on the evening of 23 November 1993 and that the evidence pointed to his having stayed the night at the house of his uncle and aunt, Ali and Mevlüde, because of the clash between the PKK and the security forces.

49. It was also established that when the villagers were gathered in the schoolyard by the security forces on the morning of 24 November 1993, Üzeyir Kurt was not among them.

50. While Hasan Kılıç maintained that Üzeyir Kurt had left with his mother on the morning of 25 November having spent the night at his house, the applicant had however consistently stated that her son was with the soldiers after the villagers had been gathered during the day in the schoolyard. The last time she saw him was when she took him cigarettes and clothing to Hasan Kılıç's house where he was being held by the security forces. Her account was largely consistent with her original statement of 24 December 1993 taken by the Diyarbakır Human Rights Association and with her statements and evidence thereafter. While the statement to the Diyarbakır Human Rights Association needed to be treated with caution, having regard to previous criticism which the Commission had made of the accuracy of the statements taken by that Association from applicants in other cases, the Commission nonetheless considered that it had evidential value insofar as it was corroborated by the applicant's detailed account to the Delegates. While the statement of Hasan Kılıç appeared to contradict the applicant's account that her son was detained as alleged, the Commission found that it did contain inaccuracies and was open to differing interpretations. The Commission regretted that Hasan Kılıç did not respond to the summons to attend the hearing and give evidence. Where his written statement appeared to conflict with the account of the applicant who did give oral evidence before the Delegates, the Commission preferred the evidence of the applicant, who was found by the Delegates to be credible and convincing.

51. The Commission did not consider that the Government's criticism of the applicant's account sufficed to undermine her credibility (see paragraphs 30-32 above). As regards her initial allegation that the villagers were blindfolded it was possible that this was a reference to the twelve persons who were removed from the schoolyard and taken into custody for questioning in Bismil (see paragraph 47 above). As to the applicant's account of finding cigarettes and a jacket, the Commission saw no particular significance in her omission to specify from where she obtained the jacket: the question was never directly put to her. Further, there was nothing in the gendarmes' testimony to indicate that villagers were not able, if they wished, to move briefly from house to house in the period in the early morning before they were gathered for the day in the schoolyard.

52. It had been maintained that the village guards had all been positioned outside the village to mind the military's vehicles and their members could not therefore have been outside Hasan Kılıç's house as alleged by the applicant. However, the Commission did not find it excluded

on the evidence that village guards were in the village at some time during the operation contrary to the apparent operational practice whereby the role of village guards should be restricted to areas outside villages other than their own.

53. The Commission found that it was the applicant's genuine and honestly-held belief that her son was taken into custody by the security forces after which he "disappeared" and that there was no basis for inferring that the applicant's testimony was influenced by a reluctance to accord blame to the PKK or to acknowledge their involvement. Having regard to the assessment of the evidence before it, the Commission accepted her evidence that she saw him surrounded by soldiers and village guards outside Hasan Kılıç's house on the morning of 25 November 1993. It found that this was the last time he was seen by any member of his family or person from the village.

(c) Other aspects of the conduct of the operation

54. The Commission found it unnecessary to make any findings as to the cause of the burning of the applicant's house or as to the role, if any, played by the security forces in the decision of the villagers to abandon the village (see paragraph 14 above).

II. RELEVANT DOMESTIC LAW AND PRACTICE

55. The Government have not submitted in their memorial any details on domestic legal provisions which have a bearing on the circumstances of the case. The Commission in its Article 31 report provided an overview of domestic law and practice which may be of relevance to the case. This overview was based on submissions by the respondent State in previous cases.

A. Constitutional provisions on administrative liability

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

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

57. 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 the theory of "social risk". Thus, the Administration may indemnify people

who have suffered damage from acts committed by unknown or terrorist authors when the State may be said to have failed in its duty to maintain public order and safety, or in its duty to safeguard individual life and property.

B. Criminal law and procedure

58. The Criminal Code makes it a criminal offence

- to deprive someone unlawfully of his or her liberty (Article 179 generally, Article 181 in respect of civil servants),
- to issue threats (Article 191),
- to subject someone to torture or ill-treatment (Articles 243 and 245).

In respect of all these offences 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 crimes 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.

59. Generally, if the alleged author of a crime 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. If the offender is a member of the armed forces, he would fall under the jurisdiction of the military courts and would be tried in accordance with the provisions of Article 152 of the Military Criminal Code.

C. Civil law provisions

60. Any illegal act by civil servants, be it a crime or a tort, which causes material or moral damage may be the subject of a claim for compensation before the ordinary civil courts. Pursuant to Article 41 of the Civil Code, an injured person may file a claim for compensation against an alleged perpetrator who has caused damage in an unlawful manner whether wilfully, negligently or imprudently. Pecuniary loss may be compensated by the civil courts pursuant to Article 46 of the Civil Code and non-pecuniary or moral damages awarded under Article 47.

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

D. The impact of Decree 285

62. In previous cases against the respondent State in which they were involved, the applicant's representatives have 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. 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.

III. RELEVANT INTERNATIONAL MATERIAL

63. The applicant as well as Amnesty International in their written submissions to the Court have drawn attention to international materials on the issue of forced disappearances. The Commission made reference to the following texts and decisions, which are analysed more fully in an appendix to its report (Article 31).

A. United Nations Material

64. The UN Declaration on the Protection of All Persons from Enforced Disappearance (G.A. res. 47/133, 18 December 1992) provides, *inter alia*:

> "The systematic practice of disappearance is of the nature of a crime against humanity and constitutes a violation of the right to recognition as a person before the law, the right to liberty and security of the person, the right not to be subjected to torture: it also violates or constitutes a grave threat to the right to life."

B. Case-law of the United Nations Human Rights Committee (HRC)

65. The United Nations Human Rights Committee, acting within the framework of the International Covenant on Civil and Political Rights ("ICCPR") has drawn up reports on a number of cases of forced disappearances: Quinteros v. Uruguay (107/1981) Report of the Human Rights Committee, GAOR, 38th Session, Supplement No.40 (1983) Annex XXII, para 14); Mojica v. Dominican Republic, decision of 15 July 1994,

Committee's views under Article 5 (4) of the Optional Protocol to the ICCPR concerning communication no. 449/1991: Human Rights Law Journal ("HRLJ") Vol. 17 No. 1-2 p. 18; Bautista v. Colombia, decision of 27 October 1995, Committee's views under Article 5(4) of the Optional Protocol to the ICCPR concerning communication no. 563/1993: HRLJ Vol. 17 No. 1-2 p. 19).

C. Material from the Organisation of American States (OAS)

66. Inter-American Convention on Forced Disappearance of Persons (resolution adopted at the 7th Plenary session by the General Assembly, June 9, 1994, OAS/Ser. P AG/doc.3114/94 rev.1: not yet in force) provides, *inter alia*:

"Preamble

... Considering that the forced disappearance of persons constitutes an extremely serious form of repression, one that violates basic human rights enshrined in the American Declaration of the Rights and duties of Man, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the American Convention on Human Rights.

...

Article 2

For the purposes of this Convention, forced disappearance is understood to be the abduction or detention of any person by an agent of a State or by a person acting with the consent or acquiescence of a State in circumstances where, after a reasonable period of time there has been made available no information that would permit the determination of the fate or whereabouts of the person abducted or detained.

...

Article 4

The forced disappearance of a person is a crime against humanity. Under the terms of this Convention, it engages the personal responsibility of its perpetrators and the responsibility of the state whose authorities executed the disappearance or consented to it.

...

Article 18

By means of ratification or accession to this Convention the States parties adopt the United Nations Standard Minimum Rules for the Treatment of Prisoners (Resolution 663 C [XXIV] of the Economic and Social Council, of 31 July 1957) as an integral part of their domestic law."

D. Case-law of the Inter-American Court of Human Rights

67. The Inter-American Court of Human Rights had considered the question of enforced disappearances in a number of cases under the provisions of the American Convention on Human Rights and prior to the adoption of the Inter-American Convention on Forced Disappearance of Persons: Velásquez Rodríguez v. Honduras, judgment of 29 July 1988 (Inter-Am. Ct. H. R. (Ser. C) No. 4) (1988)); Godínez Cruz v. Honduras, judgment of 20 January 1989 (Inter-Am. Ct. H. R. (Ser. C) No. 5) (1989)); and Cabellero-Delgado and Santana v.Colombia, judgment of 8 December 1995 (Inter-Am. Ct. H. R.).

E. Submissions of Amnesty International

68. In their written submissions to the Court, Amnesty International identified the following elements of the crime of "disappearances" from their analysis of the relevant international instruments addressing this phenomenon: (a) a deprivation of liberty; (b) by government agents or with their consent or acquiescence; followed by (c) an absence of information or refusal to acknowledge the deprivation of liberty or refusal to disclose the fate or whereabouts of the person; (d) thereby placing such persons outside the protection of the law.

69. According to Amnesty International, while "disappearances" often take the form of a systematic pattern, they need not do so. Furthermore, a "disappearance" is to be seen as constituting a violation not only of the liberty and security of the individual but also of other fundamental rights. They refer to the decision of the Inter-American Court of Human Rights in the Velásquez Rodríguez v. Honduras case (judgment of 29 July 1988) wherein that court affirmed that "the phenomenon of disappearances is a complex form of human rights violation that must be understood and confronted in an integral fashion." This complex of rights includes the right to life and the right not to be subjected to ill-treatment. The gravity of the violations of the rights attendant on a disappearance has led the United Nations Human Rights Committee to conclude in relation to Article 6 of the International Covenant on Civil and Political Rights that State Parties should take specific and effective measures to prevent the disappearance of individuals and should establish facilities and procedures to investigate

thoroughly cases of missing and disappeared persons which may involve a violation of the right to life (General Comment No. 6 (Sixteenth Session 1982) [37 UN GAOR, Supp, No.40 (A/37/40), annex V] paragraph 1). The Human Rights Committee later affirmed this statement in its Mojica v. Dominican Republic decision of 15 July 1994 with respect to the need to safeguard disappeared persons against the risks of ill-treatment.

70. Citing the above-mentioned Velásquez Rodríguez v. Honduras judgment of the Inter-American Court, Amnesty International reported that the practice of disappearances often involves the secret execution without trial and concealment of the body and that the prolonged isolation and deprivation of an individual are in themselves cruel and inhuman treatment, which is harmful to the psychological and moral integrity of the victim. In its Mojica v. Dominican Republic decision of 15 July 1994, the United Nations Human Rights Committee considered that the disappearance of a person is inseparately linked to treatment that amounts to a violation of Article 7 of the International Covenant on Civil and Political Rights which mirrors Article 3 of the European Convention on Human Rights.

71. Furthermore, Amnesty International has drawn attention to the fact that "disappearances" gravely violate the rights of the "disappeared" person's family, who almost certainly suffer severe mental anguish, often prolonged for years while uncertainty exists over their loved one's fate. Amnesty International notes that the United Nations Human Rights Committee has taken this approach in its Quinteros v. Uruguay decision of 21 July 1983.

PROCEEDINGS BEFORE THE COMMISSION

72. Mrs Koçeri Kurt applied to the Commission on 11 May 1994 on her son's behalf as well as on her own behalf. She complained that her son, Üzeyir, was taken into detention and that he has subsequently disappeared. She maintained that her son is a victim of breaches by the respondent State of Articles 2, 3, 5, 14 and 18 of the Convention and that she herself is a victim of breaches of Articles 3 and 13 of the Convention.

73. The Commission declared the application (no. 24276/94) admissible on 22 May 1995. In its report of 5 December 1996 (Article 31), it expressed the opinion that there had been a violation of Article 5 in respect of the disappearance of the applicant's son (unanimously); that there had been a violation of Article 3 in respect of the applicant (nineteen votes to five); that it was not necessary to examine separately the complaints made under Articles 2 and 3 of the Convention in relation to the applicant's son (unanimously); that there had been a violation of Article 13 of the Convention (unanimously) in respect of the applicant; that there had been

no violation of Articles 14 and 18 of the Convention (unanimously); and that Turkey had failed to comply with its obligations under Article 25 § 1 of the Convention (unanimously). The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT

74. The applicant requested the Court in her memorial to find that the respondent State were in violation of Articles 2, 3, 5, 14 and 18 of the Convention on account of her son's "disappearance" and that she herself is a victim of a violation of Articles 3 and 13. She further contended that the respondent State had failed to comply with its obligations under Article 25 § 1. She requested the Court to award her and her son just satisfaction under Article 50.

75. The Government, for its part, requested the Court in their memorial to rule that the case was inadmissible having regard to the absence of a valid application. Alternatively, they argued that the applicant's complaints were not substantiated. At the oral hearing the Government also maintained that the case should be declared inadmissible on account of the applicant's failure to exhaust domestic remedies.

AS TO THE LAW

I. THE GOVERNMENT'S FIRST PRELIMINARY OBJECTION

76. The Government maintained that the applicant had never intended to lodge a complaint against the authorities before the Convention institutions. Her sole concern in contacting the public prosecutor and other officials (see paragraphs 39-43 above) was to ascertain the fate of her son and to eliminate the possibility that he might be in detention following the military operation in her village. Her quest for information on her son's whereabouts was subsequently exploited by the Diyarbakır Human Rights Association whose representatives fabricated allegations against the State and manipulated the applicant into impugning the authorities for the disappearance of her son. They insisted that the applicant had on

1. *Note by the Registrar*. For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* 1998), but a copy of the Commission's report is obtainable from the registry.

two occasions gone of her own volition to a notary in Bismil to repudiate the allegations made in the application (see paragraph 34 above) which had been lodged with the Commission at the instigation of the Association.

77. The Commission found that the applicant's oral statements before the Delegates confirmed her intention to pursue her case against the authorities and that there was no reason to suppose that her application to the Commission, irrespective of the involvement of the Diyarbakır Human Rights Association in its preparation (see paragraphs 17 and 50 above), did not reflect her belief that the State was accountable for her son's disappearance.

78. The Court observes that the applicant confirmed her intention to take part in the proceedings before it and designated her legal representatives for this purpose (see paragraph 2 above). Moreover, she was present at the oral hearing before the Court in her case. Having regard also to her clear affirmation before the Delegates (see paragraph 77 above), it must be concluded that when she first contacted the Diyarbakır Human Rights Association on 23 December 1993 she was seeking redress in respect of the authorities' refusal to admit that her son had been taken into custody and that he had not been since. That was the essence of her complaint against the authorities and she has steadfastly maintained that complaint in all her contacts with the domestic authorities (see paragraph 37 above) and throughout the proceedings before the Convention institutions. Her application must therefore be considered valid and freely lodged by her in the exercise of her right of individual petition.

The Government's objection is therefore rejected.

II. THE GOVERNMENT'S SECOND PRELIMINARY OBJECTION

79. Although the Government did not allude to this matter in their memorial they asserted at the oral hearing, as they had done at the admissibility stage of the proceedings before the Commission, that the applicant had not exhausted available and effective remedies under domestic law. Her case must on that account be declared inadmissible having regard to the requirements of Article 26 of the Convention.

80. The Government pleaded that the applicant had never instituted legal proceedings to challenge the authorities' findings, firstly, that her son had not been detained in the village and, secondly, that he was not in detention. The applicant had herself conceded that at no stage had pressure ever been brought to bear on her to dissuade her from invoking the jurisdiction of the domestic courts. Turkish law guaranteed her a range of remedies if she believed that the State was linked to her son's disappearance. They stressed in this respect that she could have sued the authorities in administrative law

proceedings, invoking the principle of strict liability in respect of the acts of public authorities (see paragraphs 56-58 above). Furthermore, the criminal law was there to assist her if she believed that her son had been unlawfully deprived of his liberty or had been killed or ill-treated at the hands of the authorities as alleged (see paragraph 59 above). Since the applicant had never resorted to any of these remedies she must on that account be considered to have failed to comply with Article 26 of the Convention.

81. The Court notes that the Government's objection was not raised in their memorial but only at the oral hearing and therefore outside the time-limit prescribed in Rule 48 § 1 of Rules of Court A, which stipulates:

> "A Party wishing to raise a preliminary objection must file a statement setting out the objection and the ground therefor not later than the time when that Party informs the President of its intention not to submit a memorial, or alternatively, not later than the expiry of the time-limit laid down in Rule 37 § 1 for the filing of its first memorial."

82. The objection must therefore be rejected (see the Olsson v. Sweden (no. 1) judgment of 24 March 1988, Series A, no. 130, p. 28, § 56).

83. Moreover, the Court notes in this respect that Mrs Kurt did everything that could be expected of her to seek redress for the complaint. She contacted the public prosecutor in Bismil on two occasions; firstly, on 30 November 1993 and, secondly, on 15 December 1993. She also petitioned the State Security Court at Diyarbakır on 14 December 1993 (see paragraphs 39-43 above). At no stage did the authorities take a statement from her although she insisted that her son had been taken into custody following the clash between the soldiers and the PKK in her village. Her petition of 15 December was even more forceful since she stated that she was concerned for his life. Both the district gendarme command and Captain Cural of the provincial command, on the very day that the applicant lodged her first petition, reported back that it was supposed that Üzeyir Kurt had been kidnapped by the PKK. However, no reasons were given to support this hastily reached hypothesis and the public prosecutor did not enquire further into its merits. The applicant's reluctance to accept the official explanation is confirmed by the fact that she persisted with her request for information on her son's whereabouts by contacting the authorities on two further occasions, maintaining all along that he had been taken into custody. However, no serious consideration was ever given to this assertion, the authorities preferring instead to pursue an unsubstantiated line of enquiry that he had been kidnapped by the PKK. In the absence of any effective investigation by the authorities into her complaint there was no basis for any meaningful recourse by the applicant to the range of remedies described by the Government in their submissions before the Court.

In the opinion of the Court, these reasons would have been sufficient in themselves for it to have concluded in the light of its settled case-law (see, among other authorities, the Akdivar and Others v. Turkey judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, pp. 2275-2276, §§ 65-69) that there existed special circumstances which dispensed the applicant from the obligation to exhaust domestic remedies and to have rejected the Government's objection on that account.

III. ALLEGED VIOLATIONS OF ARTICLES 2, 3 AND 5 OF THE CONVENTION IN RESPECT OF THE DISAPPEARANCE OF THE APPLICANT'S SON

84. The applicant requested the Court to find on the basis of the facts established by the Commission that the disappearance of her son engaged the responsibility of the respondent State under Articles 2, 3 and 5 of the Convention and that each of those Articles had been violated. She urged the Court, in line with the approach adopted by the Inter-American Court of Human Rights under the American Convention on Human Rights and by the United Nations Human Rights Committee under the International Covenant on Civil and Political Rights (see paragraphs 63-71 above) to the phenomenon of disappearances, not to confine its consideration of her son's plight to the issues raised under Article 5 of the Convention but to have regard also to those raised under Articles 2 and 3.

85. The Government contended that the Commission's fact-finding and its assessment of the evidence were seriously deficient and could not ground a finding of a violation of any of the Articles invoked by the applicant.

86. The Commission concluded, for its part, that the respondent State had committed a particularly serious and flagrant violation of Article 5 of the Convention taken as a whole and for that reason had not found it necessary to examine separately the applicant's complaints under Articles 2 and 3.

A. Establishment of the facts

1. Arguments of those appearing before the Court

(a) The Commission

87. Before the Court the Delegate of the Commission stressed that the Commission's findings of fact had been reached on the basis of an investigation conducted by its Delegates in a scrupulously fair and impartial manner and without the benefit of any findings of a domestic inquiry. The

Commission was fully conscious of the inconsistencies and contradictions in the applicant's various written and oral statements on the course of events in the village during the military operation. Notwithstanding, she was found to be credible and convincing on the essential aspects of her account. Before the Delegates she had never wavered under cross-examination, including by the Government lawyers present, in her assertion that she had seen her son outside Hasan Kılıç's house on the morning of 25 November 1993 surrounded by soldiers and village guards. The Government's contention that Üzeyir Kurt had been either kidnapped by the PKK or had left the village to join the terrorists had no basis in fact and could not rebut the applicant's eye-witness account of her son's detention.

88. The Delegate insisted that the Commission had duly considered every single discrepancy identified by the Government in the applicant's version of the events. In particular, careful consideration was given to the seemingly conflicting statement provided by Hasan Kılıç to gendarme officers (see paragraph 31 above). Admittedly, Hasan Kılıç's account raised doubts about the accuracy of the applicant's recollection of the events on the morning of 25 November 1993. However, unlike the applicant, Hasan Kılıç had never testified before the Delegates and his statement had to be treated with caution since it had been taken by the very officers whom the applicant alleged had detained her son.

89. For the above reasons, the Delegate requested the Court to accept the facts as found by the Commission (see paragraph 53 above).

(b) The applicant

90. The applicant agreed with the facts as found by the Commission and its conclusions thereon. She had seen her son surrounded by soldiers and village guards outside Hasan Kılıç's house on the morning of 25 November 1993. She confirmed before the Court that she has not seen him since.

(c) The Government

91. The Government strenuously disputed the Commission's findings of fact, and in particular the undue weight which they gave to the applicant's evidence. They insisted that the applicant was in fact the only person claiming to have seen her son outside Hasan Kılıç's house surrounded by soldiers and village guards. However, the Commission found her testimony to be credible despite the fact that she had retracted earlier allegations made against the security forces (see paragraphs 30 and 32 above) and many features of her account were highly implausible and at odds with other evidence (see paragraph 30 and 31 above).

92. The Government criticised the Commission for not having given due weight to the evidence of other villagers who had confirmed that Üzeyir Kurt had not been detained in the village as alleged (see paragraph 38 above). Hasan Kılıç in particular had clearly affirmed when questioned that Üzeyir Kurt left his house in the company of the applicant and that there were no security forces outside the house at the relevant time (see paragraph 38 above). They regretted the Commission's unwillingness to give serious consideration to the official view that there might have been PKK involvement in his disappearance. That view had support in the statements of the villagers who had been questioned by the authorities (see paragraph 38 above).

93. For the above reasons the Government maintained that it had not been proved beyond reasonable doubt that the applicant had seen her son in the circumstances alleged and his disappearance could not therefore engage their responsibility.

2. The Court's assessment

94. The Court notes at the outset that it clearly emerges from paragraphs 159-179 of its Article 31 report that the Commission meticulously addressed the discrepancies in the applicant's account as well as each of the Government's counter-arguments.

95. As an independent fact-finding body confronted with an allegation which rests essentially on the eye-witness evidence of the complainant alone, the Commission paid particular regard to the applicant's credibility and to the accuracy of her recollection of the events on the morning of 25 November 1993. It is to be observed that at the hearing in Ankara she was questioned extensively on her account by the Delegates and by the lawyers appearing for the Government. While there were marked inconsistencies between the statement she gave to the Diyarbakır Human Rights Association (see paragraph 50 above) and her oral account before the Delegates, the applicant was steadfast in all her contacts with the authorities in her assertion that she had seen her son surrounded by soldiers and village guards in the village.

96. In the Court's view, the Commission properly assessed all the evidence before it, weighing in the balance the elements which supported the applicant's account and those which cast doubt on either its credibility or plausibility. Even though Hasan Kılıç did not respond to the Commission's summons to appear before the Delegates, his statement, which the Government consider as central to their case, was carefully scrutinised by the Commission alongside the applicant's testimony (see paragraph 50 above). Significantly, Mr Kılıç's account was found to be flawed in material respects and his non-appearance meant that, unlike the applicant's testimony, neither his credibility as a witness nor the probative

value of the statement taken from him by gendarme officers could be tested in an adversarial setting.

97. Furthermore, the Government's contention that the applicant's son had either been kidnapped by the PKK or had left the village to team up with the terrorists was duly considered by the Commission. However, support for this was mainly based on statements taken from villagers by the very gendarme officers who were the subject of the applicant's complaint (see paragraph 38 above) and these statements could properly be considered by the Commission to be of minimum evidential value.

98. The Court recalls that under its settled case-law the establishment and verification of the facts are primarily a matter for the Commission (Article 28 § 1 and 31 of the Convention). While the Court is not bound by the Commission's findings of fact and remains free to make its own appreciation in the light of all the material before it, it is only in exceptional circumstances that it will exercise its powers in this area (see, for example, the McCann and Others v. the United Kingdom judgment of 27 September 1995, Series A no. 324, p. 50, § 169; the Aksoy v. Turkey judgment of 18 December 1996, Reports 1996-VI, p 2272, § 38; the Aydın v. Turkey judgment of 25 September 1997, Reports 1997-VI, pp. 1888-89, § 70; and the Menteş v. Turkey judgment of 28 November 1997, Reports 1997-p. ..., § 66).

99. Having regard to the above considerations which are based on its own careful assessment of the evidence and the transcripts of the Delegates' hearing, the Court is not persuaded that there exist any exceptional circumstances which would compel it to reach a conclusion different from that of the Commission. It considers that there is a sufficient factual and evidentiary basis on which the Commission could properly conclude, beyond reasonable doubt, that the applicant did see her son outside Hasan Kılıç's house on the morning of 25 November 1993, that he was surrounded by soldiers and village guards at the time and that he has not been seen since.

B. Article 2

100. The applicant maintained that a number of factors militated in favour of a finding that her son was the victim of violations of Article 2 of the Convention, which stipulates:

> "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."

101. The applicant stressed that her son's disappearance occurred in a context which was life-threatening. She requested the Court to base itself on the approach taken by the Inter-American Court of Human Rights in the Velásquez Rodríguez v. Honduras case (judgment of 29 July 1988) as well as by the United Nations Human Rights Committee in the Mojica v. Dominican Republic case (decision of 15 July 1994) to the issue of enforced disappearances (see paragraphs 65-71 above) and to find the respondent State in breach of its positive obligation under Article 2 to protect her son's life. Such a finding could be reached, she maintained, even though there may not exist specific evidence that her son had died at the hands of the authorities of the respondent State.

102. In an alternative submission, the applicant asserted that there existed a well-documented high incidence of torture, unexplained deaths in custody as well as of "disappearances" in south-east Turkey which not only gave rise to a reasonable presumption that the authorities were in breach of their obligation to protect her son's life under Article 2 but, in addition, constituted compelling evidence of a practice of "disappearances" such as to ground a claim that her son was also the victim of an aggravated violation of that provision. She contended that the Inter-American Court in the above-mentioned Velásquez Rodríguez v. Honduras judgment of 29 July 1988 was prepared to draw the conclusion that the respondent State in that case had violated the right to life provision of the American Convention on Human Rights on the existence of either sort of evidence.

103. The applicant further submitted that the Court's own case-law provided two additional reasons why the respondent State should be found to be in breach of Article 2 given that it had been established that her son had been taken into custody on 25 November 1993 and has not been seen since then. In the first place, the authorities had failed to provide any convincing explanation as to how he had met his presumed death. Having regard to the approach taken by the Court in its Tomasi v. France judgment of 27 August 1992 (Series A, no. 241) to evidence of ill-treatment of a detainee, she reasoned that a similar approach should be taken *mutatis mutandis* in respect of the presumed death of her son. Secondly, and with reference to the McCann and Others v. the United Kingdom judgment of 27 September 1995 (Series A no. 324), the applicant maintained that the failure of the authorities to conduct a prompt, thorough and effective investigation into her son's disappearance must in itself be seen as a separate violation of Article 2.

104. The Government replied that the applicant had not substantiated her allegations that her son had been detained by the security forces. Accordingly, no issue could arise under Article 2.

105. The Commission found that in the absence of any evidence as to the fate of Üzeyir Kurt subsequent to his detention in the village it would be inappropriate to draw the conclusion that he had been a victim of a violation of Article 2. It disagreed with the applicant's argument that it could be inferred that her son had been killed either from the life-threatening context she described or from an alleged administrative practice of disappearances in the respondent State. In the Commission's opinion, the applicant's allegation as to the apparent forced disappearance of her son and the alleged failure of the authorities to take reasonable steps to safeguard him against the risks to his life attendant on his disappearance fell to be considered under Article 5 of the Convention.

106. The Court recalls at the outset that it has accepted the Commission's findings of fact in respect of the detention of the applicant's son by soldiers and village guards on 25 November 1993. Almost four and a half years have passed without information as to his subsequent whereabouts or fate. In such circumstances the applicant's fears that her son may have died in unacknowledged custody at the hands of his captors cannot be said to be without foundation. She has contended that there are compelling grounds for drawing the conclusion that he has in fact been killed.

107. However, like the Commission, the Court must carefully scrutinise whether there does in fact exist concrete evidence which would lead it to conclude that her son was, beyond reasonable doubt, killed by the authorities either while in detention in the village or at some subsequent stage. It also notes in this respect that in those cases where it has found that a Contracting State had a positive obligation under Article 2 to conduct an effective investigation into the circumstances surrounding an alleged unlawful killing by the agents of that State, there existed concrete evidence of a fatal shooting which could bring that obligation into play (see the above-mentioned McCann and Others judgment; and the Kaya v. Turkey judgment of 19 February 1998, Reports 1998-... p. ..., § ...).

108. It is to be observed in this regard that the applicant's case rests entirely on presumptions deduced from the circumstances of her son's initial detention bolstered by more general analyses of an alleged officially tolerated practice of disappearances and associated ill-treatment and extra-judicial killing of detainees in the respondent State. The Court for its part considers that these arguments are not in themselves sufficient to compensate for the absence of more persuasive indications that her son did

in fact meet his death in custody. As to the applicant's argument that there exists a practice of violation of, *inter alia*, Article 2, the Court considers that the evidence which she has adduced does not substantiate that claim.

109. Having regard to the above considerations, the Court is of the opinion that the applicant's assertions that the respondent State failed in its obligation to protect her son's life in the circumstances described fall to be assessed from the standpoint of Article 5 of the Convention.

C. Article 3 in respect of the applicant's son

110. The applicant, consonant with her approach to her complaints under Article 2, further alleged that her son had been the victim of breaches by the respondent State of Article 3, which stipulates:

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

111. Relying *mutatis mutandis* on the arguments used to support her complaints under Article 2, she reasoned that the respondent State was in breach of Article 3 of the Convention since the very fact of her son's disappearance in a context devoid of the most basic judicial safeguards must have exposed him to acute psychological torture. In addition, she had seen with her own eyes that he had been beaten by the security forces and this in itself gave rise to a presumption that he was physically tortured subsequent to his detention outside Hasan Kılıç's house.

112. The applicant maintained that this presumption must be considered even more compelling in view of the existence of a high incidence of torture of detainees in the respondent State. With reference to the materials relied on by her to ground her allegation of a practice of violation of Article 2, she requested the Court to conclude also that her son was the victim of an aggravated violation of Article 3 on account of the existence of an officially tolerated practice of disappearances and ill-treatment of detainees.

113. She submitted further that the failure of the authorities to provide any satisfactory explanation for her son's disappearance also constituted a violation of Article 3, and that the absence of any adequate investigation into her complaint resulted in a separate breach of that provision.

114. The Government repudiated the factual basis of the applicant's allegation under Article 3.

115. Before the Court, the Delegate explained that in the absence of any evidence as to the ill-treatment to which Üzeyir Kurt may have been subjected while in custody the Commission did not find it appropriate to find a violation of that provision. It considered that the applicant's complaints in respect of her son under Article 3 fell, like the Article 2 complaints, to be examined in the context of Article 5 of the Convention.

116. The Court agrees with the conclusion reached by the Commission on this complaint and refers in this respect to the reasons which have led it to reject the applicant's arguments alleging a violation of Article 2 (see paragraphs 107-109 above). In particular, the applicant has not presented any specific evidence that her son was indeed the victim of ill-treatment in breach of Article 3; nor has she adduced any evidence to substantiate her claim that an officially tolerated practice of disappearances and associated ill-treatment of detainees exists in the respondent State.

117. The Court, like the Commission, considers that the applicant's complaints concerning the alleged violations by the respondent State of Article 3 in respect of her son should, like the Article 2 complaints, be dealt with from the angle of Article 5 of the Convention.

D. Article 5

118. The applicant submitted that the disappearance of her son gave rise to multiple violations of Article 5 of the Convention, which, to the extent relevant, provides:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> ...
>
> 2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
>
> 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.
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

119. The applicant reasoned that the very fact that her son's detention was unacknowledged meant that he was deprived of his liberty in an arbitrary manner contrary to Article 5 § 1. She contended that the official cover-up of his whereabouts and fate placed her son beyond the reach of the law and he was accordingly denied the protection of the guarantees contained in Article 5 §§ 2, 3, 4 and 5.

120. The Government reiterated that the applicant's contention regarding the disappearance of her son was unsubstantiated by the evidence and had been disproved by the investigation which the authorities had conducted. In their submission, no issue could therefore arise under Article 5.

121. The Commission considered that the disappearance of the applicant's son raised fundamental and grave issues under Article 5 having regard to the importance of the guarantees offered by the provision for securing respect for the rights guaranteed by Articles 2 and 3. Having established that Üzeyir Kurt was in the custody of the security forces on 25 November 1993, the Commission reasoned that this finding gave rise to a presumption of responsibility on the part of the authorities to account for his subsequent fate. The authorities could only rebut this presumption by offering a credible and substantiated explanation for his disappearance and by demonstrating that they had taken effective steps to enquire into his disappearance and ascertain his fate. The Commission concluded that neither of these requirements was satisfied in the circumstances. For these reasons in particular, the Commission found that the unacknowledged detention and subsequent disappearance of Üzeyir Kurt involved a flagrant disregard of the guarantees of Article 5.

122. The Court notes at the outset the fundamental importance of the guarantees contained in Article 5 for securing the right of individuals in a democracy to be free from arbitrary detention at the hands of the authorities. It is precisely for that reason that the Court has repeatedly stressed in its case-law that any deprivation of liberty must not only have been effected in conformity with the substantive and procedural rules of national law but must equally be in keeping with the very purpose of Article 5, namely to protect the individual from arbitrariness (see, among many other authorities, the Chahal v. the United Kingdom judgment of 15 November 1996, Reports 1996-IV, p. 1864, § 118). This insistence on the protection of the individual against any abuse of power is illustrated by the fact that Article 5 § 1 circumscribes the circumstances in which individuals may be lawfully deprived of their liberty, it being stressed that these circumstances must be given a narrow interpretation having regard to the fact that they constitute

exceptions to a most basic guarantee of individual freedom (see, *mutatis mutandis*, the Quinn v. France judgment of 22 March 1995, Series A no. 311, p.17, § 42).

123. It must also be stressed that the authors of the Convention reinforced the individual's protection against arbitrary deprivation of his or her liberty by guaranteeing a corpus of substantive rights which are intended to minimise the risks of arbitrariness by allowing the act of deprivation of liberty to be amenable to independent judicial scrutiny and by securing the accountability of the authorities for that act. The requirements of Article 5 §§ 3 and 4 with their emphasis on promptitude and judicial control assume particular importance in this context. Prompt judicial intervention may lead to the detection and prevention of life-threatening measures or serious ill-treatment which violate the fundamental guarantees contained in Articles 2 and 3 of the Convention (see, *mutatis mutandis,* the above-mentioned Aksoy judgment, p. 2282, § 76). What is at stake is both the protection of the physical liberty of individuals as well as their personal security in a context which, in the absence of safeguards, could result in a subversion of the rule of law and place detainees beyond the reach of the most rudimentary forms of legal protection.

124. The Court emphasises in this respect that the unacknowledged detention of an individual is a complete negation of these guarantees and a most grave violation of Article 5. Having assumed control over that individual it is incumbent on the authorities to account for his or her whereabouts. For this reason, Article 5 must be seen as requiring the authorities to take effective measures to safeguard against the risk of disappearance and to conduct a prompt effective investigation into an arguable claim that a person has been taken into custody and has not been seen since.

125. Against that background, the Court recalls that it has accepted the Commission's finding that Üzeyir Kurt was held by soldiers and village guards on the morning of 25 November 1993. His detention at that time was not logged and there exists no official trace of his subsequent whereabouts or fate. That fact in itself must be considered a most serious failing since it enables those responsible for the act of deprivation of liberty to conceal their involvement in a crime, to cover their tracks and to escape accountability for the fate of the detainee. In the view of the Court, the absence of holding data recording such matters as the date, time and location of detention, the name of the detainee as well as the reasons for the detention and the name of the person effecting it must be seen as incompatible with the very purpose of Article 5 of the Convention.

126. Furthermore, the Court considers that having regard to the applicant's insistence that her son was detained in the village the public prosecutor should have been alert to the need to investigate more thoroughly her claim. He had the powers under the Code of Criminal Procedure to do

so (see paragraph 59 above). However, he did not request her to explain why she was so adamant in her belief that he was in detention. She was neither asked to provide a written statement nor interviewed orally. Had he done so he may have been able to confront the military personnel involved in the operation in the village with her eye-witness account. However, that line of enquiry was never opened and no statements were taken from any of the soldiers or village guards present in the village at the time. The public prosecutor was unwilling to go beyond the gendarmerie's assertion that the custody records showed that Üzeyir Kurt had neither been held in the village nor was in detention. He accepted without question the explanation that Üzeyir Kurt had probably been kidnapped by the PKK during the military operation and this explanation shaped his future attitude to his enquiries and laid the basis of his subsequent non-jurisdiction decision.

127. The Court, like the Commission, also considers that the alleged PKK involvement in the disappearance of the applicant's son lacked any firm and plausible evidentiary basis. As an explanation it was advanced too hastily by the gendarmerie in the absence of any corroborating evidence; nor can it be maintained that the statements given by the three villagers to the gendarme officers on 28 February 1994 lent credence to what was in effect mere supposition as to the fate of Üzeyir Kurt. The questions put to the villagers can only be described as formulated in a way designed to elicit responses which could enhance the credibility of the PKK kidnapping theory (see paragraph 18 above). Furthermore, and as noted earlier (see paragraph 97 above), the Government's other contention that the applicant's son had left the village to join the PKK also lacks any firm evidentiary basis.

128. Having regard to these considerations, the Court concludes that the authorities have failed to offer any credible and substantiated explanation for the whereabouts and fate of the applicant's son after he was detained in the village and that no meaningful investigation was conducted into the applicant's insistence that he was in custody and that she was concerned for his life. They have failed to discharge their responsibility to account for him and it must be accepted that he has been held in unacknowledged detention in the complete absence of the safeguards contained in Article 5.

129. The Court, accordingly, like the Commission, finds that there has been a particularly grave violation of the right to liberty and security of person guaranteed under Article 5 raising serious concerns about the welfare of Üzeyir Kurt.

IV. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION IN RESPECT OF THE APPLICANT

130. The applicant contended that she herself was the victim of inhuman and degrading treatment on account of her son's disappearance at the hands of the authorities. She requested the Court to find, like the Commission, that the suffering which she has endured engages the responsibility of the respondent State under Article 3 of the Convention.

She invoked in support of her argument the decision of the United Nations Human Rights Committee in the case of Quinteros v. Uruguay of 21 July 1983 (see paragraph 71 above) affirming that the next-of-kin of disappeared persons must also be considered victims of, *inter alia*, ill-treatment.

131. The Commission considered that the uncertainty, doubt and apprehension suffered by the applicant over a prolonged and continuing period of time caused her severe mental distress and anguish. Having regard to its conclusion that the disappearance of her son was imputable to the authorities, the Commission found that she had been subjected to inhuman and degrading treatment within the meaning of Article 3.

132. The Government contested the Commission's conclusion, reiterating that there was no credible evidence to support the applicant's view that her son had been detained by the security forces. While sympathising with the applicant's plight, they contended that there was no causal link between the alleged violation of her son's rights under the Convention and her distress and anguish.

133. The Court notes that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 (see, among other authorities, the Cruz Varas and Others v. Sweden judgment of 20 March 1991, Series A no. 201, p. 31 § 83). It recalls in this respect that the applicant approached the public prosecutor in the days following his disappearance in the definite belief that he had been taken into custody. She had witnessed his detention in the village with her own eyes and his non-appearance since that last sighting made her fear for his safety, as shown by her petitions of 30 November and 15 December 1993 (see paragraphs 39 and 42 above). However, the public prosecutor gave no serious consideration to her complaint, preferring instead to take at face value the gendarmes' supposition that her son had been kidnapped by the PKK. As a result, she has been left with the anguish of knowing that her son had been detained and that there is a complete absence of official information as to his subsequent fate. This anguish has endured over a prolonged period of time.

134. Having regard to the circumstances described above as well as to the fact that the complainant was the mother of the victim of a human rights violation and herself the victim of the authorities' complacence in the face of her anguish and distress, the Court finds that the respondent State is in breach of Article 3 in respect of the applicant.

V. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

135. The applicant, with whom the Commission agreed, asserted that the failure of the authorities to conduct an effective investigation into her son's disappearance gave rise to a breach of Article 13 of the Convention. The Government challenged this contention.

Article 13 provides:

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

136. The applicant endorsed the reasoning of the Commission in finding a violation of Article 13 (see paragraph 138 below). She maintained further that not only did the inadequacy of the official investigation into her complaint result in her being denied access to an effective remedy in respect of her son's disappearance but that this failure on the part of the authorities was indicative of the lack of an effective system of remedies in the respondent State to address the occurrence of serious violations of Convention rights.

137. The Government reaffirmed that when the applicant first contacted the public prosecutor she never intimated that she feared that her son had been unlawfully detained or that his life was at risk. She simply wanted to ascertain whether he had been taken into custody. No complaint was lodged against the authorities. They reiterated that in the circumstances best endeavours had been made to try to trace his whereabouts. Enquiries were made (see paragraphs 39-43 above) and statements were taken by gendarme officers from villagers on 23 February and 7 December 1994 which reinforced the official view that the applicant's son had either been kidnapped by the PKK or had left the village to join the terrorists (see paragraph 38 above). There was therefore no basis on which to find a violation of Article 13.

138. The Commission found that the applicant had brought the substance of her complaint to the attention of the public prosecutor. However, her petitions received no serious consideration. The public prosecutor was not prepared to enquire further into the report issued by the gendarme officers that her son had not been detained; no statements were taken from the soldiers or village guards who were involved in the military operation in the village and the inadequacy and ineffectiveness of the

investigation were further compounded by the fact that the task of taking witness statements from villagers was entrusted to the gendarme officers against whom the complaint had been made (see paragraph 38 above). For these reasons the Commission found that the authorities were in breach of Article 13.

139. The Court recalls that Article 13 guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision.

The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or the omissions of the authorities of the respondent State (see the above-mentioned Aksoy judgment, p. 2286, § 95; the above-mentioned Aydın judgment, p. 1095-96, § 103; and the above-mentioned Kaya judgment, p. ..., § 89).

140. In the instant case the applicant is complaining that she has been denied an "effective" remedy which would have shed light on the whereabouts of her son. She asserted in her petitions to the public prosecutor that he had been taken into custody and was concerned for his life since he had not been seen since 25 November 1993. In the view of the Court, where the relatives of a person have an arguable claim that the latter has disappeared at the hands of the authorities, the notion of an effective remedy for the purposes of Article 13 entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure (see, *mutatis mutandis,* the above-mentioned Aksoy, Aydın and Kaya judgments at p. 2287, § 98, pp. 1095-96, § 103 and p. ..., §§ 106 and 107 respectively). Seen in these terms, the requirements of Article 13 are broader than a Contracting State's obligation under Article 5 to conduct an effective investigation into the disappearance of a person who has been shown to be under their control and for whose welfare they are accordingly responsible.

141. For the reasons given earlier (see paragraphs 124 and 126 above), Mrs Kurt can be considered to have had an arguable complaint that her son had been taken into custody. That complaint was never the subject of any serious investigation, being discounted in favour of an unsubstantiated and hastily reached explanation that he had been kidnapped by the PKK. The

public prosecutor had a duty under Turkish law to carry out an investigation of allegations of unlawful deprivation of liberty (see paragraph 59 above). The superficial approach which he took to the applicant's insistence that her son had not been seen since being taken into custody cannot be said to be compatible with that duty and was tantamount to undermining the effectiveness of any other remedies that may have existed (see paragraphs 56-61 above).

142. Accordingly, in view in particular of the lack of any meaningful investigation, the Court finds that the applicant was denied an effective remedy in respect of her complaint that her son had disappeared in circumstances engaging the responsibility of the authorities.

There has therefore been a violation of Article 13.

VI. ALLEGED VIOLATION OF ARTICLES 2, 3 AND 5 OF THE CONVENTION IN CONJUNCTION WITH ARTICLE 14 OF THE CONVENTION

143. The applicant contended that forced disappearances primarily affected persons of Kurdish origin. The conclusion had to be drawn that her son was on that account a victim of a breach of Article 14 of the Convention, which provides:

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

144. The applicant stated that her claim was borne out by the findings contained in the reports published between 1991 and 1995 by the United Nations Working Group on Enforced or Involuntary Disappearances.

145. The Government repudiated this allegation maintaining that there was no factual basis to support it. They stressed further that the Turkish Constitution guarantees the enjoyment of rights to everyone within its jurisdiction regardless of considerations of, *inter alia*, ethnic origin, race or religion.

146. The Commission concluded that the applicant had not adduced any evidence to substantiate a breach under this head of complaint.

147. The Court agrees with the conclusion of the Commission. The evidence which has been presented by the applicant in support of her complaint does not substantiate her allegation that her son was the deliberate target of a forced disappearance on account of his ethnic origin. Accordingly, there has been no violation of the Convention under this head of complaint.

VII. ALLEGED VIOLATION OF ARTICLE 18 OF THE CONVENTION

148. The applicant complained that the respondent State has knowingly allowed a practice of "disappearances" to develop and has not taken any measures to bring it to an end. She maintained that the attitude of the authorities in this respect gave rise to a violation of Article 18 of the Convention, which provides:

> "The restrictions permitted under [the] Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

149. In support of her assertion the applicant claimed that the authorities acted outside the framework of domestic legislation governing matters such as detention. She illustrated her point by referring to the fact that custody records are not kept and that their absence enabled the authorities to circumvent the domestic rules on detention since they could simply deny that a particular individual had been detained.

150. The Government contested this allegation. Before the Court they maintained that even when operating under emergency powers in the extremely difficult security situation in south-east Turkey the military authorities were still required to act in accordance with the law.

151. The Commission concluded that the applicant had not substantiated her allegation.

152. The Court agrees with the conclusion of the Commission that the applicant has not substantiated her complaint. It notes in addition that this complaint is akin to her allegation of a practice of violation of the Convention which falls to be considered separately (see paragraph 169 below).

VIII. ALLEGED VIOLATION OF ARTICLE 25 § 1 OF THE CONVENTION

153. The applicant requested the Court to accept the Commission's finding that she had been subjected to pressure by the authorities to withdraw her application to the Commission in circumstances giving rise to a breach of Article 25 § 1 of the Convention, which stipulates:

> "The Commission may receive petitions addressed to the Secretary General of the Council of Europe from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in [the] Convention, provided that the High Contracting

Party against which the complaint has been lodged has declared that it recognises the competence of the Commission to receive such petitions. Those of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right."

154. The applicant further maintained that the steps taken by the authorities to institute criminal proceedings against her lawyer in connection with statements he had made pertaining to her application to the Commission were incompatible with their obligations under Article 25 § 1 (see paragraph 25 above). She relied once again on the Commission's finding of a violation of that provision and the reasons it had adduced in support thereof.

155. The Government strenuously denied these assertions. They contended that the applicant was throughout exploited by the representatives of the Diyarbakır Human Rights Association for propaganda purposes in order to denigrate the image of the Turkish security forces. Mrs Kurt's sole concern was to ascertain the whereabouts of her son but she unwittingly became caught up in the campaign of misinformation waged by that Association against the Turkish State.

156. The Government insisted that the authorities had never brought pressure to bear on the applicant to withdraw her application to the Convention institutions. She had gone voluntarily to the notary in Bismil on two occasions in order to repudiate the falsehoods which the Diyarbakır Human Rights Association had made in her application. They maintained that the applicant had reported to the Delegates at the hearing in Ankara that no pressure had been brought to bear on her to withdraw her application, and this was confirmed by Arap Kurt who had accompanied her to the office of the notary. It was her own decision to abandon her complaint lodged with the Commission.

157. The Government also contended that the Commission was wrong in its conclusion that they were in violation of Article 25 § 1 on account of the fact that the authorities had contemplated instituting criminal proceedings against the applicant's lawyer, Mr Şakar. They stressed that Mr Şakar had been under investigation for having aided and abetted the PKK. Any prosecution which would have been instituted would not have related to his involvement in the instant case; rather he would have been charged with membership of a terrorist organisation under Article 168 § 2 of the Turkish Criminal Code.

158. The Commission concluded that the authorities had not directly coerced the applicant. Nevertheless, and with particular regard to the circumstances of the applicant's two visits to the notary in Bismil, they had applied improper indirect pressure in respect of her complaint to the Convention institutions. Furthermore, the threatened criminal proceedings against the applicant's lawyer also gave rise to a serious interference with the exercise of the right of individual petition.

For these reasons the Commission considered that the respondent State was in breach of its obligations under Article 25 § 1.

159. The Court recalls that it is of the utmost importance for the effective operation of the system of individual petition instituted by Article 25 that applicants or potential applicants are able to communicate freely with the Commission without being subjected to any form of pressure from the authorities to withdraw or modify their complaints (see the above-mentioned Akdivar and Others judgment, p. 1219, § 105; and the above-mentioned Aksoy judgment, p. 2288, § 105).

160. The expression "any form of pressure" must be taken to cover not only direct coercion and flagrant acts of intimidation of applicants or potential applicants or their families or legal representatives but also other improper indirect acts or contacts designed to dissuade or discourage them from pursuing a Convention remedy.

The Court would observe that whether or not contacts between the authorities and an applicant or potential applicant are tantamount to unacceptable practices from the standpoint of Article 25 must be determined in the light of the particular circumstances at issue. In this respect, regard must be had to the vulnerability of the complainant and his or her susceptibility to influence exerted by the authorities. In this connection, the Court, having regard to the vulnerable position of applicant villagers and the reality that in south-east Turkey complaints against the authorities might well give rise to a legitimate fear of reprisals, has found that the questioning of applicants about their applications to the Commission amounts to a form of illicit and unacceptable pressure, which hinders the exercise of the right of individual petition, in breach of Article 25 of the Convention (see the above-mentioned Akdivar and Others judgment, p. 1219, § 105).

161. Turning to the facts of the instant case, it is to be noted that the applicant was interviewed on several occasions by the authorities as from 19 November 1994 subsequent to the communication of her application by the Commission to the Government (see paragraphs 20-24 above). On 9 December 1994, and following an interview with the Bismil public prosecutor (see paragraph 20 above), she addressed statements to the Diyarbakır Human Rights Association and to the Foreign Affairs Ministry repudiating all petitions made in her name.

162. The Court is not convinced that these two statements, made shortly after the communication of the application to the Government and in the wake of the interview with the public prosecutor, can be said to have been drafted on the initiative of the applicant. Nor is it satisfied that the two visits which the applicant made to the notary in Bismil on 6 January and 10 August 1995 were organised on her own initiative. As the Commission observed (see paragraph 158 above), the applicant was brought to the notary's office by a soldier in uniform and was not required to pay the notary for drawing up the statements in which she purported to withdraw

her application to the Commission. It cannot be said that the arguments presented by the Government in this regard establish that their was no official involvement in the organisation of these visits.

163. For the above reasons, the Court finds that the applicant was subjected to indirect and improper pressure to make statements in respect of her application to the Commission which interfered with the free exercise of her right of individual petition guaranteed under Article 25.

164. As to the threat of criminal proceedings invoked against the applicant's lawyer, the Court does not agree with the Government's assertion that these were unrelated to the application lodged with the Commission (see paragraph 157 above). The threat of prosecution concerned the allegations which Mr Şakar made against the State in the application which he lodged on Mrs Kurt's behalf. While it is true that the statement of complaint which was submitted to the Commission contained allegations which were found to be false and which Mrs Kurt herself repudiated, it must be stressed that the task of examining the substance of particular complaints falls to the Commission in the context of its fact-finding powers and having regard to the procedures which the Convention offers the respondent State to challenge the merits of the accusations levelled at it. It is not for the authorities to interfere with that process through the threat of criminal measures against an applicant's representative.

165. For the above reasons, the moves made by the authorities to institute criminal proceedings against the applicant's lawyer, even though they were not followed up, must be considered an interference with the exercise of the applicant's right of individual petition and incompatible with the respondent State's obligation under Article 25.

IX. ALLEGED ADMINISTRATIVE PRACTICE OF VIOLATION OF THE CONVENTION

166. The applicant requested the Court to find that there was a practice of "disappearances" in south-east Turkey which gave rise to an aggravated violation of Articles 2, 3 and 5 of the Convention. She highlighted in this regard the reports produced by the United Nations Working Group on Enforced and Involuntary Disappearances, in particular its 1994 report which indicated that the highest number of alleged cases of disappearances reported in 1994 was in Turkey.

The applicant further maintained that there was an officially tolerated practice of ineffective remedies in south-east Turkey, in aggravated violation of Article 13 of the Convention. She referred in support of her contention to the fact that there was convincing evidence of a policy of denial of incidents of extra-judicial killing, torture of detainees and disappearances and of a systematic refusal or failure of the prosecuting

authorities to conduct investigations into victim's grievances. Having regard to the centrality of the prosecutor's role in the operation of the system of remedies as a whole it could only be concluded that remedies were wholly ineffective in south-east Turkey and that this result was condoned by the authorities.

167. The Government rejected the applicant's claim.

168. The Commission, for its part, found that it was unnecessary to decide whether or not there was a practice of unacknowledged detention in the respondent State as maintained by the applicant. As to the alleged practice of ineffective remedies, the Delegate informed the Court that the Commission had also found it unnecessary to examine this complaint in reaching its admissibility decision.

169. The Court recalls that it has rejected the applicant's complaints that there exists a practice of violation of Articles 2 and 3 of the Convention, being of the view that she had not substantiated her allegations (see paragraphs 108 and 116 above). It is not persuaded either that the evidence which she has adduced substantiates her allegations as to the existence of a practice of violation of either Article 5 or Article 13 of the Convention.

X. APPLICATION OF ARTICLE 50 OF THE CONVENTION

170. The applicant claimed compensation for non-pecuniary damage as well as reimbursement of costs and expenses under Article 50 of the Convention, which provides:

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

A. Non-pecuniary damage

171. The applicant maintained that both she and her son had been victims of specific violations of the Convention as well as a practice of such violations. She requested the Court to award a total amount of 70,000 pounds sterling ("GBP") which she justified as follows: GBP 30,000 for her son in respect of his disappearance and the absence of safeguards and effective investigative mechanisms in that regard; GBP 10,000 for herself to compensate for the suffering to which she had been subjected on account of her son's disappearance and the denial of an effective remedy with respect to his disappearance; and GBP 30,000 to compensate both of them on account of the fact that they were victims of a practice of "disappearances" in south-east Turkey.

172. The Delegate of the Commission made no submissions on the amount claimed by the applicant.

173. The Government maintained that the applicant had not substantiated her allegations concerning either her son's disappearance or the existence of a practice of violations of the Convention in south-east Turkey. Furthermore, there was no causal link between her son's disappearance and her own alleged suffering. For these reasons they requested the Court to reject her exorbitant and unjustified demands for compensation.

174. The Court recalls that it has found the respondent State in breach of Article 5 in respect of the applicant's son. It considers that an award of compensation should be made in his favour having regard to the gravity of the breach in question. It awards the sum of GBP 15,000, which amount is to be paid to the applicant and held by her for her son and his heirs.

175. Moreover, given that the authorities have not assisted the applicant in her search for the truth about the whereabouts of her son, which has led it to find a breach of Articles 3 and 13 in her respect, the Court considers that an award of compensation is also justified in her favour. It accordingly awards the applicant the sum of GBP 10, 000.

B. Costs and expenses

176. The applicant claimed a total amount of GBP 25,453.44 in respect of costs and expenses incurred in advancing her and her son's rights before the Convention institutions. She provided the Court with the following specifications: professional fees of her United Kingdom-based lawyers; (GBP 19,285.42); professional fees claimed by her Turkish lawyers (GBP 825); administrative expenses (GBP 70.22); administrative costs incurred in Turkey (GBP 1,050); research and administrative support provided by the Kürdistan Human Rights Project ("KHRP") (GBP 2,400); postage, telecommunications and other expenses incurred by the KHRP (GBP 635); interpretation and translation costs of KHRP (GBP 690); interpreters' costs for attendance at the Delegates' hearing (GBP 275.60); her Turkish lawyer's costs for attending the Delegates' hearing (GBP 122.20); and reports and research costs (GBP 100).

177. The Delegate of the Commission did not offer any comments on the claim.

178. The Government firmly disputed their liability to reimburse the applicant. In the first place, the Diyarbakır Human Rights Association had been instrumental in circumventing the domestic legal system and in denying the domestic courts the opportunity to adjudicate on the applicant's grievances. Secondly, the involvement of non-Turkish lawyers in the Convention proceedings had not been justified and only served to inflate the costs of the case.

179. The Court notes that the issues raised by this case are particularly complex and involved on the part of the applicant's legal representatives considerable background research and analysis. Having regard to the fact that an applicant is free to designate a legal representative of his or her own choosing, Mrs Kurt's recourse to United Kingdom-based lawyers specialising in the international protection of human rights cannot be criticised. In view of the specifications submitted by the applicant and deciding on an equitable basis it awards the sum of GBP 15,000 in respect of costs and expenses claimed by the United Kingdom-based lawyers and her Turkish lawyers together with any Value Added Tax (VAT) that may be chargeable, less the amounts received by way of legal aid from the Council of Europe which have not already been taken into account.

180. On the other hand, the Court is not persuaded of the merits of the claim (GBP 3,725) made on behalf of the KHRP, having been provided with no details on the precise extent of that organisation's involvement in the preparation of the case. This part of the claim is accordingly rejected.

C. Default interest

181. According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 8% per annum.

FOR THESE REASONS, THE COURT

1. *Dismisses* unanimously the Government's preliminary objection concerning the validity of the applicant's application;
2. *Dismisses* unanimously the Government's preliminary objection concerning the non-exhaustion of domestic remedies;
3. *Holds* unanimously that it is not necessary to decide on the applicant's complaint under Article 2 of the Convention;
4. *Holds* unanimously that it is not necessary to decide on the applicant's complaint in respect of her son under Article 3 of the Convention;
5. *Holds* by six votes to three that there has been a violation of Article 5 of the Convention;
6. *Holds* by six votes to three that there has been a violation of Article 3 of the Convention in respect of the applicant herself;
7. *Holds* by seven votes to two that there has been a violation of Article 13 of the Convention;
8. *Holds* unanimously that there has been no violation of Article 14 of the Convention taken together with Articles 2, 3 and 5 of the Convention;

9. *Holds* unanimously that there has been no violation of Article 18 of the Convention;
10. *Holds* by six votes to three that the respondent State has failed to comply with its obligations under Article 25 § 1 of the Convention;
11. *Holds* by eight votes to one
(a) that the respondent State is to pay the applicant in respect of her son, within three months, by way of compensation for non-pecuniary damage, 15,000 pounds sterling (GBP) to be converted into Turkish liras at the exchange rate applicable on the date of settlement, which sum is to be held by the applicant for her son and his heirs;
(b) that the respondent State is to pay the applicant, within three months, in respect of compensation for non-pecuniary damage, GBP 10,000 pounds sterling to be converted into Turkish liras at the exchange rate applicable on the date of settlement;
(c) that simple interest at an annual rate of 8% shall be payable from the expiry of the above-mentioned three months until the date of settlement;
12. *Holds* by eight votes to one
(a) that the respondent State is to pay the applicant, within three months, in respect of costs and expenses, GBP 15,000 together with any VAT that may be chargeable, less 27,763 French francs (FRF) to be converted into pounds sterling at the rate applicable on the date of judgment;
(b) that simple interest at an annual rate of 8% shall be payable from the expiry of the above-mentioned three months until settlement;
13. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 25 May 1998.

Signed: Rudolf BERNHARDT
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 § 2 of the Convention and Rule 53 § 2 of Rules of Court A, the following separate opinions are annexed to this judgment:

(a) partly dissenting opinion of Mr Matscher;
(b) dissenting opinion of Mr Gölcüklü;
(c) dissenting opinion of Mr Pettiti.

Initialled: R. B.
Initialled: H. P.

PARTLY DISSENTING OPINION OF JUDGE MATSCHER

(*provisional translation*)

While I am conscious of the difficulties which the Commission faces in cases of this type, I consider that in the present case the manner in which it established the facts, which were accepted by the Court, was so superficial and insufficient and the analysis of those facts so clearly unsatisfactory that, in my view, neither provides a sufficiently sound basis for a finding of a violation. Furthermore, a careful study of the summary of the Commission's findings (see paragraphs 45-53 of the judgment) confirms that view, without it being necessary for me to go into detail.

None of the many witnesses heard by the local authorities or by the Delegates of the Commission were able to say that the applicant's son had been taken away by the soldiers; the mere fact that the applicant "genuinely and honestly believed" (see paragraph 53) that such was the case does not amount to proof, especially as most of the witnesses said the opposite or declared that they had no personal direct knowledge of what, in this connection, is the crucial issue in the case.

Ultimately, here, as in the Menteş case, the applicant failed by a large margin to prove the truth of her allegations beyond all reasonable doubt.

On a separate issue, I voted in favour of finding a violation of Article 13 because, in a case as serious as this one, the authorities of the respondent State failed to carry out a genuine and thorough investigation.

DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

(*provisional translation*)

I agree entirely with the dissenting opinion of Judge Matscher in this case of Kurt v. Turkey except for the final paragraph concerning Article 13.

As regards that Article, I voted in favour of finding no violation because the facts alleged were not proved beyond all reasonable doubt and, in addition, since the applicant's complaints under Article 13 were that there had been no satisfactory and efficient investigation into the allegation concerning her son's disappearance, no separate question arose under that Article. In that regard I refer for further details to my dissenting opinion in the case of Kaya v. Turkey, in which the Court gave judgment on 19 February 1998.

DISSENTING OPINION OF JUDGE PETTITI

(*provisional translation*)

I voted with the minority on the operative provisions relating to Articles 5 and 13 and with the majority on the operative provisions relating to Articles 2, 3, 13, 14 and 18. As regards Mrs Kurt personally, I voted with the minority on the operative provisions relating to Articles 3 and 25.

I did not find a breach in the instant case (Article 5), mainly because I did not agree with the majority's reasoning.

The majority looked at the case as though it were an international criminal court trying a person suspected of a serious crime ("crime") while using the personal conviction ("intime conviction") standard applied in French and Belgian criminal courts. But that type of textbook example concerns the trial of an individual, whose evidence is weighed against that of all the witnesses.

The Kurt case concerns a presumed disappearance. Under the ordinary criminal law, disappearances may involve cases of running away, false imprisonment or abduction.

Under public international law, a policy of systematic political disappearances may exist, as occurred in Brazil, Chile and Argentina.

In such cases, especially where they have been verified by the European Committee for the Prevention of Torture, it is for one or more member States of the Council of Europe to lodge an application against the State concerned. It would be cowardly to avoid the problem by leaving the Court to decide on the basis of an application by an individual. An application by a State would occasion an international regional inquiry enabling the situation to be assessed objectively and thoroughly. I could have found that there had been a violation if the case had concerned instructions given by the army, gendarmerie or the police, both with regard to the security operations and to the verification of their implementation and follow up. That would have come within the line of authorities established in the Ireland v. the United Kingdom (judgment of 18 January 1978, Series A no. 25) and McCann and Others v. the United Kingdom (judgment of 27 September 1995, Series A no. 324) cases (inadequate command and supervision, negligence and lack of subsequent review).

In the system of the European Convention on Human Rights, the fact that States are liable for the failings of the authorities of which they are composed means that the Court must identify the authorities and police or army units responsible. The Kurt case was in any event deficient in that there was no investigation of the type performed in cases before the Hague International Criminal Court and one of the main witnesses and the commanding officers of the gendarmerie units did not give evidence at the trial. The Commission itself acknowledged that it had doubts. The majority of the Court speculates on the basis of a hypothesis of continued detention

relying on their personal conviction. That to my mind, is "heresy" in the international sphere, since the instant case could have been decided on the basis of the case-law under Article 5 requiring objective evidence and documents that convince the judges beyond all reasonable doubt; but both documents and witnesses were lacking in the present case.

In addition, the Kurt case occurred in a different context to the one that led to the decisions of the Inter-American Court.

The Kurdish Human Rights Project

The Kurdish Human Rights Project (KHRP) is an independent, non-political, non-governmental human rights organisation founded and based in Britain. KHRP is a registered charity. It is committed to the protection of human rights of all persons living within the Kurdish areas, irrespective of race, religion, sex, political persuasion or other belief or opinion. Its supporters include people of Kurdish and non-Kurdish origin.

AIMS

- To promote awareness of the situation of the Kurds in Iran, Iraq, Syria, Turkey and the countries of the former Soviet Union
- To bring an end to the violation of the rights of the Kurds in these countries
- To promote the protection of human rights of Kurdish people everywhere

METHODS

- Monitoring legislation including emergency legislation and its application
- Conducting investigations and producing reports on the human rights situation of Kurds in Iran, Iraq, Syria, Turkey, and in the countries of the former Soviet Union by, amongst other methods, sending trial observers and engaging in fact-finding missions
- Using such reports to promote awareness of the plight of the Kurds on the part of committees established under human rights treaties to monitor compliance of states
- Using such reports to promote awareness of the plight of the Kurds on the part of the European Parliament, the Parliamentary Assembly of the Council of Europe, the national parliamentary bodies and inter-governmental organisations including the United Nations
- Liaison with other independent human rights organisations working in the same field and co-operating with lawyers, journalists and others concerned with human rights
- Assisting individuals with their applications before the European Commission and Court of Human Rights
- Offering assistance to indigenous human rights groups and lawyers in the form of advice and training seminars on international human rights mechanisms