CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

CASE OF AKDENIZ AND OTHERS v. TURKEY

(*Application no. 23954/94*)

JUDGMENT

STRASBOURG

31 May 2001

This judgment may be subject to editorial revision.

In the case of Akdeniz and Others v. Turkey,

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

Mr A. BAKA, *President,*
Mrs V. STRÁŽNICKÁ,
Mr M. FISCHBACH,
Mrs M. TSATSA NIKOLOVSKA,
Mr E. LEVITS,
Mr A. KOVLER, *judges*,
Mr F. GÖLCÜKLÜ, ad hoc *judge*,
and Mr E. FRIBERGH, *Section Registrar*,

Having deliberated in private on 29 June 2000 and 3 May 2001,

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

PROCEDURE

1. The case originated in an application (no. 23954/94) against Turkey lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by nine Turkish nationals, Mr Mehmet Emin Akdeniz, Mr Sabri Tutuş, Mr Sabri Avar, Mr Keleş Şimşek, Mr Seyithan Atala, Mr Aydın Demir, Mr Süleyman Yamuk, Mr Ramazan Yerlikaya and Mr Kemal Taş ("the applicants"), on 5 April 1994.

2. The applicants, who had been granted legal aid, were represented by Professor K. Boyle and Professor F. Hampson, lawyers practising in the United Kingdom. The Turkish Government ("the Government") were represented by their Agent, Mr Aslan Günduz.

3. The applicants alleged that their relatives had disappeared after they were detained by soldiers during an operation in October 1993. They invoked Articles 2, 3, 5, 13 and 14 of the Convention.

4. The application was declared admissible by the Commission on 3 April 1995. In its report of 10 September 1999 (former Article 31 of the Convention), the Commission expressed the opinion by 26 votes to 2 that there had been a violation of Article 2 of the Convention and unanimously that there had been a violation of Article 3 in respect of the missing relatives and the applicants themselves, a violation of Articles 5 and 13 of the Convention, no violation of Article 14 of the Convention and that the State had failed to comply with its obligations under former Article 25 of the Convention. The Commission referred the case to the Court on 30 October 1999 in accordance with Articles 32 § 1 and 47 of the Convention. Before

the Court, the applicants withdrew their complaint under Article 14 of the Convention.

5. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court. Mr Türmen, the judge elected in respect of Turkey, withdrew from sitting in the case (Rule 28). The Government accordingly appointed Mr F. Gölcüklü to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

6. The applicants and the Government each filed observations on the merits (Rule 59 § 1). The Court decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 2 *in fine*).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The facts of the case, particularly concerning events during October 1993 when security forces conducted an operation in the Alaca village area in south-east Turkey, were disputed by the parties. The Commission, pursuant to former Article 28 § 1 (a) of the Convention, conducted an investigation with the assistance of the parties.

8. The Commission Delegates (Mrs J. Liddy, Mr M. P. Pellonpää and Mr P. Lorenzen) heard witnesses in Ankara from 30 September to 4 October 1997 and on 4 and 9 May 1998. These included the nine applicants; Zekiye Demir, mother of the disappeared Turan Demir; Abdurrahim Yerlikaya, brother of the disappeared Nusreddin Yerlikaya; Selahattin Tutuş, brother of the disappeared Behçet Tutuş; Mehmet İlbey, a villager who witnessed events; Ulvi Kartal, Panak gendarme station commander; Ali Ergülmez, Kulp district gendarme commander; Kenan Sağlam, Bingöl public prosecutor; Bekir Selçuk, chief public prosecutor at the Diyarbakır State Security Court; Lüfti Baran, Vehbi Başer and Hakkı Zümrüt, villagers called by the Government; General Yavuz Ertürk, commander of the Bolu forces during the operation; Pembe Akdeniz, wife of the disappeared Mehmet Sali Akdeniz and Vesha Avar, the mother and sister-in-law of the disappeared Mehmet Şerif Avar and Hasan Avar.

9. The Commission's findings of fact are set out in its report of 27 October 1999 and summarised below (Section A). The applicants accept the Commission's findings of fact. The Government's submissions concerning the facts are summarised below (Section B).

A. The Commission's findings of fact

1. General background

10. The applicants are close relatives of eleven persons who went missing in October 1993.

Mehmet Emin Akdeniz is the brother of Mehmet Salih Akdeniz and the uncle of Celil Aydoğdu.

Sabri Tutuş is the son of Behçet Tutuş.

Sabri Avar is the father of Mehmet Şerif Avar and the brother of Hasan Avar.

Keleş Şimşek is the brother of Bahri Şimşek.

Seyithan Atala is the brother of Mehmet Şah Atala.

Aydın Demir is the brother of Turan Demir.

Süleyman Yamuk is the brother of Abdo Yamuk.

Ramazan Yerlikaya is the brother of Nusreddin Yerlikaya.

Kemal Taş is the father of Ümit Taş.

The eleven men disappeared at the time the security forces were carrying out a massive operation around the Alaca village in the region between Kulp-Muş-Lice.

11. Alaca village may be described as an area of dispersed hamlets and houses spread over mountainous terrain, which for administrative purposes was regarded as being in the Kulp district. Its hamlets included Gurnik (where Zekiye Demir, Aydın Demir and Turan Demir lived), Mezire (where Sabri Avar, his brother Hasan Avar and son Mehmet Şerif Avar, Bahri Şimşek and Mehmet Şah Atala were said to live), Pireş (where Abdo Yamuk lived), Kepir and Şuşan. Nearby but in the Muş district was Kayalısu village, including Licik hamlet (where Ramazan Yerlikaya and Abdurrahim Yerlikaya stated that they lived with their brother Nusreddin; Sabri Tutuş also said he lived there with his father Behçet Tutuş; Selahattin Tutuş lived there).

12. Alaca village was not far from the Şen plateau (Şenyayla), where some people led a nomadic style of life and where there were fruit and walnut trees (Mehmet İlbey stated that he lived there and Mehmet Salih Akdeniz was stated to have pastures there, living a nomadic life with other members of his family). The nearest gendarme station was at Panak, which was on the Kulp-Muş road. Many of the applicants and members of their families were also living in either Muş or Kulp, the two nearest large towns. Some distance to the south of Alaca was Inkaya of which Mehmet Salih Akdeniz was the muhtar.

13. In 1993, terrorist activity was a major concern in this area. There were several PKK bases in the vicinity of Alaca. Ulvi Kartal, the commander of Panak station, stated that his station had been attacked several times. The Kulp district gendarme commander Captain Ali

Ergülmez stated that there was intensive terrorist activity in the Kulp area. General Yavuz Ertürk of the Bolu brigade described the area as being the backbone of the PKK activities, and explained that his forces were involved in many operations there. An undated final operation report (Commission report, paragraphs 243-245) described the Şenyayla plateau as the largest training area for the PKK. According to this report, it had fortified defences and enjoyed the support of 90% of the hamlets and villages in the region, the villagers from which supplied the PKK with shelter and food. Villagers also used to go into the towns to buy food for the terrorists.

14. By October 1993, many people from in and around Alaca village had left or were about to leave either due to the difficulty of life in the remote mountainous area or due to the security situation. The Commission rejected the evidence of the gendarme witnesses that the area had already been abandoned. The weight of the evidence showed that a significant number of families were still living there, while other villagers from this area continued to move to and from the mountains to the town seasonally. Some, like Mehmet Salih Akdeniz and Pembe Akdeniz, were nomadic herders.

2. The operation conducted in October 1993 in the Kulp-Muş-Lice region

15. From 8 October 1993, the Bolu brigade assisted by gendarmerie forces conducted a massive military operation. On the evidence of the commanding officer, General Yavuz Ertürk, this involved 2,500 soldiers and helicopters. Its purpose was to converge soldiers from bases in the Kulp and Muş districts on the Şenyayla area to apprehend terrorists and locate their bases, stores and weapons dumps. The operation lasted until 24-25 October 1993. The Government and the applicants were at variance however as to the events which occurred concerning the villagers during the operation.

16. The Commission noted that the conflict lay between the Government's assertion, supported by the security force witnesses, that the missing persons had been kidnapped by the PKK dressed as soldiers and that the families in introducing the applications were acting as the pawns of the PKK, motivated by fear or a desire to obtain financial gain; and the assertion of the applicants and their families that their relatives had been detained by soldiers during the operation and last seen being taken away by helicopter. The credibility and reliability of the witnesses was the crucial issue.

17. The Commission, relying on its Delegates, found the applicants and the members of their family and the villager Mehmet İlbey were honest and convincing in the way they gave their evidence. Some were confused about details, in particular about dates, which was not unexpected due to the lapse of time. Some of the women witnesses and Sabri Avar were simple, unsophisticated individuals who were answering sincerely to the best of

their ability. The Commission commented that all the applicants showed deep and abiding distress at the uncertainty which they had suffered after the disappearance of their relatives, several making appeals that they might at last be told the fate of their family members. Their evidence was strongly consistent with supporting documentary material, including petitions made by the families shortly after the events and the reliability of this considerable weight of evidence was confirmed as more witnesses were heard. In significant aspects, it was also substantiated by the villager witnesses brought forward by the Government.

18. Conversely, the Commission Delegates received a negative impression from the gendarme witnesses, Ulvi Kartal and Ali Ergülmez. Their evidence, which included the denials that there was any operation in the area at the time, was shown to be unreliable when the General Yavuz Ertürk informed the Delegates that there was such an operation and indicated that both would have been aware. While General Ertürk impressed as a forceful and competent witness, his evidence was given under circumstances which diminished its weight, as the Government refused to allow the applicant's representatives to be present when he gave evidence to the Delegates. He showed reluctance to address the factual concerns of the Commission, avoiding precise answers. It found doubts arose as to the reliability of his evidence on the treatment of the villagers, the use of helicopters and the claim that no soldiers went into the villages or hamlets in the Alaca area. It examined the alleged points of inconsistency in the applicants' versions of events put forward by the Government. It found that some differences in detail were explicable by the lapse of time and that they were not of such a nature as to undermine the applicants or the witnesses' credibility. Their accounts were essentially consistent, credible and reliable.

19. On that basis, the Commission found as follows.

3. The taking into custody of villagers by the security forces

20. Soon after the operation started, the soldiers began collecting villagers together, for use as guides to show them the location of settlements and PKK shelters and stores, for questioning about involvement with the PKK and for possible transfer to detention elsewhere.

21. Villagers were first taken into custody on or near the Şen plateau on 9 October, the soldiers arriving at Gurnik, Mezire and Licik on about 10 October. Some villagers were looked for by name. Others were gathered generally for an identity check. The soldiers set up a camp at Kepir, a hill close to the hamlet of Gurnik, where helicopters landed, *inter alia*, to bring in supplies. There were other camps set up, one or two near Kayalisu and Licik and another near the Muş district boundary, where villagers were held for some days.

22. At the commencement of the operation, villagers who were living up on the Şenyayla plateau witnessed planes carrying out bombardment.

Mehmet Salih Akdeniz was taken by soldiers, apparently to act as guide. About a day or two later, Mehmet Salih was being held by soldiers at the camp which had been set up at Kepir.

23. On or about 10 October 1993, Celil Aydoğdu was apprehended by the soldiers. It was unclear exactly where this occurred between Gurnik and the Şen plateau. However, he was seen by a number of persons being held shortly afterwards under guard in Kepir.

24. On or about 10 October 1993, soldiers arrived at the hamlet of Mezire, about an hour from Gurnik. Vesha Avar saw them take her brother-in-law Hasan Avar out of his house. On the same day, Mehmet Şah Atala was also picked up by the soldiers at Mezire, who had been asking for him by name. The soldiers told his family that Mehmet Şah would show them around and make a statement. Abdo Yamuk, Süleyman Atala, Bahri Şimşek and Şirin Avar were also picked up at Mezire.

25. Ali Yerlikaya was apprehended at the beginning of the operation at Licik being taken to Pireş, half an hour away, where he was joined by Mehmet Şah Atala, Bahri Şimşek and Ümit Taş. The next day, on or about 10 October 1993, Ali Yerlikaya accompanied the soldiers who took Nusreddin Yerlikaya, Abdurrahim Yerlikaya and Medeni Yerlikaya from their homes at Licik, Kayalısu and brought them back to Pireş. The same day Hasan Avar and Abdo Yamuk were brought by soldiers to Pireş, where a group of 20 to 30 people were being held. They were kept overnight at a place variously described as being at the cemetery, or near Pireş or Şuşan hamlet. They were questioned and tied up during the night. The next morning, on 11 October, a helicopter landed and a person arrived with his face covered. Some of the villagers thought to have recognised this man when the wind blew his scarf aside. His identity was not established however. A selection process was carried out, with identity cards being handed in and inspected. All the villagers but nine were allowed to go. Mehmet Şah Atala, Abdo Yamuk, Bahri Şimşek, Hasan Avar, the three Yerlikaya brothers, Ali Yerlikaya and a young man, a stranger to the village said to be called Ümit Taş, were placed on a helicopter and flown to Kepir that day.

26. Behçet Tutuş and Selahattin Tutuş were apprehended by the soldiers in Gurnik on their way to their village Licik from Muş, shortly after the operation started. Turan Demir and Mehmet Şerif Avar were with them, having come back from Muş on the same minibus. The date when they were detained was unclear. However, on an assessment of the varying accounts, the Commission found that the group of Turan Demir, Behçet Tutuş, Mehmet Şerif Avar and Selahattin Tutuş were brought to Kepir before the group from the cemetery at Pireş, on or before 11 October.

27. Shortly after the operation began, Ramazan Yerlikaya was detained with others near their village of Kayalısu. These villagers were held on a plateau area near the village for nine days. During that time, checks were

made on the radio as to whether any of them were wanted. During this time, they were tied up. On about 19 October, he and a relative were taken by helicopter to Muş where he was held in a basement with over a hundred other people, including Süleyman Yamuk, who were villagers from Kayalısu and other places in Muş. He was released after about eight days.

28. At a time unspecified after the operation began, Sabri Tutuş and several of his male relatives were at their home in Licik when the soldiers took them. They were held by soldiers for about nine days in a wood near Licik before being released.

29. On or about 13 or 14 October, Süleyman Yamuk was detained by soldiers in or near Pireş. He was taken the same day to Muş by helicopter where he was detained for six to seven days. Mehmet İlbey was also apprehended with several others when he arrived in Gurnik on 13 October. They were taken up to Kepir and their ID cards collected. A man with his face covered seemed to inspect them. By this date, the eleven men who were later to go missing, were being held at Kepir.

4. Ümit Taş

30. Ümit Taş, who was sixteen-seventeen years old, was not from the Alaca village. He is known to have been detained by the police when he arrived in Kulp on or about 25 September. His brother Mehmet Tahir arrived in Kulp, paying visits to him. According to the official documents provided, in particular a release statement of 30 September 1993 apparently bearing Ümit Taş's thumbprint, he ceased to be in police custody at that date. According to the evidence of his father, the applicant Kemal Taş, Mehmet Tahir arrived to visit him but was told by the police that he had been released. When Ümit did not arrive home however, Mehmet Tahir and then the applicant went back to Kulp to discover what had happened to him.

31. The applicant alleges that in making enquiries he was told that his son had been handed over to the forces from Bolu who were on an operation. He also heard from nomads that his son had been seen tied up outside the Panak station and that from there he had been taken to Gurnik. When he visited Gurnik, people there told him that they had seen his son with the other detainees held at Kepir.

32. The evidence before the Delegates concerning Ümit Taş showed that he was not known by any of the applicants and witnesses. Several witnesses referred to seeing a person, not from the village, being detained with the other ten. Others only knew of the name Ümit Taş when his father came looking for him after events. Abdurrahim Yerlikaya gave eye-witness evidence that he saw Ümit Taş, detained with them overnight at Pireş and taken with them to Kepir. However, he did not talk to the young man himself. He stated that Mehmet Şah Atala and Abdo Yamuk who were with the young man, told him that his name was Ümit Taş.

33. The Commission observed that there were difficulties in the evidence concerning the identification of Ümit Taş, in particular the differing ages estimated by the persons who saw him. However this could be accounted for, *inter alia*, by the fact that ill-treatment or living rough over a period of time could change a person's appearance dramatically. In light of the firm identification of Abdurrahim Yerlikaya, supported by the evidence of Keleş Şimşek who had heard from his brother Bahri that Ümit Taş was in the group of eleven and the written statement of 25 December 1993 by Ali Yerlikaya naming Ümit Taş as a young boy caught in Kulp who had been held with him, the Commission was satisfied that these elements were sufficiently coherent and consistent to establish beyond reasonable doubt that he was the eleventh detainee.

5. Events at Kepir

34. At Kepir, the villagers were held in different groups, to which different restrictions applied. Eleven of them (the persons who later disappeared) were kept in one group. They were tied up, though they were untied for visits, or when they ate or relieved themselves. Four witnesses (Pembe Akdeniz, Vesha Avar, Selahattin Tutuş, Mehmet İlbey) however stated that Mehmet Salih Akdeniz, though of this group, was not tied up. Other detainees – Selahattin Tutuş, Mehmet İlbey – were held in a group of about 30-50 villagers, who were not tied up. They were kept in the camp during the day and sent to houses in Gurnik to spend the night. Abdurrahim Yerlikaya and Ali Yerlikaya, who were tied up, were held with or near the group of eleven.

35. As concerning the way in which the eleven men were treated at Kepir, the Commission found that:

– the eleven persons, save Mehmet Salih Akdeniz, were tied up (Vesha Avar described that her relatives' toes were swollen as a result);

– they were kept outside during the day and at night (Mehmet Şah Atala was seen to be flushed, shaking, his lips chapped and to be affected by the cold);

– they were questioned by the soldiers;

– they were in a state of some distress and apprehension (Turan Demir was described as hungry, thirsty and miserable; Mehmet Salih Akdeniz told others that he was in a terrible state and feared that they were going to be killed; Mehmet İlbey's evidence referred to the detainees being in a miserable state, having gone hungry and been tied up for a week);

– Behçet Tutuş and Nusreddin Yerlikaya were taken from the group by helicopter apparently to act as guides or show locations;

– Abdo Yamuk was taken away from the group for a day or two and on his return was seen to be limping and needing the support of soldiers to walk;

– Ümit Taş was also taken away to Şen pastures to act as a guide;

– money (20 million TRL) was taken from Behçet Tutuş by the soldiers;

36. There was insufficient evidence to establish that the eleven men were subject to torture under interrogation. There was some evidence of beating of the detainees (Selahattin Tutuş witnessed his brother Behçet being beaten), but the nature and extent of the beating was not apparent.

37. By a date about 16-17 October, all the detainees at Kepir, save eleven, had been released. Descriptions were given of a selection process where names were called out and those persons released. Some of the remaining detainees were seen being placed in helicopters. The Commission observed that the timing of this event is problematic, the evidence of the principal witnesses being vague or confused on this point. The weight of the evidence placed the last sighting of the remaining eleven detainees at about 17-19 October but this can only be regarded as approximate.

38. The eye-witness evidence as to whom was seen being taken away was also not clear. Zekiye Demir referred to seeing Turan and his friends being put on the helicopter but that it was too far to see. Vesha Avar referred to ten persons. She did not know Ümit Taş and if he was there she was not in a position to identify him. She stated specifically that she could see Hasan and Mehmet Şerif Avar being put on the helicopter. The Commission noted that the applicants and the other witnesses appeared to associate the placing of detainees on the helicopter with their missing relatives largely because some were identified by the women and also on the basis that these eleven persons were the only detainees remaining at Kepir after the others such as Abdurrahim Yerlikaya and Mehmet İlbey were released. They had also been held together as a distinct group and were no longer there after the operation ended. While this provided strong circumstantial evidence, the Commission was not satisfied that it could be established, to the necessary standard of proof, that the eleven missing persons were all placed on the helicopters, in particular Ümit Taş, though it was satisfied that at least some of the eleven detainees were. There was no evidence that any of these persons were seen after the operation ended on or about 24-25 October. The Commission found that when they were last seen they were detained under guard by security forces.

6. Attempts by the families of the eleven disappeared persons to find their relatives

39. The applicants approached numerous authorities in the region, sometimes alone or in small and varying groups, seeking to find out what had happened to the eleven missing men from Kepir.

i. Mehmet Emin Akdeniz wrote a petition to the State Security Prosecutor on 1 and 8 November 1993. He went to the Bingöl public prosecutor on 18 January 1994, who spoke on the phone with a major. In Diyarbakır, he contacted Mehmet Gören a friend of the regiment commander. He also went to Ankara where, on 23 November 1993, he saw

the Prime Minister and the Minister for Human Rights. He contacted the Minister of the Interior and on 27 November went back to see the Minister for Human Rights. He went to see the deputy regional governor with seven others. He went to Kayseri, submitting a petition to the prosecutor and enquiring at the prison.

ii. Sabri Avar went to the police in Diyarbakır, accompanied others to see the Kulp district governor and petitioned the Muş public prosecutor.

iii. Selahattin Tutuş went to the Kulp public prosecutor who sent him to Diyarbakır. He visited the Provincial Governor's office. Sabri Tutuş went to see the Kulp District Governor with Süleyman Yamuk and Sabri Avar and to enquire at the Kulp gendarmerie. He also went to see the Diyarbakır provincial governor and public prosecutor.

iv. Seyithan Atala went first to the Diyarbakır State Security Court and returned repeatedly with petitions. He checked the prisons regularly. He saw the Emergency Area Assistant Governor and went with Mehmet Emin Akdeniz and Aydin Demir to the provincial gendarme headquarters, where they talked to a lieutenant colonel. On 27 December 1993, he went with Süleyman Yamuk and Sabri Avar to Kulp, where they saw the public prosecutor, the governor Kadir Koçdemır and then the Kulp gendarme commander. In light of what the governor said about the involvement of the Bolu forces, he went to Bolu with Süleyman Yamuk in an attempt to see General Yavuz Ertürk.

v. Keleş Şimşek approached the authorities in Diyarbakır.

vi. Aydın Demir went to the Diyarbakır gendarmerie and to the Governor.

vii. Kemal Taş went to the district governor, public prosecutor, police and gendarmes in Kulp, the commando unit, police and public prosecutor in Elazıg, and various authorities (including prisons) in Bingöl, Muş, Erzurum and Erzincan where a woman prosecutor suggested he try Diyarbakır. He submitted three or four petitions to the Diyarbakır public prosecutor.

viii. Süleyman Yamuk went to the public prosecutor in Bingöl, the Diyarbakır State Security Court, the District Governor in Kulp (with Seyithan Atala, Sabri Avar and Kemal Taş) and to Bolu with Seyithan Atala. He submitted two petitions to the Ministry of Justice.

ix. Ramazan Yerlikaya visited the Governor's office in Diyarbakır and the State Security Court. On 27 December 1993, he went to the Governor's office in Kulp with Seyithan Atala, Süleyman Yamuk and Sabri Tutuş and also to the authorities in Muş and Diyarbakır.

7. Investigation

40. As far as may be deduced from the documents, the official steps taken by the authorities were as follows:

41. In respect of the petition of 5 October 1993 by Mehmet Ali Taş concerning Ümit Taş, the public prosecutor made enquiries from the Kulp

district gendarme command and to the Security Directorate, the latter of which indicated that Ümit Taş had been released from their custody.

42. In respect of petitions of 2 November 1993 by Seyithan Atala (concerning Mehmet Şah Atala), 5 and 8 November 1993 by Mehmet Emin Akdeniz (concerning Mehmet Salih Akdeniz and Celil Aydoğdu), 26 November 1993 by Hüsnü Demir (concerning Turan Demir) and 12 December 1993 by Keleş Şimşek (concerning Bahri Şimşek) to the Diyarbakır State Security Court ("SSC") prosecution, manuscript notes indicated that the records had been checked and the names not discovered. Aziz Atala's petition of 17 December 1993 (concerning Mehmet Şah Atala) and Hüsnü Demir's of the same date (concerning Turan Demir) met the same response verbally.

43. In respect of a petition of 12 November 1993 by Mehmet Emin Akdeniz concerning his father to the Bingöl chief public prosecutor, a hand-written note indicated that the public prosecutor had checked with the gendarmes and police but no record of the name was found.

44. In respect of a petition of 14 December 1993 by Mehmet Emin Akdeniz and Aziz Atala, which mentioned all eleven missing persons, to the Kayseri State Security Court prosecutor, a manuscript note indicated that the public prosecutor made an enquiry of the Kayseri prison authorities.

45. Following Mehmet Emin Akdeniz's visit to Ankara where he complained to various ministers in or about November 1993, an enquiry was made by the Minister of State to the Ministry of the Interior, to which, on 20 January 1994, the gendarme general command replied that Mehmet Salih Akdeniz and Celil Aydoğdu had not been detained by the provincial gendarme command.

46. Following a petition of 15 December 1993 by Kemal Taş to the Kulp public prosecutor, which requested an investigation be carried out into Ümit Taş's whereabouts, the public prosecutor took a statement of the same date and a note on the petition indicates that enquiries were made of the district gendarmerie and Security Directorate.

47. Following a petition of 22 December 1993 from Süleyman Yamuk, the Kulp district governor replied on 18 April 1994 that Abdo Yamuk, Turan Demir, Behcet Tutuş, Bahri Şimşek and Mehmet Şah Atala had not been detained by Kulp security forces and referred to not having any information as the operation had concluded in the Muş province.

48. In or about December 1993-January 1994, the Diyarbakır SSC public prosecutor made a request to the Kulp public prosecutor for information relevant to the complaints about the disappearance.

49. On the petitions submitted by Sabri Tutuş and Süleyman Yamük on 27 December 1993 which both refer to their relatives and mention that 10 other people were missing, it appears from the noted number 1993/130 prel. that the Kulp public prosecutor opened an investigation. Ramazan

Yerlikaya, Sabri Avar and Seyithan Atala made petitions at the same time. The following steps then ensued:

– On 28 December 1993, the Kulp public prosecutor requested the Diyarbakır chief public prosecutor to provide information about the relatives of seven of the applicants' missing relatives (namely, the relatives of the five applicants who have submitted petitions on 27 December and Ümit Taş);

– The Diyarbakır SSC prosecutor replied on 19 January 1994 that the seven persons' names were not in the records.

50. On 31 January 1994, the Kulp public prosecutor issued a decision of withdrawal of duty in respect of the seven missing relatives, referring the case to the Diyarbakır SSC on the basis that they had been kidnapped by the PKK. The grounds for this conclusion were not apparent. The petitions in the file at this point, and the statement of Kemal Taş, referred to the missing persons having disappeared while in the custody of the security forces. No step had been taken by the Kulp public prosecutor beyond enquiring whether their names had been registered as detained by the Kulp gendarmerie and police or appeared in the Diyarbakır SSC records.

51. From 31 January 1994, the investigation was transferred to the Diyarbakır SSC prosecutor. The following steps were taken under investigation no. 1994/940:

– On 15 February 1994, the SSC Chief Prosecutor instructed the Kulp public prosecutor, Kulp district gendarme command, Diyarbakır Security Directorate and Diyarbakır provincial gendarme command to report on any information, documents or confession etc relevant to the investigation every three months;

– The petitions dated 9 March 1994 from Hüsnü Demir, which referred to Turan Demir and 10 other missing persons and from Seyithan Atala, which referred to Mehmet Şah Atala and 10 other missing persons was added to the file.

– Enquiries were made to the local gendarme station at Panak. A report dated 10 March 1994 was issued by gendarme sergeant Ulvi Kartal referring to the disappearance of seven persons and stating that he had no information and that the search was ongoing. In his testimony to the Delegates, Ulvi Kartal stated that since the area was not inhabited he had not needed to make any enquiries in order to answer the petition. The petition however was counter-signed by Vehbi Başer, the muhtar of the village, who before the Delegates had confirmed that there was an operation in the village following which eleven persons had disappeared.

– On 10 March 1994, the Diyarbakır provincial gendarme command requested an investigation into the alleged disappearance of eleven named persons and for a report to be made urgently. The letter referred to complaints having been made to the European Commission of Human

Rights. The Diyarbakır SSC prosecutor replied on 17 March 1994 that the men had not been detained.

– On 18 April 1994, a request was made by the Ministry of Justice (General Directorate of International Law and Foreign Relations) to the Kulp prosecutor for an investigation to be made into allegations that eleven named persons had disappeared. In response, the Kulp prosecutor sent back on 11 May 1994 a request for information from the Diyarbakır SSC as to whether the men had been detained under their jurisdiction and sent another brief enquiry to the Kulp gendarme district command which received the same brief reply that the men had not been detained (25 May 1994). By letter dated 6 June 1994, the Kulp prosecutor stated an investigation file had been opened no. 1994/50 concerning the missing persons, though only 5 names were mentioned.

– On 12 August 1994, the Diyarbakır Chief Prosecutor requested, on prompting from Ankara, that the Kulp public prosecutor take statements from Mehmet Emin Akdeniz and Kemal Taş, as well as any other witnesses. This request seemed to lead to further action by the Kulp public prosecutor: a request on 18 August yet again for information as to whether the men had been detained to be provided by the Kulp district gendarme command, as well as a similar letter to the Security Directorate and widening the enquiry this time to the Kulp district mechanised infantry battalion.

– On 22 August 1994, the Diyarbakir SSC prosecution took statements from Aydın Demir, Aziz Atala and Sabri Tutuş, which all maintained that the security forces were responsible for the disappearance of their relatives. Aziz Atala named the Bolu forces.

– On 25(8) August 1994, the Kulp Security Directorate provided information about Ümit Taş's detention in September 1993.

– On 28 October 1994, a statement was taken from Mehmet Emin Akdeniz by a Diyarbakır public prosecutor. He referred to Pembe and Zekiye Akdeniz as having seen the eleven missing persons being taken away. He also mentioned the Bolu forces.

– On 4 November 1994, the Kulp public prosecutor sent a reminder to the Kulp gendarme division command for information to be provided.

– On 9 November 1994, the Kulp district gendarme command enclosed a further investigation report dated 1 November 1994 from the Panak commander Ulvi Kartal which stated that an investigation had been carried out into the possibility of a kidnapping but no information had been obtained. However, as stated above, Ulvi Kartal informed the Delegates that he in fact took no steps to investigate.

– On 12 December 1994, a statement was taken from Kemal Taş by the Kulp public prosecutor. He, *inter alia*, named a shepherd from Yakut called Çesim as having given information that his son had been seen with the soldiers in the operation at Alaca.

– On 19 December 1994, a statement was taken from Mehmet Tahir Taş by a public prosecutor, which referred to his brother having been held by Kulp gendarme commandos and then in Alaca.

– On a date unspecified a statement was taken from Zeki Akdeniz by the same public prosecutor that took the statements of Kemal Taş and Mehmet Tahir Taş (above). This statement refers to a possibility that the PKK kidnapped the missing persons though also said that the people went missing after an operation.

– On 27 December 1994, the Kulp public prosecutor asked the Kulp gendarmes for Pembe and Zekiye Akdeniz to be brought to make a statement. A reminder was sent on 23 February 1995.

– On 3 July 1995, the Kulp public prosecutor asked for the gendarmes to make enquiries about Çesim, a villager from Yakut.

– On 3 August 1995, the Diyarbakır public prosecutor requested the Kulp public prosecutor to summon Mehmet Emin Akdeniz, Kemal Taş and Ramazan Yerlikaya for their statements to be taken. A request was made the same day to the security directorate for Sabri Tutuş, Aydın Demir and Seyithan Atala to be brought. On 11 August 1995, Muş public prosecutor was making similar requests in respect of Sabri Avar and Süleyman Yamuk.

– On 11 September 1995, the Diyarbakır Security Directorate provided information about certain of the applicants, and referred to the fact that Süleyman Atala and Hüsnü Demir had been brought in to make statements.

– On 19 September 1995, the statement of Sabri Tutuş was taken, which referred to the military operation which he had witnessed in the village.

– On 26 September 1995, the statement of Kemal Taş was taken by the Diyarbakır SSC Chief Prosecutor.

– Following further requests for Mehmet Emin Akdeniz to be brought (20 September 1995), the Diyarbakır public prosecutor was informed the same day of information provided by the Kulp gendarmes on 18 August as regarded his address. A statement was then taken from him on 3 October 1995. It referred to the women as being eye-witnesses.

– On 23 October 1995, the Kulp public prosecutor instructed that Pembe Akdeniz, Zekiye Akdeniz and the shepherd Çesim be brought. At about the time, he was also making enquiries about Vehbi Başer the current muhtar of Alaca. He requested that Diyarbakır prosecution return the investigation file to enable him to pursue matters. The file was provided on 4 December 1995.

– On 11 December 1995, the Kulp prosecutor made requests for Hüsnü Demir, Çesim, Misbah Akdeniz, Medine Akdeniz, Pembe Akdeniz and Zekiye Akdeniz to be brought. Further reminders were sent for Hüsnü Demir on 5 August 1996 and for the latter two witnesses on 16 April 1996.

– On a date in April 1996, a statement was taken from Çesim Boskurt, who denied having witnessed any events. On 29 May 1996, a statement was taken from Pembe Akdeniz in which she confirmed witnessing her husband

being detained by soldiers during an operation. By a report of that date, it was indicated that Zekiye Akdeniz had died.

– A statement was taken on 9 August 1996 from Mizbah Akdeniz which gave no substantial information.

– On 8 April 1997, a second statement was taken from Mizbah Akdeniz, which this time referred to the operation and the Bolu forces taking his father as a guide. On 25 April a statement was taken from Aydın Demir.

52. On 29 April 1997, the Diyarbakir SSC Chief Prosecutor issued a decision of withdrawal of jurisdiction, in which it concluded that there was an absence of evidence that the PKK kidnapped the missing persons, named the security forces as the defendants and noted that the complaints involved an alleged disappearance in custody. The file was accordingly sent back to the Kulp public prosecutor, who on 20 June 1997 joined it to the ongoing file at Kulp. The only step taken by the Kulp public prosecutor according to the documents provided to the Commission was on 8 September 1997 to request the Kulp police and gendarme authorities to provide information as to any developments and whether the missing persons had been found missing or dead.

53. The Commission observed that a number of reports were made to the authorities in Ankara on the progress of the investigations. On 30 June and 24 August 1995, Bekir Selçuk, Diyarbakır SSC Chief Prosecutor reported to the Ministry of Justice, that the missing persons had probably been kidnapped by the PKK and that no concrete evidence had been obtained. The second letter claimed also that the applicants had denied that they were eye-witnesses and failed to give the names of the women who were alleged to have witnessed events and that there was no evidence that an operation took place in Alaca or that people were detained. These two letters ignored the fact that Zeki Akdeniz stated that he saw an operation take place, that the statements of Sabri Tutuş, Aziz Atala and Aydın Demir gave details of an operation in the village and that in his statement of 28 October 1994 Mehmet Emin Akdeniz had named Pembe and Zekiye Akdeniz as eye-witnesses.

54. The letter of 31 December 1994 from the General Gendarmerie Headquarters to the Ministry of Foreign Affairs denied that any operation had occurred at Alaca village area on 9 October 1993 and omitted to refer to the operation conducted on the nearby Şen plateau by the Bolu forces.

8. Contacts with the applicants by the authorities concerning their applications

55. The authorities took steps to contact all the applicants concerning their applications, and did question all of them save Seyithan Atala.

In October 1995, Mehmet Emin Akdeniz was summoned by the State Security Court (SSC) Chief Public Prosecutor, being held in custody for two nights beforehand by the police. He described how the prosecutor claimed

that it was other people bringing the application rather than himself and how the prosecutor was angry when he maintained that he had applied to Europe after applications in Turkey had proved futile.

In June 1997, Sabri Avar was summoned by the Muş public prosecutor who asked if he had complained against the State and why he had applied to the Human Rights.

In or about 1996, Keleş Şimşek was summoned by the public prosecutor in Mersin, who asked him why he had applied to European Human Rights Commission.

In August 1994, Seyithan Atala's brother Aziz was summoned during his absence on military service and his statement taken by the Diyarbakir public prosecutor, who referred to documents from the Ministry of Justice and enclosed petitions.

On 19 September 1995, Sabri Tutuş was questioned by the SSC Chief Prosecutor. He recalled that he was questioned about what had happened in the village. Though he did not remember being questioned about his application, he was asked to confirm his signature on his statement to the Human Rights Association ("HRA") which was part of his application. He had also given a statement to the Diyarbakır public prosecutor on 22 August 1994.

On 25 April 1997, Aydın Demir was held overnight by the police and, after the documents relevant to his application were read out, questioned by the SSC Chief Public Prosecutor about whether he had applied to the HRA and to Europe.

Kemal Taş made a statement to the Chief Public Prosecutor on 26 September 1996, from which it appears that he was asked about his statement to the HRA and whether he had signed a power of attorney for the lawyers representing him in this application.

In or about 1996, Süleyman Yamuk was summoned by the Tarsus public prosecutor, who said that he had complained against the State and to whom he explained why he had made a petition to Europe.

Ramazan Yerlikaya also recalled being summoned by a prosecutor who claimed that he had complained against the State, in or about 1998.

56. In the statements recorded as taken from Aziz Atala, Sabri Tutuş, Kemal Taş, Mehmet Emin Akdeniz and Aydın Demir, there were references to correspondence and enclosures from the Ministry of Justice (General Directorate of International Law and Foreign Relations) or to documents from the Commission being read out. When questioned about this during the witness hearings before the Commission Delegates, the Diyarbakır SSC Chief Prosecutor stated that he did not have copies of the applicants' petitions to show them but only correspondence from the Ministry. The Commission rejected this denial. It observed that he considered it his duty to verify the signatures on applications to the Commission. Sabri Tutuş recalled being asked to do so. It found that these four applicants, and, in the

case of Seyithan Atala, his brother Aziz, were questioned about their applications on the basis of the documents submitted on their behalf to the Commission.

B. The Government's submissions on the facts

57. A military operation was carried out in October 1993 in the Kulp-Muş-Bingöl triangle of Diyarbakır province. It was carried out by the Bolu brigade under General Yavuz Ertürk. No aeroplanes were used during the operation and only a limited number of UH-1 helicopters were made available, taking a maximum of 6 persons. Persons detained during the operation were transported on foot to Muş.

58. The authorities carried out investigations promptly into the alleged disappearance of the eleven persons. The applicant Kemal Taş was informed that his son had been released. The petitions lodged by the other applicants asked only for information and did not contain denunciations. The petitions were only made in December 1993 in any event, without any explanation for why they waited so long to take action.

59. The applicants' assertions of security force involvement in the detention and disappearance of their relatives were totally unsubstantiated. If thousands of soldiers were involved, it would have been expected that they would have talked about when leaving their military service.

60. All these factors indicated that it was probable that the persons were kidnapped by the PKK.

C. Materials provided by the Government

61. The Government provided a batch of documents relating to the investigation by the Kulp public prosecutor from 1996-2000, some of which were already provided to the Commission. They have not made any submissions as to the significance of these documents or as to whether they contradict any findings by the Commission.

II. RELEVANT DOMESTIC LAW AND PRACTICE

62. The principles and procedures relating to liability for acts contrary to the law may be summarised as follows.

A. Criminal prosecutions

63. Under the Criminal Code all forms of homicide (Articles 448 to 455) and attempted homicide (Articles 61 and 62) constitute criminal offences. It is also an offence for a government employee to subject some-one to torture

or ill-treatment (Article 243 in respect of torture and Article 245 in respect of ill-treatment) or to deprive an individual unlawfully of his or her liberty (Article 179 generally, Article 181 in respect of civil servants).

64. The authorities' obligations in respect of conducting a preliminary investigation into acts or omissions capable of constituting such offences that have been brought to their attention are governed by Articles 151 to 153 of the Code of Criminal Procedure. Offences may be reported to the authorities or the security forces as well as to public prosecutor's offices. The complaint may be made in writing or orally. If it is made orally, the authority must make a record of it (Article 151).

If there is evidence to suggest that a death is not due to natural causes, members of the security forces who have been informed of that fact are required to advise the public prosecutor or a criminal court judge (Article 152). By Article 235 of the Criminal Code, any public official who fails to report to the police or a public prosecutor's office an offence of which he has become aware in the exercise of his duty is liable to imprisonment.

A public prosecutor who is informed by any means whatsoever of a situation that gives rise to the suspicion that an offence has been committed is obliged to investigate the facts in order to decide whether or not there should be a prosecution (Article 153 of the Code of Criminal Procedure).

65. In the case of alleged terrorist offences, the public prosecutor is deprived of jurisdiction in favour of a separate system of State Security prosecutors and courts established throughout Turkey.

66. If the suspected offender is a civil servant and if the offence was committed during the performance of his duties, the preliminary investigation of the case is governed by the Law of 1914 on the prosecution of civil servants (sometimes referred to as the Official Conduct Act), which restricts the public prosecutor's jurisdiction *ratione personae* at that stage of the proceedings. In such cases it is for the relevant local administrative council (for the district or province, depending on the suspect's status) to conduct the preliminary investigation and, consequently, to decide whether to prosecute. Once a decision to prosecute has been taken, it is for the public prosecutor to investigate the case.

An appeal to the Supreme Administrative Court lies against a decision of the Council. If a decision not to prosecute is taken, the case is automatically referred to that court.

67. By virtue of Article 4, paragraph (i), of Legislative Decree no. 285 of 10 July 1987 on the authority of the governor of a state of emergency region, the 1914 Law (see paragraph 66 above) also applies to members of the security forces who come under the governor's authority.

68. If the suspect is a member of the armed forces, the applicable law is determined by the nature of the offence. Thus, if it is a "military offence" under the Military Criminal Code (Law no. 1632), the criminal proceedings

are in principle conducted in accordance with Law no. 353 on the establishment of courts martial and their rules of procedure. Where a member of the armed forces has been accused of an ordinary offence, it is normally the provisions of the Code of Criminal Procedure which apply (see Article 145 § 1 of the Constitution and sections 9 to 14 of Law no. 353).

The Military Criminal Code makes it a military offence for a member of the armed forces to endanger a person's life by disobeying an order (Article 89). In such cases civilian complainants may lodge their complaints with the authorities referred to in the Code of Criminal Procedure (see paragraph 64 above) or with the offender's superior.

B. Civil and administrative liability arising out of criminal offences

69. Under section 13 of Law no. 2577 on administrative procedure, anyone who sustains damage as a result of an act by the authorities may, within one year after the alleged act was committed, claim compensation from them. If the claim is rejected in whole or in part or if no reply is received within sixty days, the victim may bring administrative proceedings.

70. Article 125 §§ 1 and 7 of the Constitution provides:

> "All acts or decisions of the authorities are subject to judicial review...
>
> The authorities shall be liable to make reparation for all damage caused by their acts or measures."

That provision establishes the State's strict liability, which comes into play if it is shown that in the circumstances of a particular case the State has failed in its obligation to maintain public order, ensure public safety or protect people's lives or property, without it being necessary to show a tortious act attributable to the authorities. Under these rules, the authorities may therefore be held liable to compensate anyone who has sustained loss as a result of acts committed by unidentified persons.

71. Article 8 of Legislative Decree no. 430 of 16 December 1990, the last sentence of which was inspired by the provision mentioned above (see paragraph 71 above), provides:

> "No criminal, financial or legal liability may be asserted against ... the governor of a state of emergency region or by provincial governors in that region in respect of decisions taken, or acts performed, by them in the exercise of the powers conferred on them by this legislative decree, and no application shall be made to any judicial authority to that end. This is without prejudice to the rights of individuals to claim reparation from the State for damage which they have been caused without justification."

72. Under the Code of Obligations, anyone who suffers damage as a result of an illegal or tortious act may bring an action for damages (Articles 41 to 46) and non-pecuniary loss (Article 47). The civil courts are

not bound by either the findings or the verdict of the criminal court on the issue of the defendant's guilt (Article 53).

However, under section 13 of Law no. 657 on State employees, anyone who has sustained loss as a result of an act done in the performance of duties governed by public law may, in principle, only bring an action against the authority by whom the civil servant concerned is employed and not directly against the civil servant (see Article 129 § 5 of the Constitution and Articles 55 and 100 of the Code of Obligations). That is not, however, an absolute rule. When an act is found to be illegal or tortious and, consequently, is no longer an "administrative act" or deed, the civil courts may allow a claim for damages to be made against the official concerned, without prejudice to the victim's right to bring an action against the authority on the basis of its joint liability as the official's employer (Article 50 of the Code of Obligations).

THE LAW

I. THE COURT'S ASSESSMENT OF THE FACTS

73. The Court reiterates its settled case-law that under the Convention system prior to 1 November 1998 the establishment and verification of the facts was primarily a matter for the Commission (former Articles 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 assessment in the light of all the material before it, it is however only in exceptional circumstances that it will exercise its powers in this area (see, among other authorities, the Akdivar and Others v. Turkey judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, p. 1218, § 78).

74. The Government submitted that the Commission accepted the applicants' allegations as true without considering other possibilities and took for granted their reliability. In their view, the Commission based itself solely on the oral and documentary evidence provided by the applicants. They criticised the way in which the Commission rejected the evidence of General Yavuz Ertürk – in particular, that it did not accept his evidence that there were no helicopters in use allowing the transport of eleven men, only helicopters carrying up to six persons, or his evidence that no helicopters could land at Kepir. They disputed that there was any sufficient evidence allowing the eleventh detainee to be identified as Ümit Taş, considering the differing ages given by the witnesses had not been adequately explained by the Commission. There were accordingly insufficiently concrete elements to substantiate the claims that the eleven relatives of the applicants had been

taken by soldiers. In addition, they considered that there was no explanation for why the applicants had waited until December to lodge their petitions and why they did so in Diyarbakır rather than Kulp. As almost all the missing persons were known to be supporters of the State and had committed no crimes, this coincidence, along with the other factors, indicated that the missing persons had probably been kidnapped by the PKK.

75. The Court observes that the Commission based its examination on all the evidence in the file, not only the submissions of the applicants. A detailed consideration of the conflicting points of evidence is set out in its report, including an assessment of the reliability and weight to be placed on the evidence of each of the witnesses. Its view of the weight to be attached to the General's evidence took into account the fact that General gave evidence in conditions excluding the applicants' representatives who had no opportunity to put questions orally and for his demeanour to be observed in answering them. The Commission acknowledged that there were fewer elements supporting the identification of the eleventh detainee as Ümit Taş but concluded that the evidence, if believed, reached the requisite standard of proof.

76. The Court notes that the account of the applicants alleging an operation had initially been denied by the authorities. Indeed the Government denied to the Commission that any such operation had occurred. During the taking of evidence, it transpired however that a large-scale military operation had occurred as alleged, under the command of an officer who had been named by the applicants at an early stage. On numerous points, the applicants' accounts proved to be substantiated, often by the evidence of the Government's own witnesses, for example, the villager Vehbi Başer, who said that he and others were still living in the region at the time of the operation and that he heard helicopters flying over the area and the reference by the General to the participation in the operation of gendarmes forces from Muş as the applicants' witnesses had alleged and his confirmation that his troops used villagers as guides.

77. No support for doubting the authenticity of the applicants' complaints can be derived from the alleged delay in bringing the matter to the attention of the authorities, or the inappropriate authorities. Kemal Taş approached the authorities in Kulp immediately his son failed to return home from that town in October. The other applicants began approaching the authorities in October and November also (see the petitions listed in the Commission report, paragraphs 114-150). Given that they had no idea of where their relatives had been taken, their reaction in approaching the authorities in Diyarbakır as well as elsewhere in the province is entirely comprehensible. The Commission took into account the Government argument that the applicants' claims were fabricated and motivated by fear of the PKK or desire to gain money. Having heard all the applicants, it

found however that they were honest, convincing and suffering deeply from the uncertainty as to the fate of their relatives.

78. Having regard to the complexity of the factual aspects of the case, involving numerous applicants and villagers and the inevitable difficulties arising due to the passage of time since events, the Court finds that the Commission approached its task with assessing the evidence with the requisite caution, giving detailed consideration to the elements which supported the applicants' claims and those which cast doubt on their credibility. It does not find that the criticisms made by the Government raise any matter of substance which might warrant the exercise of its own powers of verifying the facts. In these circumstances, the Court accepts the facts as established by the Commission (see paragraphs 10-56 above).

II. ALLEGED VIOLATIONS OF ARTICLE 2 OF THE CONVENTION

79. The applicants alleged that their relatives had disappeared after being detained by the security forces and that it could be presumed that they were dead in circumstances for which the authorities were liable. They also complained that no effective investigation had been conducted into the circumstances of those deaths. They invoked Article 2 of the Convention, which 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."

80. The Government disputed those allegations. The Commission expressed the opinion by 26 votes to 2 that Article 2 had been infringed on the ground that the eleven people who had disappeared after being detained by the security forces must be presumed to have died and that the authorities had failed to carry out an adequate investigation into the circumstances surrounding their deaths.

A. Submissions of the parties

81. The applicants submitted that the authorities were under an obligation to protect the right to life of persons detained. They were required to provide a plausible explanation as to what happened to their relatives, failure to do so indicating that they were responsible for a life-threatening situation in breach of Article 2. As regarded the context in south-east Turkey, where there was ample evidence of a high risk of torture and death in custody in 1993 and evidence that unacknowledged detention was used by the authorities as a regular technique, it could be presumed in this case that their relatives were dead. This presumption was supported by circumstantial evidence, such as the way in which the detainees were kept apart and ill-treated, the lack of any records kept in respect of their detention and the fact that there has been no news of them for over a period of seven years. The authorities must be regarded as responsible for their deaths which occurred following their detention.

82. The applicants also submitted that the authorities had failed to comply with their obligation under Article 2 of the Convention to carry out an effective investigation into the deaths of their relatives. The investigation was dilatory, transferred back and forth between Diyarbakır and Kulp, failed to investigate the involvement of security forces in events and assumed on the basis of very little evidence that the PKK were responsible for abducting the missing people. In their view the findings of the Commission concerning the shortcomings in the investigative and judicial mechanisms in the south-east at this time necessarily meant that there was a practice of inadequate, superficial and ineffective investigations into unlawful attacks and killings in aggravated violation of Article 2 of the Convention.

83. The Government regarded the applicants' complaints as unsubstantiated and fabricated with respect to the alleged involvement of the security forces. They shared the opinion of the two members of the Commission who dissented on Article 2, namely that the finding that the missing persons had lost their lives was not based on sufficient evidence to justify a finding under this provision. In their view, presumption of death could not be founded on probabilities.

B. Concerning responsibility of the State for the death of the eleven missing men

84. The Court has accepted the Commission's establishment of facts in this case, namely, that Mehmet Salih Akdeniz, Celil Aydoğdu, Behçet Tutuş, Mehmet Şerif Avar, Hasan Avar, Bahri Şimşek, Mehmet Şah Atala, Turan Demir, Abdo Yamuk, Nusreddin Yerlikaya and Ümit Taş were last seen while being detained by the security forces during the operation conducted in October 1993 and that they have since disappeared.

85. Where an individual is taken into custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which an issue arises under Article 3 of the Convention (see the Tomasi v. France judgment of 27 August 1992, Series A no. 241-A, §§ 108-111; the Ribitsch v. Austria judgment of 4 December 1995, Series A no. 336, § 34, and the *Selmouni v. France* [GC] no. 25803/94, ECHR 1999-V, § 87). The obligation on the authorities to account for the treatment of an individual in custody is particularly stringent where that individual dies. Whether the failure on the part of the authorities to provide a plausible explanation as to a detainee's fate, in the absence of a body, might also raise issues under Article 2 of the Convention depends on all the circumstances of the case, and in particular on the existence of sufficient circumstantial evidence, based on concrete elements, from which it may be concluded to the requisite standard of proof that the detainee must be presumed to have died in custody (see *Çakıcı v. Turkey* [GC], no. 23657/94, ECHR 1999-IV, § 85; *Ertak v. Turkey* no. 20764/92 (Sect. 1) ECHR 2000-V, § 131, and *Timurtaş v. Turkey* no. 23531/94 (Sect. 1) ECHR 2000-VI, §§ 82-86).

86. In this respect, the period of time which has elapsed since the person was placed in detention, although not decisive in itself, is a relevant factor to be taken into account. It must be accepted that the more time goes by without any news of the detained person, the greater the likelihood that he or she has died. Consequently, the passage of time may affect the weight to be attached to other elements of circumstantial evidence and issues may therefore arise which go beyond a mere irregular detention in violation of Article 5. Such an interpretation is in keeping with the effective protection of the right to life as afforded by Article 2, which ranks as one of the most fundamental provisions in the Convention (see, amongst other authorities, the above-mentioned Çakıcı v. Turkey judgment, § 86).

87. Turning to the particular circumstances of the case, the Court observes that although the applicants' relatives were detained on or about 9 to 12 October 1993 no entries were subsequently made in any custody records. The evidence of the applicants and other villagers indicated that they were held at Kepir until about 17 to 19 October 1993, at which point some of them at least were seen being loaded onto a helicopter. There has been no news of the missing men since.

88. The Court draws very strong inferences from the length of time which has elapsed – over seven years, the lack of any documentary evidence relating to their detention and from the inability of the Government to provide a satisfactory and plausible explanation as to what happened to them. It also observes that in the general context of the situation in south-east Turkey in 1993, it can by no means be excluded that an unacknowledged detention of such persons would be life-threatening. It is recalled that the Court has held in two recent judgments that defects

undermining the effectiveness of criminal law protection in the south-east region during the period relevant also to this case permitted or fostered a lack of accountability of members of the security forces for their actions (see *Kılıç v. Turkey* no. 22492/93 (Sect. 1), ECHR 2000-III, § 75, and *Mahmut Kaya v. Turkey* no. 22535/93, (Sect. 1) ECHR 2000-III, § 98).

89. For the above reasons, the Court finds that the eleven men must be presumed dead following their detention by the security forces. Consequently, the responsibility of the respondent State for their death is engaged. Noting that the authorities have not accounted for what happened during their detention and that they do not rely on any ground of justification in respect of any use of lethal force by their agents, it follows that liability for their deaths is attributable to the respondent Government (see the Çakıcı v. Turkey judgment, cited above, § 87). Accordingly, there has been a violation of Article 2 on that account.

C. Concerning the alleged inadequacy of the investigation into deaths

90. The Court reiterates that the obligation to protect life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention "to secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see, *mutatis mutandis*, the McCann and Others v. the United Kingdom judgment of 27 September 1995, Series A no. 324, p. 49, § 161, and the Kaya v. Turkey judgment of 19 February 1998, *Reports* 1998-I, § 105).

91. In the present case, the Court recalls that the applicants brought the substance of their complaint to the notice of numerous authorities in the region from October 1993 onwards. The Kulp public prosecutor commenced an investigation in December 1993. However, within less than two months, he ceded jurisdiction to the Diyarbakır State Security public prosecutor on the apparent basis that it was a PKK-linked terrorist crime. There was no evidence in the file to provide any support for this assumption. The only material consisted of the petitions of the applicants and members of their family who referred to their relatives having been detained by soldiers, in addition to the absence of any entries being found in Kulp or Diyarbakır custody records. It was not until August 1994 that the Diyarbakır prosecutor began taking statements from the applicants. Though Mehmet Emin Akdeniz mentioned in his statement of 28 October 1994 that there were women who had witnessed the removal of the missing men in a security force helicopter, a statement was not taken from Pembe Akdeniz until 29 May 1996. It may be noted that, save one ambiguous statement by Zeki Akdeniz, all the statements from the applicants and their families

maintained that soldiers had taken the missing men. On 29 April 1997, the Diyarbakır prosecutor declined jurisdiction, sending the file back to the Kulp public prosecutor noting the absence of evidence of PKK involvement. No substantive progress in the investigation since that date has been brought to the attention of the Commission or Court.

92. The Court is struck by the lack of any meaningful effort by the public prosecutors to investigate the serious allegations that were being made. Despite the weight of the evidence from the applicants, the denials of gendarmes and security force sources of any knowledge about events or the whereabouts of the missing men were accepted without further action. No steps were taken to discover the extent or nature of the operation which occurred at the relevant time while the few steps taken to find eye-witnesses who could assist in uncovering the facts were taken years after the events. The effectiveness of the procedures was not facilitated by the way in which the investigation was transferred between Kulp to Diyarbakır, jurisdiction depending on who – the PKK or the security forces – were currently perceived as the perpetrators of the incident.

93. The Court agrees with the Commission's assessment that having regard to the inactivity of the public prosecutors and their reluctance in face of accumulating evidence to pursue any lines of enquiry concerning security force involvement the investigation did not provide any safeguard in respect of the right to life.

There was a failure to provide an effective investigation into the disappearance of the applicants' relatives and there has accordingly been a violation of Article 2 of the Convention on this account also.

III. ALLEGED VIOLATIONS OF ARTICLE 3 OF THE CONVENTION

A. Concerning the applicants' eleven relatives

94. The applicants complained that their relatives had been the victim of treatment contrary to Article 3 of the Convention which provides:

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

95. The applicants, adopting the conclusions of the Commission, submitted that the conditions of detention of their relatives constituted inhuman and degrading treatment, referring in particular to the cold, the evidence of beatings and psychological suffering.

96. The Government, criticising the way in which the Commission had evaluated the evidence of the applicants, submitted that the alleged victims had not been produced and the effects of any alleged ill-treatment were unknown, rendering any findings baseless.

97. The Court's case-law indicates that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and/or mental effects and, in some cases, the sex, age and state of health of the victim (see, amongst other authorities, the Tekin v. Turkey judgment of 9 June 1998, *Reports* 1998-IV, § 52).

98. The Court recalls that it has accepted the Commission's findings of fact, namely that the eleven relatives of the applicants were detained in the open at Kepir for a period of at least a week and that during this time, they suffered significant privation, including, save in the case of Mehmet Salih Akdeniz, being bound. Some beatings occurred, e.g. Behcet Tutuş, while Abdo Yamuk suffered an injury to his leg. The evidence showed that they suffered not only from cold but from fear and anguish as to what might happen to them. This treatment reaches the threshold of inhuman and degrading treatment and discloses in that respect a violation of Article 3 of the Convention.

B. Concerning the applicants

99. The applicants requested the Court to confirm the findings of the Commission that the disappearance of their relatives caused them such a degree of suffering as to constitute inhuman and degrading treatment contrary to Article 3 of the Convention.

100. The Government rejected the applicants' claims in this respect.

101. The Court observes that in the Kurt case (Kurt v. Turkey judgment of 25 May 1998, *Reports* 1998-III, pp. 1187-88, §§ 130-34), which concerned the disappearance of the applicant's son during an unacknowledged detention, it found that the applicant had suffered a breach of Article 3 having regard to the particular circumstances of the case. It referred particularly to the fact that she was the mother of a victim of a serious human rights violation and herself the victim of the authorities' complacency in the face of her anguish and distress. The Kurt case does not however establish any general principle that a family member of a "disappeared person" is thereby a victim of treatment contrary to Article 3.

Whether a family member is such a victim will depend on the existence of special factors which gives the suffering of the applicant a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation. Relevant elements will include the proximity of the family tie – in that context, a certain weight will attach to the parent-child bond, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person and the way

in which the authorities responded to those enquiries. The Court has emphasised that the essence of such a violation does not so much lie in the fact of the "disappearance" of the family member but rather concerns the authorities' reactions and attitudes to the situation when it is brought to their attention. It is especially in respect of the latter that a relative may claim directly to be a victim of the authorities' conduct (see *Cakici v. Turkey* [GC] no. 23657/94, §§ 98-99, ECHR 1999-IV, *Timurtaş v. Turkey*, no 23531/94, §§ 95-98 ECHR 2000-VI, and *Taş v. Turkey*, no. 24396/94 (Sect. 1) (bil.), ECHR 2000-XI, §§ 79-80).

102. In the present case, the applicants were respectively fathers (Sabri Avar and Kemal Taş), brothers (Mehmet Emin Akdeniz, Sabri Avar, Keleş Şimşek, Seyithan Atala, Aydın Demir, Süleyman Yamuk and Ramazan Yerlikaya), son (Sabri Tutuş) and uncle (Mehmet Emin Akdeniz) of the disappeared persons. Only Keleş Şimşek was present at Kepir and directly witnessed the detention of the eleven missing men, most of the other applicants being elsewhere during the operation. The applicants made approaches to the authorities asking about their relatives, and were not successful in obtaining any information. It may be noted that some of the applicants were more active than others in this regard. While it is not disputed that the applicants suffered, and continue to suffer, distress as a result of the disappearance of their relatives, the Court is not satisfied that the present case discloses the special circumstances referred to in the Çakıcı case (cited above) and does not consider that the applicants may claim to be a victim of the authorities' conduct to an extent which discloses a breach of Article 3 of the Convention. Accordingly, it finds no violation of that provision in this respect.

IV. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

103. The applicants complained that the disappearance of their relatives in detention disclosed a violation, in numerous aspects, of Article 5 of the Convention which 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."

104. The applicants submitted, relying on the findings of the Commission, that their relatives had been taken into custody by the security forces in circumstances falling outside the specified grounds in Article 5 § 1. There was no evidence that their relatives had been informed of the reasons for their arrest as required by Article 5 § 2 or that they had ever been brought before a judge or other appropriate judicial officer as required by Article 5 § 3. The refusal of the State to acknowledge their relatives' detention also rendered nugatory the fundamental safeguards provided for in Article 5 § 4.

105. The Government submitted that there was no basis for finding that the eleven persons had been taken into custody and therefore no possibility of any violation of Article 5 of the Convention.

106. The Court's case-law stresses the fundamental importance of the guarantees contained in Article 5 for securing the rights of individuals in a democracy to be free from arbitrary detention at the hands of the authorities. It has reiterated in that connection 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 arbitrary detention. In order to minimise the risks of arbitrary detention, Article 5 provides a corpus of substantive rights intended to ensure that the act of deprivation of liberty be amenable to independent judicial scrutiny and secures the accountability of the authorities for that measure. The unacknowledged detention of an individual is a complete negation of these guarantees and discloses a most grave violation of Article 5. Bearing in mind the responsibility of the authorities to account for individuals under their control, Article 5 requires them to take effective measures to safeguard against the risk of disappearance and to conduct a prompt and effective investigation into an arguable claim that a person has been taken into custody and has not been seen since (Kurt v. Turkey judgment, *loc. cit*., pp. 1184-85, § 122-125, Çakıcı v. Turkey judgment, *loc. cit.*, § 104).

107. The Court notes that its reasoning and findings in relation to Article 2 above leave no doubt that detention of the applicants' relatives was in breach of Article 5. They were held at Kepir by security forces for a

period of at least a week during an operation in or about the Alaca district, following which they have disappeared. The authorities have failed to provide a plausible explanation for their whereabouts and fate after that date. The investigation carried out by the domestic authorities into the applicants' allegations was neither prompt nor effective. It regards with particular seriousness the lack of any entries in official custody records in respect of these persons' detention. The recording of accurate and reliable holding data provides an indispensable safeguard against arbitrary detention, the absence of which enables those responsible for the act of deprivation of liberty to escape accountability for the fate of the detainee (see the Kurt v. Turkey judgment, *loc. cit*., § 125).

108. The Court concludes that the eleven missing men were held in detention in the complete absence of the safeguards contained in Article 5 and that there has been a particularly grave violation of the right to liberty and security of person guaranteed under that provision.

V. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

109. The applicants asserted that they had been denied access to an effective domestic remedy and alleged a breach of Article 13, which provides:

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

110. The applicants, adopting the findings of the Commission, complained of a denial of an effective remedy in relation both to their missing relatives and in their own regard. He referred to the attitude of the public prosecutors, the Governors, gendarmes and armed forces. They submitted that Article 13 required effective accountability by the authorities for arguable claims that persons had disappeared in custody. This case disclosed that they in fact enjoyed complete immunity. The failings were both systematic and systemic.

111. The Government reaffirmed that all the necessary enquiries had been made, but that the available evidence had not corroborated the applicants' allegations.

112. The Court reiterates that Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. Article 13 thus requires the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief, although the 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 also varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State (see the aforementioned Çakıcı judgment, *loc. cit.*, § 112, and the other authorities cited there).

The Court has further previously held that where the relatives of a person have an arguable claim that the latter has disappeared at the hands of the authorities, or where a right with as fundamental an importance as the right to life is at stake, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure (see the Kurt v. Turkey judgment, *loc. cit*., § 140, and the Yaşa v. Turkey judgment of 2 September 1998, *Reports* 1998-VI, p. 2442, § 114).

113. Turning to the facts of the case, the Court considers that there can be no doubt that the applicants had an arguable complaint that their relatives had disappeared after being taken into custody. In view of the fact, moreover, that the Court has found that the domestic authorities failed in their obligation to protect the life of the applicants' relatives, the applicants were entitled to an effective remedy within the meaning as outlined in the preceding paragraph.

114. Accordingly, the authorities were under the obligation to conduct an effective investigation into the disappearance of the applicants' missing relatives. For the reasons set out above (see paragraphs 91-93), no effective criminal investigation can be considered to have been conducted in accordance with Article 13, the requirements of which may be broader than the obligation to investigate imposed by Article 2 (see the Kaya v. Turkey judgment, cited above, pp. 330-31, § 107). The Court finds therefore that the applicants have been denied an effective remedy in respect of the disappearance and death of their relatives and thereby access to any other available remedies at their disposal, including a claim for compensation.

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

VII. ALLEGED VIOLATION OF FORMER ARTICLE 25 OF THE CONVENTION

115. The applicants complained that they had been subject to serious interference with the exercise of their right of individual petition, in breach of former Article 25 § 1 of the Convention (now replaced by Article 34), which provided:

> "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."

116. The applicants submitted that they had been summoned and questioned about their applications to the Commission. Mehmet Emin Akdeniz had been held for two nights by the police and Aydın Demir had been detained overnight before being questioned by the police. Though Seyithan Atala was doing military service, they summoned his brother Aziz instead. This was not consistent with the State's obligation under former Article 25 of the Convention.

117. The Government made no submissions on this aspect. Before the Commission, they referred to the evidence of the Diyarbakır State Security Court Chief Public Prosecutor, Bekır Selçuk, stating that he had summoned the applicants to ask them for their knowledge of the case and that he would not have asked them why they brought their applications.

118. The Court reiterates that it is of the utmost importance for the effective operation of the system of individual petition instituted by former Article 25 (now replaced by Article 34) that applicants or potential applicants should be able to communicate freely with the Convention organs without being subjected to any form of pressure from the authorities to withdraw or modify their complaints (see the Akdivar and Others v. Turkey judgment, cited above, p. 1219, § 105; the Aksoy v. Turkey judgment of 18 December 1996, *Reports* 1996-VI, p. 2288, § 105; the Kurt v. Turkey judgment, cited above, p. 1192, § 159, and Ergı v. Turkey judgment of 28 July 1998, *Reports* 1998-IV, p. 1784, § 105). In this context, "pressure" includes not only direct coercion and flagrant acts of intimidation but also other improper indirect acts or contacts designed to dissuade or discourage applicants from pursuing a Convention remedy (see the above mentioned Kurt judgment, *loc. cit.*).

Furthermore, whether or not contacts between the authorities and an applicant are tantamount to unacceptable practices from the standpoint of former Article 25 § 1 must be determined in the light of the particular circumstances of the case. In this respect, regard must be had to the vulnerability of the complainant and his or her susceptibility to influence exerted by the authorities (see the Akdivar and Others and Kurt judgments cited above, p. 1219, § 105, and pp. 1192-93, § 160, respectively). In previous cases, the Court has had 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, and it 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 former Article 25 of the Convention (*ibid*.).

119. In the instant case, it has been found that the applicants were questioned by police and public prosecutors about their applications to the Commission. Though Seyithan Atala was not questioned as he was absent on military service, his brother was summoned in his place. Two of the applicants (Mehmet Emin Akdeniz and Aydın Demir) were held in detention. The applicants were asked why they had introduced their applications and in at least five instances (Aziz Atala, Sabri Tutuş, Kemal Taş, Mehmet Emin Akdeniz and Aydın Demir) shown documents submitted on their behalf to the Convention organs as part of a procedure undertaken to verify the authenticity of their applications.

120. The Court finds that the applicants must have felt intimidated by these contacts with the authorities, which went beyond an investigation of the facts underlying their complaints. This constituted undue interference with their petition to the Convention organs.

121. The respondent State has therefore failed to comply with its obligations under former Article 25 § 1 of the Convention.

VIII. ALLEGED PRACTICE BY THE AUTHORITIES OF INFRINGING ARTICLES 2, 5 AND 13 OF THE CONVENTION

122. The applicants maintained that there existed an officially tolerated practice of disappearances in south-east Turkey in 1993-1994 contrary to Article 5, a practice of inadequate investigations into disappearances and presumed deaths violating Article 2, and a practice of failing to provide an effective remedy in aggravated breach of Article 13. They referred to other cases concerning events in south-east Turkey in which the Commission and the Court had also found breaches of these provisions.

123. Having regard to its findings under Articles 2, 5 and 13 above, the Court does not find it necessary to determine whether the failings identified in this case are part of a practice adopted by the authorities.

IX. APPLICATION OF ARTICLE 41 OF THE CONVENTION

124. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Pecuniary damage

125. The applicants claimed damages for pecuniary loss, including costs of travel during the search of their relatives and loss of earnings in respect of their relatives who left dependants and contributed to the running of the family farming activities. Taking into account the average life expectancy in Turkey in that period and attributing current agricultural prices to farm produce, the calculation for loss of income according to actuarial tables resulted in the capitalised sums quoted below.

Mehmet Salih Akdeniz (68 years old at the time of disappearance) left a widow. The family, including 4 male adults, farmed approximately a 100 dönüm of land, on which they produced 2 tonnes of tobacco and sold 150 sheep and goats per year. On the basis of an annual share of 2,936.39 pounds sterling (GBP), this resulted in a figure for loss of income of GBP 12,920.12.

Mehmet Sah Atala (24 years' old at the time of disappearance) left a widow and daughter. His family were farmers, with approximately 850–900 acres of land, on which they grew approximately two tonnes of tobacco, one ton of nuts and sold 100 sheep and goats per year. As the family, including ten brothers, farmed the land together, a claim was made on the basis of an annual share of GBP 1,147.24 which gave a figure of GBP 24,321.49 reflecting loss of income. A claim was made for GBP 2,720.60, representing the sale of 50 goats, to finance the applicant's travel to Bolu, Muş and Elazığ to search for his brother. This made a total of GBP 27,042.09.

Celil Aydogu (52 years' old) left a widow and eight daughters. He farmed 120 dönüm of land, growing approximately 1.5 tonnes of tobacco, 5 tonnes of wheat and sold 50 sheep and goats per year. On an annual income of GBP 5,954.72, a claim was made for loss of income of GBP 57,760.78.

Nusreddin Yerlikaya (40 years' old) left a widow and nine children. His family, including his brother, were farmers with approximately 150 dönüms of land on which they grew about 1.5 tonnes of tobacco, 4 tonnes of wheat and sold 100 sheep and goats per year. An annual share of GBP 4,206.55 gave a figure for loss of income of GBP 66,547.62.

Bahri Simşek (41 years' old), who left a widow and nine children, the oldest of whom was 10 years old, farmed approximately 150 dönüm of land, on which he grew about 1.5 tonnes of tobacco and wheat and sold 100 sheep and goats per year. On the basis of an annual income of GBP 8,194.57, a claim was made for loss of income of GBP 126,196.38. Additionally, Bahri Simşek was a service veteran of a campaign in Cyprus and receiving a pension at the time of his death. Upon his disappearance, the Government refused to pay the pension to his family, as they could not prove his death. For the period of October 1993 to July 1997 (45 months), taking the 1997

rate of TRL 15,750,000 per month (GBP 62.96), a claim was made for GBP 3,205.06, which figure included an adjustment of simple interest of 3.5%. This made a total claim of GBP 129,401.44.

AbdoYamuk (48 years' old) left two widows and children. The family, including four adult males, farmed approximately 200 dönüm of land, on which they raised about 1.5 tonnes of tobacco, 1 tonne of beans and sold 100 sheep and goats per year. On the basis of his share of GBP 2,212.54, a claim was made for loss of income of GBP 26,550.48. A sum of GBP 2,720.60 was claimed in respect of the sale of 50 goats to finance the applicant's travel to Bolu and Elazığ to search for his brother. This made a total claim of GBP 29,271.08.

Hasan Avar (45 years' old) who left a widow and eight children, farmed 150 dönüm of land together with two other adult members of the family, growing about 2 tonnes of tobacco, 3 tonnes of wheat and sold 150 sheep and goats per year, along with dairy products. Taking an annual share of GBP 3,387.09 this gave a claim of loss of income of GBP 45,725.72.

Mehmet Serif Avar (24 years'old) left two widows and six children. He farmed land with his father, producing 1.5 tonnes of tobacco and selling 150 sheep and goats per year. On an annual share of GBP 5,326.47, a claim was made for loss of income of GBP 112,921.16.

Behçet Tutuş (44 years' old) left a widow and seven children. His family, including four adult male members, farmed 350 dönüm of irrigated land, producing 2 tonnes of tobacco, 3 tonnes of wheat and selling about 67 sheep and goats per year. On an annual share of GBP 1,998.11, this gave a claim for loss of income of GBP 27,973.54. The sum of GBP 1,140.21 representing the cash removed from Behçet Tutuş by a soldier in detention was also claimed, making a total of GBP 29,113.75.

Turan Demir (34 years' old) left a widow and three children. His family, including 4 brothers, farmed 500 dönüm of land together, growing about 4 tonnes of tobacco, 1 tonne of beans as well as producing wheat and vegetables, raising cows and selling 100 sheep and goats per year. On an annual share of GBP 3,086.63, a claim for loss of income was made in the sum of GBP 56,176.67.

Ümit Taş (16 years' old) worked, along with two other adult males, on his father's farm of 100 dönüm of land, where they grew approximately 2 tonnes of tobacco, wheat and sold about 80 sheep and goats per year. On the basis of an annual share of GBP 2,440.16, a claim for loss of income amounted to GBP 56,123.68.

126. The Government submitted that the sums claimed were excessive and estimated on fictitious bases. It was unacceptable to put forward claims on rough figures. They considered that the claims for sheep, goats and crops were irrelevant, as there was no allegation of loss of property. They disputed the applicability of the actuarial tables used by the applicants which were

designed for use in the United Kingdom. Any claims should be documented properly.

127. As regards the claims for loss of earnings, the Court's case-law establishes that there must be a clear causal connection between the damage claimed by the applicant and the violation of the Convention and that this may, in the appropriate case, include compensation in respect of loss of earnings (see, amongst other authorities, the Barberà, Messegué and Jabardo v. Spain judgment of 13 June 1994 (*Article 50*), Series A no. 285-C, pp. 57-58, §§ 16-20, and the Cakıcı v. Turkey judgment, cited above, § 127).

128. A precise calculation of the sums necessary to make complete reparation *(restitutio in integrum*) in respect of the pecuniary losses suffered by an applicant may be prevented by the inherently uncertain character of the damage flowing from the violation (Young, James and Webster v. the United Kingdom judgment (*former Article 50*) of 18 October 1982, Series A no. 55, p. 7, § 11). An award may still be made notwithstanding the large number of imponderables involved in the assessment of future losses, though the greater the lapse of time involved the more uncertain the link between the breach and the damage becomes. The question to be decided in such cases is the level of just satisfaction, in respect of either past and future pecuniary loss, which it is necessary to award to an applicant, the matter to be determined by the Court at its discretion, having regard to what is equitable (Sunday Times v. the United Kingdom judgment (*former Article 50*) of 6 November 1989, Series A no. 38, p. 9, § 15; *Lustig-Prean and Beckett v. the United Kingdom* (Article 41), nos. 31417/96 and 32377/96 (Sect. 3), judgment of 25 July 2000, §§ 22-23, to be published in the Court's official reports).

129. The Court has found (paragraph 89 above) that the authorities were liable under Article 2 of the Convention for the deaths of the applicants' missing relatives. In these circumstances, there is a causal link between the violation of Article 2 and the loss by their families of the financial support which they provided for them. While the figures put forward by the applicants relating to the income derived from the farming activities of the missing men have not been supported by any documentation and may be regarded as involving, inevitably, a degree of speculation, the Court notes that the Government have not provided any detailed arguments to contradict the basis of the applicants' calculations. Nor have they suggested any figure which they would regard as reasonable. They have not disputed in addition the claim made in respect of Bahri Simşek's veteran's pension.

130. The Court is satisfied that the applicants' relatives were involved in farming activities prior to their disappearance and death and, save in the case of Ümit Taş who was unmarried and was working with his father, providing financial support to their wives and children. But for their death, it may have been anticipated, with due regard to their respective ages, that they would have continued to provide such support for some time to come.

It is accordingly appropriate to make an award to the dependants of the missing men to reflect the loss of financial support and in the case of Ümit Taş an award to his father in respect of the loss of his son's assistance on his farm. As regards the claims for the sale of sheep and goats to finance the travelling undertaken in the search of the missing men, the Court notes that it is not explained in detail how the costs were incurred, though it accepts that expenses were incurred in this process. Having regard to awards made in other cases, and basing itself on equitable considerations, the Court awards the following sums:

i. to Mehmet Emin Akdeniz to be held for the widow of his brother Mehmet Salih Akdeniz, GBP 12,000;

ii. to Mehmet Emin Akdeniz to be held for the widow and children of his nephew Celil Aydoğdu, GBP 35,000;

iii. to Seyithan Atala GBP 500 for costs of travel and in respect of loss of income, such sum to be held for the widow and daughter of his brother Mehmet Şah Atala, GBP 20,000;

iv. to Ramazan Yerlikaya to be held for the widow and children of his brother Nusreddin Yerlikaya, GBP 45,000;

v. to Keleş Şimşek to be held for the widow and children of his brother Bahri Şimşek, GBP 80,000 for loss of income and GBP 3,200 for loss of pension;

vi. to Süleyman Yamuk GBP 500 for costs of travel and in respect of loss of income, to be held for the widows and children of his brother Abdo Yamuk, GBP 20,000;

vii. to Sabri Avar to be held for the widow and children of his brother Hasan Avar, GBP 30,000;

viii. to Sabri Avar to be held for the widows and children of his son Mehmet Şerif Avar, GBP 70,000;

ix. to Sabri Tutuş to be held for the widow and children of his father Behçet Tutuş, GBP 20,000 for loss of income and GBP 1,140 for the money removed during detention;

x. to Aydin Demir to be held for the widow and children of his brother Turan Demir, GBP 35,000;

xi. to Kemal Taş GBP 10,000.

These sums are to be converted into Turkish liras at the rate applicable at the date of payment.

B. Non-pecuniary damage

131. Referring to the serious violations suffered by the missing men and their families, the applicants claimed non-pecuniary damage of GBP 40,000 in respect of each of the missing men and GBP 10,000 in their own regard.

132. The Government submitted that the awards made should not unjustly enrich the applicants. The claims were however highly exaggerated

and included the illusory element of damages for continuing violations. The sums were also disproportionate in comparison with the awards made by the Court in comparable cases.

133. As regards the claims made for non-pecuniary damage on behalf of the missing eleven men, the Court notes that awards have previously been made to surviving spouses and children and, where appropriate, to applicants who were surviving parents or siblings. It has previously awarded sums as regards the deceased where it was found that there had been arbitrary detention or torture before his disappearance or death, such sums to be held for the person's heirs (see the Kurt v. Turkey judgment, cited above, §§ 174-175, and the Cakıçı v. Turkey judgment, cited above, § 130). The Court notes that there have been findings of violations of Articles 2, 3, 5 and 13 in respect of the detention, ill-treatment and presumed death of the missing men, whose fate after their disappearance remains unknown. Having regard to awards in similar cases, it finds it appropriate in the circumstances of the present case to award GBP 20,000, to be converted into Turkish liras on the date of payment and which amount is to be paid to each applicant and held by them for the widows and children of the missing men, and in the case of Ümit Taş held for his heirs.

134. As regards the applicants themselves, the Court has not found a breach of Article 3 in their regard. However, they undoubtedly suffered damage in respect of the violations found by the Court and may be regarded as injured parties for the purposes of Article 41 (see Çakıcı v. Turkey judgment cited above, § 130, *in fine*). Having regard to the gravity of the violations and to equitable considerations, it awards GBP 2,500 to each applicant.

C. Costs and expenses

135. The applicants claimed legal fees and expenses of GBP 26,688.25. This included GBP 21,683.25 for the professional fees and expenses of their legal representatives in England and GBP 5,005 for the fees and costs of their lawyers in Turkey.

136. The Government submitted, without further explanation, that the claims for legal costs consisted of unnecessary and excessive expenses.

137. The Court notes the complexity of the case, which involved numerous applicants and involved hearing of witnesses in Turkey on two separate occasions. Having regard to the details of the claims submitted by the applicants, the Court awards the sum of GBP 26,600 together with any value-added tax that may be chargeable, less the 17,500 French francs (FRF) received by way of legal aid from the Council of Europe. This sum is to be paid into the sterling bank account in the United Kingdom identified in the applicants' just satisfaction claim.

D. Default interest

138. 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 7,5% per annum.

FOR THESE REASONS, THE COURT

1. *Holds* by six votes to one that the Government is liable for the death of the eleven missing relatives of the applicants in violation of Article 2 of the Convention;

2. *Holds* by six 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 of the death of the eleven missing men;

3. *Holds* by six votes to one that there has been a violation of Article 3 of the Convention in respect of the eleven missing men;

4. *Holds* by six votes to one that there has been no violation of Article 3 of the Convention in respect of the applicants;

5. *Holds* unanimously that there has been a violation of Article 5 § 1 of the Convention;

6. *Holds* by six votes to one that there has been a violation of Article 13 of the Convention;

7. *Holds* by six votes to one that the State has failed to comply with its obligations under former Article 25 of the Convention;

8. *Holds* by six votes to one
   (a) that the respondent State is to pay for pecuniary damage, within three months, the following sums, to be converted into Turkish liras at the rate applicable at the date of settlement:
      (i) to Mehmet Emin Akdeniz to be held for the widow of his brother Mehmet Salih Akdeniz, 12,000 (twelve thousand) pounds sterling;
      (ii) to Mehmet Emin Akdeniz to be held for the widow and children of his nephew Celil Aydoğdu, 35,000 (thirty five thousand) pounds sterling;

(iii) to Seyithan Atala 500 (five hundred) pounds sterling and to be held for the widow and daughter of his brother Mehmet Şah Atala, 20,000 (twenty thousand) pounds sterling;
(iv) to Ramazan Yerlikaya to be held for the widow and children of his brother Nusreddin Yerlikaya, 45,000 (forty five thousand) pounds sterling;
(v) to Keleş Şimşek to be held for the widow and children of his brother Bahri Şimşek, 83,200 (eighty three thousand two hundred) pounds sterling;
(vi) to Süleyman Yamuk 500 (five hundred) pounds sterling and to be held for the widows and children of his brother Abdo Yamuk, 20,000 (twenty thousand) pounds sterling;
(vii) to Sabri Avar to be held for the widow and children of his brother Hasan Avar, 30,000 (thirty thousand) pounds sterling;
(viii) to Sabri Avar to be held for the widows and children of his son Mehmet Şerif Avar, 70,000 (seventy thousand) pounds sterling;
(ix) to Sabri Tutuş to be held for the widow and children of his father Behçet Tutuş, 21,140 (twenty one thousand one hundred and forty) pounds sterling;
(x) to Aydin Demir to be held for the widow and children of his brother Turan Demir, 35,000 (thirty five thousand) pounds sterling;
(xi) to Kemal Taş, 10,000 (ten thousand) pounds sterling;

(b) that simple interest at an annual rate of 7.5% shall be payable from the expiry of the above-mentioned three months until settlement;

9. *Holds* by six votes to one
(a) that the respondent State is to pay each of the applicants, within three months, in respect of compensation for non-pecuniary damage, the following sums, to be converted into Turkish liras at the rate applicable at the date of settlement
(i) 20,000 (twenty thousand) pounds sterling to be held for the heirs of each missing relative;
(ii) 2,500 (two thousand five hundred) pounds sterling;
(b) that simple interest at an annual rate of 7.5% shall be payable from the expiry of the above-mentioned three months until settlement;

10. *Holds* unanimously
(a) that the respondent State is to pay the applicants, within three months, in respect of costs and expenses and into the bank account identified by them in the United Kingdom, 26,600 (twenty six thousand six hundred) pounds sterling, together with any value-added tax that may be chargeable, less 17,500 (seventeen thousand five hundred) French francs to be converted into pounds sterling at the exchange rate applicable at the date of delivery of this judgment;

(b) that simple interest at an annual rate of 7.5% shall be payable from the expiry of the above-mentioned three months until settlement;

11. *Dismisses* unanimously the remainder of the applicants' claims for just satisfaction.

Done in English, and notified in writing on 31 May 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Erik FRIBERGH
Registrar

András BAKA
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following partly dissenting opinions are annexed to this judgment:

(a) the partly dissenting opinion of Mr Fischbach;
(b) the partly dissenting opinion of Mr Gölcüklü.

A.B.B.
E.F.

PARTLY DISSENTING OPINION OF JUDGE FISCHBACH

(Translation)

I voted in favour of finding a violation of Article 3 in respect of the applicants, since I consider that the special conditions held in the Çakıcı v. Turkey judgment of 8 July 1999 to be decisive for the issue of violation of Article 3 were satisfied in the present case.

Although it is true that only one of the applicants was the direct witness of the events in question, it should be noted that a number of applicants were themselves caught up in the military operation, while three of them were detained by the troops. Three other applicants, who were not present in the Alaca district at the material time, immediately took the necessary steps to find out what had happened and what had become of the persons who had disappeared after the end of the operation.

It is also true that in only three cases did the applicant share a parent-child relationship with one of the victims, and that the other applicants were either the brothers of the men who had disappeared or in one case an uncle, but they were nevertheless all in the same situation of expectancy, anxiety and distress, while their repeated enquiries were constantly frustrated by the indifference and insensitivity of the authorities.

That being so, I consider that it would be unreasonable to try to draw distinctions between the applicants in accordance with the closeness of their relationships to the men who disappeared, and to find on that basis a violation in respect of some of the applicants and no violation in respect of the others.

PARTLY DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

(Translation)

1. In this case I consider that Article 2 is inapplicable and that if the case is to be examined at all it should be under Article 5, in accordance with the case-law of the Court and the Commission in the Kurt v. Turkey case and the Commission's case-law in the Timurtaş v. Turkey case, because the death of the persons considered to have disappeared has not been proved beyond a reasonable doubt, but is merely supposed or presumed. In my opinion, it is wrong to refer to the Çakıcı and Ertak judgments because in those two cases the victims' deaths had been established, whereas in the present case it is known only that the applicants' relatives were arrested and the eleven persons concerned are still listed as missing.

For further details, I refer to my dissenting opinion on this point in the Timurtaş v. Turkey case, *mutatis mutandis*.

2. In the judgment the Court found a violation of Article 3 on the ground that the victims had been ill-treated while detained. In the file I could find no documentary evidence of this other than the applicants' allegations. The Court said: "The evidence showed that they suffered not only from the cold but from fear and anguish as to what might happen to them" (paragraph 98). Are not fear and anguish of that kind the common lot of every prisoner? And can this be considered treatment falling within the scope of Article 3?

As regards the discomfort and inconvenience the victims may have suffered, it should be pointed out that members of the security forces have to live in conditions which are almost as harsh in that part of the country.

3. Under Article 13 no separate issue arises because the Court found a violation of Article 2 in its procedural aspect, so that the same facts are at issue. The Court has held in four recent judgments (*Hugh Jordan v. the United Kingdom*, no. 24746/94 (Sect. 3), 4 May 2001, §§ 164 and 165; *Kelly and Others v. the United Kingdom*, no. 28883/95 (Sect. 3), 4 May 2001, §§ 158 and 159; *McKerr v. the United Kingdom*, no. 30054/96 (Sect. 3), 4.5.2001, §§ 175 and 176; and *Shanagan v. the United Kingdom*, no. 37715/97 (Sect. 3), 4 May 2001, §§ 139 and 140):

> "As regards the applicant's complaints concerning the investigation into the death carried out by the authorities, these have been examined above under the procedural aspect of Article 2... The Court finds that no separate issue arises in the present case.
>
> The Court concludes that there has been no violation of Article 13 of the Convention."

4. I consider that there has been no violation of Article 3 as regards the applicants, in accordance with the Court's case-law.

5. As to application of Article 41, there is no evidence in the file capable of justifying the Court's award of a sum for pecuniary damage, other than

suppositions and speculation, especially about "loss of income". I consider that the Court is not equipped to carry out this type of actuarial calculation. Moreover, where compensation for pecuniary damage is concerned, there is no cause to make an award on the basis of "equitable considerations", this being appropriate only for non-pecuniary damage. If the Court considers that a sum should be awarded for damage, and for alleged loss of income at that, it would have been preferable to order an expert report, as the former Court did on a number of occasions. In my opinion, moreover, it is not for the Government, as the Court considers, to comment on the speculations put forward without any acceptable basis by the applicants. Failing a proper expert report on the question, any discussion or supposition is baseless and therefore unacceptable.

Besides, the sums awarded are more than excessive.

6. In the Convention system there is either "violation" or "no violation". There is no "most grave violation" (paragraph 106), "particularly grave violation" (paragraph 108), "serious violations" (paragraph 131) or "gravity of violation". Qualifying adjectives of this kind must be avoided in the text of judicial decisions, which must always remain neutral by employing dispassionate language.