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

CASE OF ÇAKICI v. TURKEY

(Application no. 23657/94)

JUDGMENT

STRASBOURG

8 July 1999

In the case of Çakıcı v. Turkey,

The European Court of Human Rights, sitting, in accordance with Article 27 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), as amended by Protocol No. 11[1], and the relevant provisions of the Rules of Court[2], as a Grand Chamber composed of the following judges:

Mr L. WILDHABER, *President*,
Mrs E. PALM,
Mr L. FERRARI BRAVO,
Mr L. CAFLISCH,
Mr J.-P. COSTA,
Mr W. FUHRMANN,
Mr K. JUNGWIERT,
Mr M. FISCHBACH,
Mr B. ZUPANČIČ,
Mrs N. VAJIĆ,
Mr J. HEDIGAN,
Mrs W. THOMASSEN,
Mrs M. TSATSA-NIKOLOVSKA,
Mr T. PANŢÎRU,
Mr E. LEVITS,
Mr K. TRAJA,
Mr F. GÖLCÜKLÜ, ad hoc *judge,*

and also of Mrs M. DE-BOER-BUQUICCHIO, *Deputy Registrar*,

Having deliberated in private on 24 March and 17 June 1999,

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

PROCEDURE

1. The case was referred to the Court, as established under former Article 19 of the Convention[3], by the European Commission of Human Rights ("the Commission") on 14 September 1998, within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention. It originated in an application (no. 23657/94) against the Republic of Turkey lodged with the Commission under former Article 25 by a Turkish national, Mr İzzet Çakıcı, on 2 May 1994.

Notes by the Registry

1-2. Protocol No. 11 and the Rules of Court came into force on 1 November 1998.

3. Since the entry into force of Protocol No. 11, which amended Article 19, the Court has functioned on a permanent basis.

The Commission's request referred to former Articles 44 and 48 and to the declaration whereby Turkey recognised the compulsory jurisdiction of the Court (former Article 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 2, 3, 5, 13, 14 and 18 of the Convention.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of former Rules of Court A[1], the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (former Rule 30).

3. As President of the Chamber which had originally been constituted (former Article 43 of the Convention and former Rule 21) in order to deal, in particular, with procedural matters that might arise before the entry into force of Protocol No. 11, Mr R. Bernhardt, the President of the Court at the time, acting through the Deputy Registrar, consulted the Agent of the Turkish Government ("the Government"), the applicant's lawyer and the Delegate of the Commission on the organisation of the written procedure. Pursuant to the order made in consequence, the Registrar received the applicant's memorial on 23 December 1998 and the Government's memorial on 4 January 1999.

4. After the entry into force of Protocol No. 11 on 1 November 1998 and in accordance with the provisions of Article 5 § 5 thereof, the case was referred to the Grand Chamber of the Court. The Grand Chamber included *ex officio* Mr R. Türmen, the judge elected in respect of Turkey (Article 27 § 2 of the Convention and Rule 24 § 4 of the Rules of Court), Mr L. Wildhaber, the President of the Court, Mrs E. Palm, Vice-President of the Court, and Mr J.-P. Costa and Mr M. Fischbach, Vice-Presidents of Sections (Article 27 § 3 of the Convention and Rule 24 §§ 3 and 5 (a)). The other members appointed to complete the Grand Chamber were Mr L. Ferrari Bravo, Mr L. Caflisch, Mr W. Fuhrmann, Mr K. Jungwiert, Mr B. Zupančič, Mrs N. Vajić, Mr J. Hedigan, Mrs W. Thomassen, Mrs M. Tsatsa-Nikolovska, Mr T. Panţîru, Mr E. Levits and Mr K. Traja (Rule 24 § 3 and Rule 100 § 4).

5. On 7 January 1999, Mr Wildhaber exempted Mr Türmen from sitting; the latter had withdrawn following a decision taken by the Grand Chamber under Rule 28 § 4.

On 10 February 1999, the Government informed the Registrar of the appointment of Mr F. Gölcüklü as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

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1. *Note by the Registry*. Rules of Court A applied to all cases referred to the Court before the entry into force of Protocol No. 9 (1 October 1994) and from then until 31 October 1998 only to cases concerning States not bound by that Protocol.

6. At the Court's invitation (Rule 99), the Commission delegated one of its members, Mrs J. Liddy, to take part in the proceedings before the Grand Chamber.

7. In accordance with the President's decision, a hearing took place in public in the Human Rights Building, Strasbourg, on 24 March 1999.

There appeared before the Court:

(a) *for the Government*
Mrs D. AKÇAY, *Agent*,
Mr B. CALIŞKAN,
Mr E. GENEL,
Ms A. GÜNYAKTI,
Mr H. MUTAF, *Advisers*;

(b) *for the applicant*
Ms F. HAMPSON,
Ms A. REIDY, *Counsel*;

(c) *for the Commission*
Mrs J. LIDDY, *Delegate*.

The Court heard addresses by Mrs Liddy, Ms Hampson and Mrs Akçay.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The applicant

8. The applicant, Mr İzzet Çakıcı, is a Turkish citizen who was born in 1953 and is at present living in Diyarbakır in south-east Turkey. His application to the Commission was brought on his own behalf and on behalf of his brother Ahmet Çakıcı, who, he alleges, has disappeared in circumstances engaging the responsibility of the State.

B. The facts

9. The facts surrounding the disappearance of the applicant's brother are disputed.

10. The facts presented by the applicant are contained in Section 1 below. In his memorial to the Court, the applicant relied on the facts as established by the Commission in its report (former Article 31 of the Convention) adopted on 12 March 1998 and his previous submissions to the Commission.

11. The facts as presented by the Government are set out in Section 2.

12. A description of the materials submitted to the Commission is contained in Part C. A description of the proceedings before the domestic authorities regarding the disappearance of the applicant's brother as established by the Commission is set out in Part D.

13. The Commission, with a view to establishing the facts in the light of the dispute over the circumstances surrounding the disappearance of the applicant's brother, conducted its own investigation pursuant to former Article 28 § 1 (a) of the Convention. To this end, the Commission examined a series of documents submitted by both the applicant and the Government in support of their respective assertions and appointed three delegates to take the evidence of witnesses at hearings conducted in Ankara on 3 and 4 July 1996 and in Strasbourg on 4 December 1996. The Commission's evaluation of the evidence and its findings thereon are summarised in Part E.

1. Facts as presented by the applicant

14. On 8 November 1993, the applicant's brother, Ahmet Çakıcı, was detained during an operation in the village of Çitlibahçe carried out by gendarmes and village guards. When the operation commenced early in the morning, Ahmet Çakıcı hid in a house near the fountain while the other men were gathered in an open area. The security forces began setting fire to the houses. Ahmet Çakıcı retrieved money, 4,700,000 Turkish liras (TRL), which he had hidden in the roof of his house and was caught leaving the house. Ahmet Çakıcı was taken from the village by the security forces. This was witnessed by the other villagers. The money was taken from Ahmet Çakıcı by a first lieutenant. Remziye Çakıcı, Ahmet Çakıcı's wife, was told by a boy from the village that he had seen a gendarme take money from Ahmet Çakıcı.

15. Ahmet Çakıcı was first taken to Hazro, where he was kept overnight before being taken to Diyarbakır. In Diyarbakır, he was detained at the provincial gendarmerie headquarters. After about six to seven days, he was held for sixteen to seventeen days in the same room as Mustafa Engin, Abdurrahman Al and Tahsin Demirbaş, who had been taken into custody on 8 November 1993 by the security forces in an operation at Bağlan. Ahmet

Çakıcı had been beaten, a rib being broken and his head split open. He was taken out of the room for interrogation on several occasions, when he received electric shocks and was beaten. Mustafa Engin was also told by Ahmet Çakıcı that a first lieutenant had taken money from him. At the end of this period, the other three detainees were brought before the court. Engin and Demirbaş were released and Abdurrahman Al was remanded in custody. Engin did not see Ahmet Çakıcı again.

16. After eighty-five days at the provincial gendarmerie headquarters, in or about late January-early February 1994, Ahmet Çakıcı was taken back to Hazro where he was detained for several months. From there he was moved to the gendarmerie station at Kavaklıboğaz. During a period of thirteen days in or about spring or early summer 1994, Hikmet Aksoy, who was also detained at Kavaklıboğaz, saw Ahmet Çakıcı when they were taken out of the cells for meals. At the end of that period, Hikmet Aksoy was transferred to Lice.

17. In May 1996, following the transmission of Government submissions, the applicant learned for the first time that it was claimed by the authorities that Ahmet Çakıcı had been killed in a clash between 17 and 19 February 1995 on Kıllıboğan Hill, Hani. The identification appeared to be based solely on the claim that Ahmet Çakıcı's identification card was found on one of the bodies.

2. Facts as presented by the Government

18. The Government recall that at this time the PKK (the Workers' Party of Kurdistan) had destroyed numerous villages, inflicted suffering on thousands of innocent victims and exerted intolerable oppression over the population of the south-east region.

19. They state that Ahmet Çakıcı was not taken into custody by the security forces during the operation carried out at Çitlibahçe on 8 November 1993 and was not held in detention over any subsequent period. The custody records indicated that he was not held at Hazro or at Diyarbakır provincial gendarmerie headquarters. Nor was he was taken to the gendarmerie station at Kavaklıboğaz.

20. Ahmet Çakıcı was a militant member of the PKK organisation. Following an armed clash between the PKK and the security forces on 17 to 19 February 1995, he had been found dead with fifty-five other militants at Kıllıboğan Hill. Ahmet Çakıcı had been implicated in the killing on 23 October 1993 of five teachers from Dadaş whom he had reportedly described as "servile dogs of the State". He most probably disappeared after this incident with the intention of escaping justice and continuing his activities for the PKK.

21. No complaint was made to the public prosecutor at Hasro by any member of the applicant's family in respect of the alleged disappearance.

C. Materials submitted by the applicant and the Government to the Commission in support of their respective assertions

22. In the proceedings before the Commission, the applicant and the Government submitted a number of statements by the applicant, which he had made to the Human Rights Association in Diyarbakır (HRA) and to the public prosecutor at Diyarbakır. Statements had also been taken by the HRA and the public prosecutor from Remziye Çakıcı, the wife of Ahmet Çakıcı, and Mustafa Engin, who had been detained from 9 November to 1 December 1993 at Diyarbakır provincial gendarmerie headquarters. Mustafa Engin had also made a statement to a police officer. Statements had been taken by Osman Baydemir, on behalf of the applicant, from Abdurrahman Al, who had been detained at the same time as Mustafa Engin, and from two villagers, Mehmet Bitgin and Fevzi Okatan.

23. The Government also provided an arrest report dated 8 November 1993 concerning the apprehension of Mustafa Engin, Abdurrahman Al and Tahsin Demirbaş, two operation reports dated 7 and 8 November 1993 respectively concerning the operation at Çitlibahçe village, documents concerning the witness Hikmet Aksoy whom the Commission's delegates had summoned to give evidence but who did not appear and documents relating to inquiries made by the authorities into the allegations.

24. The Commission requested copies of the custody records for the relevant period for Hazro gendarmerie station, Lice gendarmerie station, Diyarbakır provincial gendarmerie headquarters and the gendarmerie station at Kavaklıboğaz. The Commission's delegates further requested the opportunity to inspect the original records of Hazro, Diyarbakır and Kavaklıboğaz. The Government provided the original custody record of the Hazro central gendarmerie station as well as copies of the custody record of Lice gendarmerie headquarters and Diyarbakır provincial gendarmerie headquarters for the relevant period. The Government did not provide the Commission's delegates with sight of the original custody record for Diyarbakır provincial gendarmerie headquarters, or with either a copy of, or sight of, the original custody record for the gendarmerie station of Kavaklıboğaz.

D. Proceedings before the domestic authorities

25. On 22 December 1993, Tevfik Çakıcı, the father of the applicant and Ahmet Çakıcı, submitted a handwritten petition to the Diyarbakır National Security Court requesting information as to what had happened to Ahmet Çakıcı, who had been taken into custody on 8 November 1993 by the security forces at the same time as Mustafa Engin, Abdurrahman Al and Tahsin Demirbaş, who had been released twenty-four days later. An oral

reply was given to him that Ahmet Çakıcı was not on the list of persons in custody.

26. By letter dated 4 April 1994, the Hazro public prosecutor, Aydın Tekin, informed the Chief Public Prosecutor at the Diyarbakır National Security Court that, on examination of their records, Ahmet Çakıcı had not been taken into custody or detained on 8 November 1993.

27. By letter dated 19 April 1994 to the Chief Public Prosecutor at the Diyarbakır National Security Court, the Hazro public prosecutor, Aydın Tekin, confirmed his letter of 4 April 1994 and stated that no application had been filed by Ahmet Çakıcı's family to the effect that he was missing.

28. By letter dated 18 August 1994, the Ministry of Justice (General Directorate for International Law and External Relations), referring to correspondence from the Foreign Ministry of 19 July 1994 outlining the complaints made by the applicant to the European Commission of Human Rights, requested the Diyarbakır Attorney-General to have the applicant's complaints investigated and evaluated according to law.

29. On 9 September 1994, the applicant's statement was taken by a public prosecutor at Diyarbakır. In his statement, he stated that his brother Ahmet Çakıcı had been taken into custody by soldiers on 8 November 1993 and that he had been seen by Mustafa Engin and Tahsin Demirbaş, who were also detained. On 25 November 1994, the public prosecutor took a statement from Remziye Çakıcı. She stated that gendarmes had taken away her husband during an operation on 8 November 1993.

30. By letter dated 1 December 1994, Colonel Eşref Hatipoğlu of Diyarbakır provincial gendarmerie command informed the Diyarbakır Attorney-General, in reply to a letter of enquiry of 22 November 1994, that their records indicated that Ahmet Çakıcı had not been detained on 8 November 1994 [error for 1993].

31. By letter dated 8 December 1994, Colonel Eşref Hatipoğlu reported to the Diyarbakır provincial authorities on the subject of the applicant's application to the European Commission of Human Rights. It was reported, *inter alia*, that police officers had been unable to find the addresses of the applicant, his father, Ahmet Çakıcı, Mustafa Engin, Abdurrahman Al or Tahsin Demirbaş for the purpose of taking their statements. It had been established that Ahmet Çakıcı, who was alleged to be missing, was involved with the PKK, having participated in killings. He was reported to have been a member of the PKK mountain team which, on 23 October 1993, kidnapped seven persons (five teachers, an imam and the imam's brother) from Dadaş village and killed five of them. Their headquarters were looking for him.

32. By letter dated 1 March 1995, Colonel Eşref Hatipoğlu forwarded to Hazro district gendarmerie command documents found in the area and upon the bodies of fifty-six terrorists found dead as a result of an operation carried out in the Kıllıboğan region from 17-19 February 1995.

33. By letter dated 14 March 1995, Hazro public prosecutor Mustafa Turhan requested that the Lice public prosecutors investigate whether Mustafa Engin and Tahsin Demirbaş were detained by the gendarmes on 8 November 1993, and that they seek observations from Mustafa Engin concerning Ahmet Çakıcı, who was alleged to have disappeared in custody.

34. By letter dated 14 April 1995, Hazro public prosecutor Mustafa Turhan requested the Hazro district gendarmerie command urgently to inform him concerning the operation carried out in Çitlibahçe on 8 November 1993 and to investigate and establish whether Ahmet Çakıcı had been detained along with Mustafa Engin, Abdurrahman Al and Tahsin Demirbaş.

35. By letter dated 17 May 1995, the Hazro district gendarmerie command informed the Hazro public prosecutor in reply that the operation on 8 November 1993 had been intended to capture members of the PKK and those aiding and abetting them and that their records indicated that Ahmet Çakıcı, Mustafa Engin, Abdurrahman Al and Tahsin Demirbaş had not been detained.

36. By letter dated 22 May 1995, the Hazro public prosecutor requested the Hazro district gendarmerie command as a matter of urgency to establish the whereabouts of Ahmet Çakıcı.

37. By letter dated 23 June 1995 to the Hazro public prosecutor, the district gendarmerie command at Hazro referred to the prosecutor's enquiry dated 22 May 1995 about the whereabouts of Ahmet Çakıcı and to the letter dated 1 March 1995 from the Diyarbakır provincial gendarmerie command. It stated that Ahmet Çakıcı had been a member of the PKK. Following an operation carried out at Kıllıboğan Hill on 17-19 February which resulted in the deaths of fifty-six terrorists, Ahmet Çakıcı's identity was established by the identity card located amongst the documents found on the body of a terrorist. It was concluded that he was one of the terrorists.

38. By letter dated 27 June 1995, the Hazro public prosecutor informed the Diyarbakır Attorney-General, in reference to their letter of 1 December 1994 and the letter of the Ministry of Justice of 18 August 1994, that an operation had been carried out on 8 November 1993 in order to apprehend members of the PKK and those assisting them and that Ahmet Çakıcı, Mustafa Engin and Tahsin Demirbaş had not been detained as claimed. Referring to the letter of 23 June 1995 above, it was stated that Ahmet Çakıcı was a member of the PKK and found dead during operations carried out in the Kıllıboğan Hill region, Hani district, on 17-19 February 1995. The Lice public prosecutor had been requested to obtain a statement from Mustafa Engin, a response to which was still awaited.

39. By letter dated 4 July 1995, the Hazro public prosecutor's office informed the Ministry of Justice (Directorate of International Law and Foreign Affairs) of the information provided by the Hazro gendarmes

(see paragraph 37 above). It stated that a preliminary investigation (no. 1994/191) had been started and was still pending.

40. By letter dated 5 March 1996, the Hazro public prosecutor informed the Ministry of Justice that upon its request the Diyarbakır Attorney-General had been instructed to take a statement from Mustafa Engin.

41. On 12 March 1996, a police officer took a brief statement from Mustafa Engin in which it was stated that he had not seen Ahmet Çakıcı for three years. On 13 May 1996, a public prosecutor at Diyarbakır took a statement from Mustafa Engin. In this statement, he stated, *inter alia*, that he had not seen Ahmet Çakıcı in custody though Ahmet Çakıcı might have seen him and referred to himself having been given electric shocks once while he was detained at Diyarbakır provincial gendarmerie headquarters.

42. By decision of 13 June 1996, Hazro public prosecutor Mustafa Turhan issued a decision of lack of jurisdiction and transferred the file to the District Administrative Council. The decision named the applicant and Remziye Çakıcı as the complainants and identified the victim as Ahmet Çakıcı. The offence was described as ill-treatment, torture and confiscation of money of a detainee and the defendants as unidentified individuals of Hazro gendarmerie station and village guards. It stated that the complainants claimed that soldiers from Hazro gendarmerie command arrived in Çitlibahçe on the morning of 8 November 1993 and detained the victim, that the victim had been taken to Diyarbakır where he was tortured and that a lieutenant had removed TRL 4,280,000 from him. The investigation had established that the victim was a member of the PKK terrorist organisation and that following an operation by the security forces in the Kıllıboğan Hill region on 17 and 19 February the victim's identity card had been located on one of the dead terrorists, thus confirming the individual's identity as Ahmet Çakıcı without doubt. Mustafa Engin had made a statement to the effect that he had not seen Ahmet Çakıcı. The suspects fell under the Law on the prosecution of civil servants and following the withdrawal by the Hazro prosecution the documentation was transferred to the Presidency of Hazro District Administrative Council for the necessary action.

E. The Commission's evaluation of the evidence and its findings of fact

43. Since the facts of the case were disputed, particularly concerning the events in or around November 1993, the Commission conducted an investigation, with the assistance of the parties, and accepted documentary evidence, including written statements and oral evidence taken from eleven witnesses: the applicant; Fevzi Okatan, previous *muhtar* of Çitlibahçe; Remziye Çakıcı, the wife of Ahmet Çakıcı; Mustafa Engin, who had been detained at Diyarbakır provincial gendarmerie headquarters from

9 November to 1 December 1993; Ertan Altınoluk, who had been gendarmerie commander of Hazro in November 1993 and had commanded the operation at Çitlibahçe on 8 November 1993; Mehmet Bitgin, a villager from Çitlibahçe; Mustafa Turhan, public prosecutor in Hazro from November 1994; Aytekin Türker, the Hazro central station commander at Hazro district gendarmerie headquarters from July 1993 to August 1994; Ahmet Katmerkaya, the gendarme responsible for keeping the custody records at Diyarbakır provincial gendarmerie headquarters since August 1992; Kemal Çavdar, a gendarme who had served at Kavaklıboğaz station from July 1993 to August 1995; and Abdullah Cebeci, the brother of the imam who had been kidnapped with five teachers from Dadaş.

A further six witnesses had been summoned but did not appear: Aydın Tekin, Hazro public prosecutor in 1994; Colonel Eşref Hatipoğlu, Diyarbakır provincial gendarmerie commander; Hikmet Aksoy, who was alleged by the applicant to have seen his brother in detention at Kavaklıboğaz; Tevfik Çakıcı, the father of the applicant and Ahmet Çakıcı; Tahsin Demirbaş and Abdurrahman Al, who had both been detained at Diyarbakır provincial gendarmerie headquarters from 8 November to 1 December 1993. It appeared that Tevfik Çakıcı had died prior to the hearing. The Government claimed that they were unable to locate the witness Hikmet Aksoy for the hearing in July 1996 despite the fact that they had been provided with information from the applicant that he was detained in Konya Prison. The Government stated that Hikmet Aksoy was served with the summons for the hearing to take place before the delegates on 20 November 1996 but that he refused to sign the acknowledgment of service and was released from prison on 18 November 1996. The Government failed to provide the Commission with any explanation as to the timing and reason for his release. Aydın Tekin had informed the Commission by letter that he had no direct or indirect knowledge of the incident and that he did not consider himself obliged to attend. At the hearing in July 1996, the Government Agent explained to the delegates that they were unable to require public prosecutors to attend, nor could they oblige a senior officer such as Eşref Hatipoğlu to attend either.

The Commission made a finding in its report (at paragraph 245) that the Government had fallen short of their obligations under former Article 28 § 1 (a) of the Convention to furnish all the necessary facilities to the Commission in its task of establishing the facts. It referred to

(i) the Government's failure to provide the Commission's delegates with the opportunity to view original custody records (see paragraph 24 above);

(ii) the Government's failure to facilitate the attendance of the witness Hikmet Aksoy;

(iii) the Government's failure to secure the attendance of the witnesses Aydın Tekin and Eşref Hatipoğlu.

44. In relation to the oral evidence, the Commission was aware of the difficulties attached to assessing evidence obtained orally through interpreters. It therefore paid careful attention to the meaning and significance which should be attributed to the statements made by witnesses appearing before its delegates.

In a case where there were contradictory and conflicting factual accounts of events, the Commission particularly regretted the absence of a thorough domestic judicial examination. It was aware of its own limitations as a first-instance tribunal of fact. In addition to the problem of language adverted to above, there was also an inevitable lack of detailed and direct familiarity with the conditions pertaining in the region. Moreover, the Commission had no power to compel witnesses to appear and testify. In the present case, while seventeen witnesses had been summoned to appear, only eleven gave evidence. The lack of documentary materials is adverted to above. The Commission was therefore faced with the difficult task of determining events in the absence of potentially significant testimony and evidence.

The Commission's findings may be summarised as follows.

1. The operation in Çitlibahçe village on 8 November 1993

45. Çitlibhaçe was in a district where terrorist activity was intense in 1993. On or about 23 October 1993, members of the PKK kidnapped five teachers, an imam and the imam's brother, Abdullah Cebeci, from the village of Dadaş and marched them across country, passing near the village of Bağlan. Mustafa Engin was required to shelter one of the teachers, who was of Kurdish origin, overnight before allowing him to leave. The PKK shot and killed the remaining four teachers and the imam, while Abdullah Cebeci, though wounded, was able to reach safety. He gave the gendarmes at Lice gendarmerie headquarters descriptions of the persons whom he had seen, including the villagers who had brought food and stood guard. Bağlan was a village under the jurisdiction of Lice gendarmes. The kidnap victims had also passed close to the village of Çitlibahçe, less than a kilometre from Bağlan, but which was under the jurisdiction of the Hazro gendarmes.

46. The gendarmes from Hazro and Lice conducted a coordinated operation on 8 November 1993. This operation concerned the collecting of evidence and information relating to the kidnapping and murder and the apprehension of persons suspected of involvement. Ertan Altınoluk was in command of the gendarmes from Hazro. The operation order drawn up by him on 7 November 1993 indicated that the purpose of the operation was the capture of PKK terrorists and their collaborators and the destruction of shelters, and it named Çitlibahçe as the place of the operation. The Commission rejected the testimony of Ertan Altınoluk that they were not looking for Ahmet Çakıcı when they went to Çitlibahçe. The delegates assessed his evidence as evasive and unhelpful, and demonstrating a lack of sincerity. The Commission had regard to the evidence from two other

gendarmes that Ahmet Çakıcı was already wanted by the authorities in relation to suspected PKK involvement before this operation and found that in all probability the Hazro gendarmes went to Çitlibahçe with the intention of locating and apprehending Ahmet Çakıcı in relation to the kidnapping incident.

47. The Commission assessed the evidence of the witnesses from the village, Remziye Çakıcı, Fevzi Okatan and Mehmet Bitgin, who stated that they saw Ahmet Çakıcı being taken from the village by the gendarmes, as being on the whole consistent, credible and convincing. They found the Government's objections to their credibility to be unfounded on examination. Accordingly, the Commission found that when the gendarmes arrived in Çitlibahçe on 8 November 1993, Ahmet Çakıcı attempted to hide but was found and taken from the village in custody by the Hazro gendarmes. Meanwhile, in Bağlan village, the Lice gendarmes took into detention three individuals, Mustafa Engin, Abdurrahman Al and Tahsin Demirbaş.

2. The alleged detention and ill-treatment of Ahmet Çakıcı

48. Mustafa Engin, Abdurrahman Al and Tahsin Demirbaş were taken to Lice gendarmerie headquarters where they spent the night. They were not entered into the custody records. The next day, on 9 November 1993, they were taken to Diyarbakır provincial gendarmerie headquarters, where entries in the custody record stated that they had been detained on that day.

49. The Hazro gendarmerie station custody record made no entry on 8 November with respect to Ahmet Çakıcı. Nor did the copies of the entries for the period November to December 1993 at the Diyarbakır provincial gendarmerie headquarters. The Commission examined in detail the entries for both. It found disturbing discrepancies. In particular, it found that entries were not in sequential or chronological order; that all the entries in the Diyarbakır custody record were in the same handwriting; and that the number of persons recorded as detained in Diyarbakır exceeded the officially available number of cells. This gave rise, *inter alia*, to a strong suspicion that entries were not made contemporaneously. The oral explanations of Ahmet Katmerkaya, who was responsible for the Diyarbakır provincial gendarmerie records, were found by the Commission to be highly unsatisfactory, indicating that an entry in the register did not necessarily indicate the physical presence of a suspect and that no entries were made to reflect the movements of suspects in and out of the custody area. It concluded that the record did not constitute an accurate or comprehensive record of the persons who might have been detained over that period and the absence of Ahmet Çakıcı's name in the Hazro and Diyarbakır records was not sufficient to prove that he had not been taken into custody.

50. The Commission accepted the oral evidence of Mustafa Engin, who stated that while he was detained at Diyarbakır provincial gendarmerie

headquarters he saw and spoke to Ahmet Çakıcı, who was detained over a period of sixteen to seventeen days in the same room. It also accepted his evidence that Ahmet Çakıcı looked in a bad condition, with dried blood on his clothes, and that Ahmet Çakıcı had told him that he had been beaten, one of his ribs broken, his head split open and that he had been given electric shocks twice. Supporting evidence for the fact that Ahmet Çakıcı had been detained and ill-treated was to be found in the written statement of Abdurrahman Al, taken by the HRA.

The Commission gave consideration to the written statements made by Mustafa Engin and relied on by the Government as undermining his oral testimony. It found the first statement taken from Mustafa Engin by a police officer on 12 March 1996 to be a brief and imprecise denial. The statement taken by a public prosecutor on 13 May 1996 was also brief and contained contradictory and ambiguous phrasing. It concluded that this statement was not a full and frank reflection of Mustafa Engin's testimony and did not destroy the credibility of his evidence to the delegates. It accordingly found it established that Ahmet Çakıcı was taken after his apprehension at Çitlibahçe to Hazro where he spent the night of 8 November 1993 and that he was transferred to Diyarbakır provincial gendarmerie headquarters where he was last seen by Mustafa Engin on or about 2 December when the latter was released.

51. The Commission made no findings as to the allegation made by the applicant that Ahmet Çakıcı was taken from Diyarbakır provincial gendarmerie headquarters to Hazro and from Hazro to Kavaklıboğaz gendarmerie station. These allegations were based on oral statements made to the applicant by Hikmet Aksoy, who did not appear before the delegates and who had not produced any written statement. While there were some supporting elements, the Commission found that the evidence failed to reach the requisite standard of proof.

3. The reports of Ahmet Çakıcı's death

52. The family of Ahmet Çakıcı were not informed of his alleged death in a clash between the PKK and the security forces on 17 to 19 February 1995. Although Colonel Eşref Hatipoğlu had been requested to provide the authorities with information as to the whereabouts of Ahmet Çakıcı, he made no official report as to the alleged finding of Ahmet Çakıcı's identity card on the body of one of the dead terrorists at Kıllıboğan Hill. The first report as to the finding of the identity card was made by the Hazro gendarmes, who had been passed information that the clash had occurred, accompanied by unspecified documents, by Colonel Hatipoğlu. There were however no documents provided to the Commission relating to the identification of the body or release of the body for burial. The Commission was not prepared to find it established that Ahmet Çakıcı was killed as alleged or that his body was amongst those found at Kıllıboğan Hill.

4. The investigation into the alleged disappearance of Ahmet Çakıcı

53. The Commission found that the applicant and his father, Tevfik Çakıcı, made petitions and enquiries to the National Security Court prosecutor at Diyarbakır in relation to the disappearance of Ahmet Çakıcı. The only steps taken by the authorities were to verify whether the National Security Court records contained the name of Ahmet Çakıcı and for an enquiry to be sent to the Hazro public prosecutor, who examined his records.

54. Following communication of the application to the Government, further enquiries were made by the Diyarbakır and Hazro public prosecutors. Statements were taken from Mustafa Engin, Remziye Çakıcı and the applicant. The addresses of Tahsin Demirbaş and Abdurrahman Al were not discovered. The Commission found that the Hazro public prosecutor made enquiries from the Hazro district gendarmerie as to their alleged apprehension of Ahmet Çakıcı but that he did not inspect the original custody record. Nor was any inspection carried out by a public prosecutor of the Diyarbakır provincial gendarmerie custody records. No steps were taken to verify the information submitted by the Hazro district gendarmerie that Ahmet Çakıcı was amongst the dead terrorists at Kıllıboğan Hill.

55. In reaching his decision of lack of jurisdiction of 13 June 1996, the Hazro public prosecutor had available to him the statements taken from Mustafa Engin, Remziye Çakıcı and the applicant and the information from the Hazro gendarmerie with regard to the alleged discovery of Ahmet Çakıcı's body. He also may have had documents relating to the applicant's application to the Commission and copies of custody records.

II. RELEVANT DOMESTIC LAW AND PRACTICE

56. The Government have not submitted in their memorial any details on domestic legal provisions which have a bearing on the circumstances of this case. The Court refers to the overview of domestic law derived from previous submissions in other cases, in particular the Kurt v. Turkey judgment of 25 May 1998, *Reports of Judgments and Decisions* 1998-III, pp. 1169-70, §§ 56-62, and the Tekin v. Turkey judgment of 9 June 1998, *Reports* 1998-IV, pp. 1512-13, §§ 25-29.

A. State of emergency

57. Since approximately 1985, serious disturbances have raged in the south-east of Turkey between the security forces and the members of the PKK (Workers' Party of Kurdistan). This confrontation has, according to

the Government, claimed the lives of thousands of civilians and members of the security forces.

58. Two principal decrees relating to the south-eastern region have been made under the Law on the State of Emergency (Law no. 2935, 25 October 1983). The first, Decree no. 285 (10 July 1987), established a regional governorship of the state of emergency in ten of the eleven provinces of south-eastern Turkey. Under Article 4 (b) and (d) of the decree, all private and public security forces and the Gendarmerie Public Peace Command are at the disposal of the regional governor.

59. The second, Decree no. 430 (16 December 1990), reinforced the powers of the regional governor, for example to order transfers out of the region of public officials and employees, including judges and prosecutors, and provided in Article 8:

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

B. Constitutional provisions on administrative liability

60. Article 125 §§ 1 and 7 of the Turkish Constitution provides as follows:

> "All acts or decisions of the administration are subject to judicial review ...
>
> …
>
> The administration shall be liable to make reparation for any damage caused by its own acts and measures."

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

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

C. Criminal law and procedure

63. The Turkish Criminal Code makes it a criminal offence:

– to deprive an individual unlawfully of his or her liberty (Article 179 generally, Article 181 in respect of civil servants);

– to issue threats (Article 191);

– to subject an individual to torture or ill-treatment (Articles 243 and 245);

– to commit unintentional homicide (Articles 452, 459), intentional homicide (Article 448) and murder (Article 450).

64. For all these offences complaints may be lodged, pursuant to Articles 151 and 153 of the Code of Criminal Procedure, with the public prosecutor or the local administrative authorities. 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 to bring a prosecution (Article 153). Complaints may be made in writing or orally. A complainant may appeal against the decision of the public prosecutor not to institute criminal proceedings.

D. Civil-law provisions

65. Any illegal act by civil servants, be it a crime or a tort, which causes material or moral damage may be the subject of a claim for compensation before the ordinary civil courts. Pursuant to Article 41 of the Code of Obligations, an injured person may file a claim for compensation against an alleged perpetrator who has caused damage in an unlawful manner whether wilfully, negligently or imprudently. Pecuniary loss may be compensated by the civil courts pursuant to Article 46 of the Code of Obligations and non-pecuniary or moral damages awarded under Article 47.

E. Impact of Decree no. 285

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

67. The public prosecutor is also deprived of jurisdiction with regard to offences alleged against members of the security forces in the state of emergency region. Decree no. 285, Article 4 § 1, provides that all security forces under the command of the regional governor (see paragraph 58 above) shall be subject, in respect of acts performed in the course of their duties, to the Law of 1914 on the prosecution of civil servants. Thus, any prosecutor who receives a complaint alleging a criminal act by a member of the security forces must make a decision of non-jurisdiction and transfer the

file to the Administrative Council. These councils are made up of civil servants, chaired by the governor. A decision by the Council not to prosecute is subject to an automatic appeal to the Supreme Administrative Court. Once a decision to prosecute has been taken, it is for the public prosecutor to investigate the case.

PROCEEDINGS BEFORE THE COMMISSION

68. Mr İzzet Çakıcı applied to the Commission on 2 May 1994. He alleged that his brother Ahmet Çakıcı had been taken into custody by the security forces and had since disappeared and that these events had not been adequately investigated by the authorities. He relied on Articles 2, 3, 5, 13, 14 and 18 of the Convention.

69. The Commission declared the application (no. 23657/94) admissible on 15 May 1995. In its report of 12 March 1998 (former Article 31 of the Convention), it expressed the opinion that there had been a violation of Article 2 in respect of the disappearance of the applicant's brother (unanimously); that there had been a violation of Article 3 in respect of the applicant's brother (unanimously); that there had been a violation of Article 5 in respect of the disappearance of the applicant's brother (unanimously); that there had been a violation of Article 3 in respect of the applicant (by twenty-seven votes to three); that there had been a violation of Article 13 (unanimously); and that there had been no violation of Articles 14 and 18 of the Convention (unanimously). The full text of the Commission's opinion and of the partly dissenting opinion contained in the report is reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT

70. The applicant requested the Court in his memorial to find that the respondent State was in violation of Articles 2, 3, 5, 13, 14 and 18 of the Convention and that it had not fulfilled its obligations under former Article 28 § 1 (a). He requested the Court to award him and his brother's wife and heirs just satisfaction under Article 41.

71. The Government, for their part, requested the Court in their memorial to reject the case as inadmissible on account of the applicant's

1. *Note by the Registry.* For practical reasons this annex will appear only with the final printed version of the judgment (in the official reports of selected judgments and decisions of the Court), but a copy of the Commission's report is obtainable from the Registry.

failure to exhaust domestic remedies. In the alternative, they argued that the applicant's complaints were not substantiated by the evidence.

THE LAW

I. THE COURT'S ASSESSMENT OF THE FACTS

72. The Court recalls its established case-law that under the Convention system prior to 1 November 1998 the establishment and verification of the facts were primarily a matter for the Commission (former Articles 28 § 1 and 31). 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 only in exceptional circumstances that it will exercise its powers in this area (see, amongst other authorities, the Akdivar and Others v. Turkey judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, p. 1214, § 78).

73. The Government, in their memorial and oral pleadings, submitted that the Commission's evaluation of the evidence was defective in that it had, *inter alia*, failed to take into account certain contradictions and weaknesses in the testimony of the applicant, Remziye Çakıcı and Mustafa Engin and had taken into account irrelevant matters, such as the alleged defects in custody records. They invited the Court to reconsider the Commission's findings of fact.

74. In the instant case, the Court recalls that the Commission reached its findings of fact after a delegation had heard evidence in Ankara and in Strasbourg (see paragraph 43 above). It finds that the Commission approached its task of assessing the evidence before it with the requisite caution, giving detailed consideration to the elements which supported the applicant's account and those which cast doubt on its credibility. In particular, the Commission scrutinised carefully the evidence deriving from Mustafa Engin and Ertan Altınoluk, the gendarmerie officer who conducted the operation at the village of Çitlibahçe.

75. In the Court's view, the criticisms made by the Government do not disclose any matter of substance which might warrant the Court exercising its own powers of verifying the facts. In these circumstances, the Court accepts the facts as established by the Commission.

76. In addition to the difficulties inevitably arising from a fact-finding exercise of this nature, the Commission was unable to obtain certain documentary evidence and testimony that it deemed essential for the fulfilment of its functions. The Commission found that the Government had failed to provide the Commission's delegates with the opportunity to inspect

original custody records, to facilitate the attendance of the witness Hikmet Aksoy and to secure the attendance before the delegates of two State officials, Aydın Tekin (a public prosecutor) and Colonel Eşref Hatipoğlu (a gendarmerie officer) (see paragraph 43 above).

The Court notes that it is of the utmost importance for the effective operation of the system of individual petition instituted under former Article 25 of the Convention (now replaced by Article 34) not only that applicants or potential applicants are able to communicate freely with the Convention organs without being subjected to any form of pressure from the authorities but also that States furnish all necessary facilities to enable a proper and effective examination of applications (see former Article 28 § 1 (a) of the Convention, which concerned the fact-finding responsibility of the Commission, now replaced by Article 38 of the Convention as concerns the Court's procedures). The Court also notes the lack of explanation given by the Government with regard to the custody records, and finds the explanations given by the Government in respect of the witnesses unsatisfactory and unconvincing. Consequently, it confirms the finding, reached by the Commission in its report, that in this case the Government fell short of their obligations under former Article 28 § 1 (a) to furnish all necessary facilities to the Commission in its task of establishing the facts.

II. THE GOVERNMENT'S PRELIMINARY OBJECTION

77. The Government maintained that the applicant had not exhausted domestic remedies as required by Article 35 of the Convention by making proper use of the redress available through the procedure of instituting criminal proceedings, or by lodging claims before the civil or administrative courts. They invoked the Court's judgment in the Aytekin case (Aytekin v. Turkey judgment of 23 September 1998, *Reports* 1998-VII) as establishing that the Turkish authorities showed no reluctance in instituting criminal proceedings against members of the security forces and that civil and administrative remedies were effective.

They submitted, in particular, that the applicant did not petition the public prosecutor as claimed in respect of the alleged disappearance of his brother, since the petition of 22 December 1993 bore no address, or any stamp of receipt or registration indicating that it had been received by the prosecutor's office.

78. The applicant's counsel at the hearing maintained that the applicant's father had presented a petition at the Diyarbakır National Security Court public prosecutors' office and stated that there was no invariable practice of registering such petitions. Further, the petition clearly identified the applicant's claim that his brother had been taken by the security forces and identified three witnesses to that fact.

79. The Commission, rejecting the Government's arguments in its decision on admissibility, found that the applicant could be regarded as having brought his complaints before the relevant and competent authorities, who were under an obligation under Turkish law to investigate, and he was consequently not required to pursue any other legal remedy.

80. The Court observes that the Commission found that the applicant and his father had made petitions and enquiries to the National Security Court prosecutor in relation to the disappearance of Ahmet Çakıcı. The Court is also satisfied that their concerns were known to the prosecutors at both the Diyarbakır National Security Court and Hazro, since it is apparent that enquiries had been made from the former to the latter, as demonstrated by letters of 4 and 19 April 1994 (see paragraphs 26-27 above). However, the reaction of the authorities to the serious allegations in issue was marked notably by inertia. Notwithstanding that the applicant maintained his complaints in his statement to the public prosecutor of 9 September 1994, which were confirmed in Remziye Çakıcı's statement of 12 November 1994, no measures were taken by public prosecutors beyond enquiries as to possible entries in custody records in Hazro and Diyarbakır and obtaining two brief, ambiguous statements from Mustafa Engin. Later, in 1995, there were no steps taken to verify the report that Ahmet Çakıcı's body had been found or to seek documentary confirmation of the purported identification, by requesting copies of any autopsy report or burial records. In the absence of an effective investigation into the alleged disappearance and in light of the authorities' repeated denial that Ahmet Çakıcı had ever been in custody, the Court finds that there was no basis for any meaningful recourse by the applicant to the civil and administrative remedies referred to by the Government, and the applicant must be regarded as having done everything that could reasonably be expected of him to exhaust the domestic remedies available to him (see the Kurt v. Turkey judgment of 25 May 1998, *Reports* 1998-III, pp. 1175-77, §§ 79-83).

Consequently, the Court dismisses the Government's preliminary objection.

III. ALLEGED VIOLATIONS OF ARTICLE 2 OF THE CONVENTION

81. The applicant alleged that his brother had been taken into unacknowledged detention and had since disappeared in circumstances which disclosed a violation of Article 2 of the Convention. This provision 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."

A. Arguments of those who appeared before the Court

1. The applicant

82. The applicant referred to the Commission's findings that his brother Ahmet Çakıcı had been ill-treated during an unacknowledged detention and that the authorities had claimed that he was dead as disclosing a very strong probability that his brother had died in circumstances for which the authorities were responsible. The applicant submitted that in respect of detained persons a government assumed a special obligation for their safety and their right to life and that there was a positive obligation on them to account for the detainee and produce him alive. Further, once it was determined that a suspicious death had occurred, there was an obligation on the State to conduct a thorough and effective investigation. In the present case, the public prosecutor took no steps even to investigate the claimed finding of Ahmet Çakıcı's body. This was part of a systematic failure by public prosecutors to discharge their obligations under the Convention.

2. The Government

83. The Government submitted that Article 2 could not be properly invoked in the present case, relying, *inter alia*, on the Court's approach in the Kurt case (Kurt judgment cited above, p. 1182, § 107), where there was found to be a lack of concrete indications that the applicant's son had met his death during his unacknowledged detention. The Government also referred to the McCann case (McCann and Others v. the United Kingdom judgment of 27 September 1995, Series A no. 324) as demonstrating the applicability of Article 2 in circumstances where the security forces were established as having caused the death of the person concerned, which, they argued, was not the position in this case. They repeated their criticisms of any findings which relied on the inconsistent statements of the applicant and Mustafa Engin concerning the alleged detention or ill-treatment of Ahmet Çakıcı.

3. The Commission

84. The Commission was of the opinion that in the circumstances of this case there was a very strong probability that Ahmet Çakıcı was no longer alive and that this, since it arose in the context of an unacknowledged detention and findings of ill-treatment, disclosed a failure by the authorities to comply with their obligations under Article 2.

B. The Court's assessment

85. The Court has accepted above the Commission's establishment of the facts in this case, namely, that Ahmet Çakıcı was the victim of an unacknowledged detention and serious ill-treatment. As the Commission pointed out, very strong inferences may be drawn from the authorities' claim that his identity card was found on the body of a dead terrorist. The Court finds on this basis that there is sufficient circumstantial evidence, based on concrete elements, on which it may be concluded beyond reasonable doubt that Ahmet Çakıcı died following his apprehension and detention by the security forces. This case is therefore to be distinguished from the Kurt case (Kurt judgment cited above, p. 1182, §§ 107-08), in which the Court examined the applicant's complaints about the disappearance of her son under Article 5. In the Kurt case, although the applicant's son had been taken into detention, no other elements of evidence existed as regarded his treatment or fate subsequent to that.

86. The Court reiterates that Article 2 of the Convention, which safeguards the right to life, ranks as one of the most fundamental provisions in the Convention and, together with Article 3 of the Convention, enshrines one of the basic values of the democratic societies making up the Council of Europe (see the McCann and Others judgment cited above, pp. 45-46, §§ 146-47). The obligation imposed is not exclusively concerned with intentional killing resulting from the use of force by agents of the State but also extends, in the first sentence of Article 2 § 1, to imposing a positive obligation on States that the right to life be protected by law. This 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, among other authorities, the Yaşa v. Turkey judgment of 2 September 1998, *Reports* 1998-VI, p. 2438, § 98).

87. As Ahmet Çakıcı must be presumed dead following an unacknowledged detention by the security forces, the Court finds that the responsibility of the respondent State for his death is engaged. It observes that no explanation has been forthcoming from the authorities as to what occurred following his apprehension, nor any ground of justification relied on by the Government in respect of any use of lethal force by their agents.

Liability for Ahmet Çakıcı's death is therefore attributable to the respondent State and there has accordingly been a violation of Article 2 on that account.

Furthermore, having regard to the lack of effective procedural safeguards disclosed by the inadequate investigation carried out into the disappearance and the alleged finding of Ahmet Çakıcı's body (see paragraphs 80 and 105-07), the Court finds that the respondent State has failed in its obligation to protect his right to life. Accordingly, there has been a violation of Article 2 of the Convention on this account also.

IV. ALLEGED VIOLATIONS OF ARTICLE 3 OF THE CONVENTION

A. Concerning the applicant's brother, Ahmet Çakıcı

88. The applicant alleged that his brother had been the victim of breaches by the respondent State of Article 3 of the Convention, which provides:

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

89. The applicant submitted that his brother had been subjected to serious ill-treatment, amounting to torture, while detained at Hazro and at Diyarbakır provincial gendarmerie headquarters. He had, *inter alia*, been beaten and subjected to electric shocks. The applicant further submitted that the failure to provide an effective investigation into the circumstances of Ahmet Çakıcı's detention disclosed an additional breach of Article 3, relying on Assenov and Others v. Bulgaria (judgment of 28 October 1998, *Reports* 1998-VIII, p. 3179, § 102).

90. The Government's submissions on this aspect were restricted to their criticisms of the Commission's assessment of the facts and of its alleged failure to apply a strict standard of interpretation in keeping with the case-law regarding Article 3 of the Convention.

91. The Commission considered that the evidence of Mustafa Engin, who had witnessed the after-effects of the ill-treatment of Ahmet Çakıcı and to whom Ahmet Çakıcı had spoken of being beaten and subjected to electric shocks, provided a sufficient basis for finding that Ahmet Çakıcı had been tortured. It expressed the consideration that in cases of unacknowledged detention and disappearance independent, objective medical evidence or eyewitness testimony was unlikely to be forthcoming and that to require either as a prerequisite of a finding of a violation of Article 3 would undermine the protection afforded by that provision.

92. The Court notes that Mustafa Engin's evidence to the delegates was judged to be reliable and credible. This witness was detained in the same room as Ahmet Çakıcı for a period of sixteen to seventeen days and had the

opportunity to see and talk to Ahmet Çakıcı. His evidence (see paragraph 50 above) was that he saw bloodstains on Ahmet Çakıcı's clothing and that Ahmet Çakıcı was in a very poor physical condition. Ahmet Çakıcı told him that he had been beaten, that one of his ribs had been broken and his head split open. He was taken from the room in which they were held together and informed Mustafa Engin on his return that he had twice been given electric shocks, which treatment Mustafa Engin also stated that he received during interrogation.

The Court shares the Commission's opinion that this evidence supports a finding to the required standard of proof, i.e. beyond reasonable doubt, that Ahmet Çakıcı was tortured during his detention. There has, consequently, been a violation of Article 3 of the Convention in respect of the applicant's brother, Ahmet Çakıcı.

93. The Court does not deem it necessary to make a separate finding under Article 3 in respect of the alleged deficiencies in the investigation, as it examines this aspect under Article 13 of the Convention below.

B. Concerning the applicant

94. Relying, *inter alia*, on the Court's judgment in the Kurt case (Kurt judgment cited above, pp. 1187-88, §§ 130-34), the applicant complained that the disappearance of his brother constituted inhuman treatment in relation to himself and other members of the family, including Remziye, Ahmet Çakıcı's wife, and their children. He referred to the lack of information given to them by the authorities in answer to their enquiries and to the prolonged period of uncertainty as to the fate of Ahmet Çakıcı which continued to trap the family in a cycle of unfounded hope and inhibited the grieving process.

95. The Government disputed that the applicant might claim to be an indirect victim of a violation of the rights of his brother. In any event, they submitted that the links between the brothers were not particularly close and that this aspect of the application had not been the subject of any detailed examination necessary to reaching any findings on the point.

96. The majority of the Commission, referring to the long period of uncertainty, doubt and apprehension suffered by the applicant and to the failure of the authorities to account for what had happened to Ahmet Çakıcı, found that the applicant could claim to have been subjected to inhuman and degrading treatment contrary to Article 3 of the Convention. A minority of the Commission considered that the emotional stress caused to the applicant could not raise a separate issue, since otherwise the notion of victim would be extended unacceptably to a wide circle of those indirectly affected by violations of the Convention.

97. The Court notes that this complaint was examined before the Commission solely in relation to the applicant. According to the

Commission's decision on admissibility, no complaint was made in respect of Ahmet Çakıcı's wife and children. The compass of the case before the Court being delimited by the Commission's decision on admissibility (see, amongst other authorities, the McMichael v. the United Kingdom judgment of 24 February 1995, Series A no. 307-B, p. 50, § 71), the Court will accordingly examine this aspect of the application in relation to the applicant alone.

98. The Court observes that in the Kurt case (Kurt judgment cited above, 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 would further emphasise 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.

99. In the present case, the applicant was the brother of the disappeared person. Unlike the applicant in the Kurt case, he was not present when the security forces took his brother, as he lived with his own family in another town. It appears also that, while the applicant was involved in making various petitions and enquiries to the authorities, he did not bear the brunt of this task, his father Tevfik Çakıcı taking the initiative in presenting the petition of 22 December 1993 to the Diyarbakır National Security Court. Nor have any aggravating features arising from the response of the authorities been brought to the attention of the Court in this case. Consequently, the Court perceives no special features existing in this case which would justify finding an additional violation of Article 3 of the

Convention in relation to the applicant himself. Accordingly, there has been no breach of Article 3 as concerns the applicant in this case.

V. ALLEGED VIOLATIONS OF ARTICLE 5 OF THE CONVENTION

100. The applicant submitted that the disappearance of his brother gave rise to multiple violations of Article 5, 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.
>
> 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

101. The applicant submitted that his brother, Ahmet Çakıcı, was detained by the security forces, being taken to Hazro for one night and then to Diyarbakır provincial gendarmerie headquarters where he was detained until at least 2 December 1993. His detention was not recorded in the relevant custody records and was denied by the authorities, thus depriving him of the safeguards that should accompany detention. He was not brought before a judicial officer within a reasonable time as required by Article 5 § 3, was denied access to a lawyer, doctor or relative, and was unable to challenge the lawfulness of his detention, as required by Article 5 § 4. There

was also no prompt and effective investigation by the authorities into the family's claim that Ahmet Çakıcı had been taken into custody, which, in the applicant's view, constituted a separate violation of Article 5.

102. The Government, denying that Ahmet Çakıcı was taken into custody, maintained that the authorities furnished to the applicant all available information concerning his brother, in particular as regards the fact that his name did not appear in any custody record. They submitted that the Commission's criticism of the custody registers was irrelevant to the facts of this case and, in any event, disproportionate. They took the view that it would not be possible to hold persons in detention for the period alleged without properly recording them in the relevant registers or instituting the appropriate judicial procedures. They also referred to their derogation under Article 15, citing the Aksoy case (Aksoy v. Turkey judgment of 18 December 1996, *Reports* 1996-VI) in which the Court acknowledged the existence of a public emergency threatening the life of the nation as a result of the terrorist threat in south-east Turkey.

103. The Commission, finding that Ahmet Çakıcı had been arbitrarily deprived of his liberty by the security forces, held that the Government had not provided a credible or substantiated explanation of what had happened to him. When examining the safeguards in place to protect a detained person from involuntary disappearance, it observed that the custody registers for Lice, Hazro and Diyarbakır provincial gendarmerie headquarters disclosed omissions, irregularities and inconsistencies such that they could no longer be regarded as reliable or accurate. It was also not satisfied that the gendarmes were properly aware of, or put into practice, correct and effective registration procedures.

104. The Court has frequently emphasised 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 (see, amongst others, the Kurt judgment cited above, pp. 1184-85, § 122). In that context, it has repeatedly stressed 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 (see, amongst other authorities, the Chahal v. the United Kingdom judgment of 15 November 1996, *Reports* 1996-V, p. 1864, § 118). 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 is amenable to independent judicial scrutiny and secures the accountability of the authorities for that measure. As the Court previously held in the Kurt case (Kurt judgment cited above, p. 1185, § 124), the unacknowledged detention of an individual is a complete negation of these guarantees and discloses a most grave violation of Article 5. Given 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.

105. In the light of those considerations, the Court recalls that it has accepted the Commission's findings that Ahmet Çakıcı was apprehended by the security forces, taken to Hazro where he spent the night of 8 November 1993 and transferred to Diyarbakır provincial gendarmerie headquarters where he was detained until at least 2 December 1993 (see paragraph 50 above). This detention was not recorded in the Hazro or Diyarbakır custody records, nor was there any other official record of his whereabouts or fate. The recording of accurate holding data concerning the date, time and location of detainees, as well as the grounds for the detention and the name of the persons effecting it, is necessary for the detention of an individual to be compatible with the requirements of lawfulness for the purposes of Article 5 § 1. The lack of records of this applicant discloses a serious failing, which is aggravated by the Commission's findings as to the general unreliability and inaccuracy of the records in question. The Court also shares the Commission's concerns with regard to the practices applied in the registration of holding data by the gendarme witnesses who appeared before the Commission's delegates – the fact that it is not recorded when a person is held elsewhere than the officially designated custody area or when a person is removed from a detention area for any purpose or held in transit. It finds unacceptable the failure to keep records which enable the location of a detainee to be established at a particular time.

106. Further, the Court notes that, notwithstanding that the applicant's family brought to the attention of the authorities that there were three eye-witnesses to the detention of Ahmet Çakıcı, no steps were taken to seek any evidence, beyond enquiring as to entries in custody records, until after the application was communicated to the Government by the Commission. The Court has already commented on the restricted number of enquiries which resulted even at that stage and on the lack of any investigation into the report that Ahmet Çakıcı's body had been found (see paragraph 80 above). There was neither a prompt nor a meaningful inquiry into the circumstances of Ahmet Çakıcı's disappearance.

107. Accordingly, the Court concludes that Ahmet Çakıcı was held in unacknowledged 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.

VI. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

108. The applicant complained that he was deprived of an effective remedy in respect of the disappearance of his brother, as a direct victim

himself and on behalf of his brother, 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."

109. The applicant submitted that he was denied an effective remedy due to the dilatory and superficial investigation conducted into the disappearance of his brother. He referred, *inter alia*, to the failure of the public prosecutors to inspect directly the original custody records and the reliance of the public prosecutor in his decision of non-jurisdiction on the unsubstantiated report that Ahmet Çakıcı's body had been found after a clash with terrorists.

110. The Government maintained that the system of criminal, civil and administrative justice offered effective redress, when utilised properly by applicants acting in good faith, referring in particular to the Aytekin case (Aytekin judgment cited above). The applicant in the present case did not seriously attempt to seek a remedy from the domestic authorities, who, contrary to his assertions, took the necessary and appropriate steps in relation to his allegations once they had been brought to their attention.

111. The Commission concluded that there had been a violation of Article 13 since the public prosecutors had not investigated promptly or effectively the disappearance of the applicant's brother, ignoring or discounting the evidence which supported the applicant's claims. At the hearing, the Delegate of the Commission sought to place this case in the context of the previous fifteen judgments rendered by the Court in which allegations of failure to protect life, disappearance, ill-treatment and destruction of homes in south-east Turkey were associated with failures to provide an effective remedy, in particular a reluctance to pursue investigations into allegations of wrongdoing by the security forces and a readiness to accept the unsubstantiated assertions of the security forces at face value. Findings had been made concerning inadequate investigative procedures in all of those cases, save the Aytekin case, which differed in that there was an identified perpetrator of the lethal shooting of the applicant's husband from the outset of the incident.

112. The Court recalls that Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. 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 Aksoy judgment cited above, p. 2286, § 95; the Aydın v. Turkey judgment of 25 September 1997, *Reports* 1997-VI, pp. 1895-96, § 103; and the Kaya v. Turkey judgment of 19 February 1998, *Reports* 1998-I, pp. 329-30, § 106).

113. The Court has confirmed the Commission's findings in the present case concerning the unacknowledged detention, ill-treatment and disappearance of the applicant's brother in circumstances that give rise to the presumption that he has died since those events. Given the fundamental importance of the rights in issue, the right to protection of life and freedom from torture and ill-treatment, Article 13 imposes, without prejudice to any other remedy available under the domestic system, an obligation on States to carry out a thorough and effective investigation apt to lead to those responsible being identified and punished and in which the complainant has effective access to the investigation proceedings (see the Yaşa judgment cited above, p. 2442, § 114).

114. It follows that, in the instant case, the authorities had an obligation to carry out an effective investigation into the disappearance of the applicant's brother. Having regard to paragraphs 80 and 106 above, the Court finds that the respondent State has failed to comply with this obligation, which failure undermined the effectiveness of any other remedies which might have existed.

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

VII. ALLEGED VIOLATIONS OF ARTICLES 14 AND 18 OF THE CONVENTION

115. The applicant submitted that the disappearance of his brother illustrated the discriminatory policy pursued by the authorities against Kurdish citizens and the existence of an authorised practice, in violation of Articles 14 and 18 of the Convention respectively.

Article 14 provides:

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

Article 18 provides:

> "The restrictions permitted under [the] Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

116. The Commission concluded that the applicant's allegations under these provisions were unsubstantiated and disclosed no violations. The Government were of the same view.

117. The Court, on the basis of the facts as established by the Commission, finds no violation of these provisions either.

VIII. ALLEGED PRACTICE BY THE AUTHORITIES OF INFRINGING ARTICLE 13

118. The applicant argued that there was evidence that practices, tolerated at the highest level, in violation of the Convention existed in Turkey and that the degree of official tolerance evident in these practices rendered the system of remedies in south-east Turkey wholly ineffective, such that there was a practice of violating Article 13.

119. The Government rejected the applicant's allegations in this regard.

120. The Delegate of the Commission, while referring to the Court's previous judgments in Turkish cases containing findings of ineffective remedies, pointed out that the Commission had not yet found a practice in the light of its own extensive experience, although it could not be excluded that the Commission could yet do so in the cases examined before its office expired at the end of October 1999.

121. The Court considers that the scope of examination of the evidence undertaken in this case and the material on the case file are not sufficient to enable it to determine whether the authorities have adopted a practice of violating Article 13 of the Convention.

IX. APPLICATION OF ARTICLE 41 OF THE CONVENTION

122. Under Article 41 of the Convention,

> "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

123. The applicant requested that pecuniary damages be paid for the benefit of his brother's surviving spouse and children. He claimed a sum of 282.47 pounds sterling (GBP) representing 4,700,000 Turkish liras (TRL), which it is alleged was taken from Ahmet Çakıcı on his apprehension by a first lieutenant, and GBP 11,534.29 for loss of earnings, this capital sum being calculated with reference to Ahmet Çakıcı's estimated monthly earnings of TRL 30,000,000.

124. The Government disputed that the sum of TRL 4,700,000 should be paid having regard to the source of the information, Mustafa Engin, whose evidence, in the Government's view, was contradictory and unreliable. They submitted that it would be inappropriate to pay loss of earnings in respect of Ahmet Çakıcı since it had not been established that he was dead and, in any event, an award could not be made to Ahmet Çakıcı's heirs since they were not applicants in this case.

125. The Court observes that the applicant introduced this application on his own behalf and on behalf of his brother. In these circumstances, the Court may, if it considers it appropriate, make awards to the applicant to be held by him for his brother's heirs (see the Kurt judgment cited above, p. 1195, § 174).

126. As regards the claim of TRL 4,700,000, the Court notes that the Commission did not make any finding of fact as regarded the allegation that a gendarmerie officer had removed money from Ahmet Çakıcı. The Court recalls that this claim derives from the evidence of Mustafa Engin who stated that Ahmet Çakıcı told him, while they were detained together at Diyarbakır provincial gendarmerie headquarters, that a first lieutenant had taken the money from him. Remziye Çakıcı also claimed that a boy from the village had told her that he had seen a gendarme take money from Ahmet Çakıcı (see paragraphs 14 and 15 above). The Court has accepted the Commission's opinion that these witnesses were generally credible but notes that neither witness was a direct eyewitness of the alleged confiscation but rely on what they were told by others. The Court is not satisfied that this furnishes a sufficiently substantiated basis for making an award of pecuniary damage in this regard.

127. As regards the applicant's 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). The Court has found (paragraph 85 above) that it may be taken as established that Ahmet Çakıcı died following his apprehension by the security forces and that the State's responsibility is engaged under Article 2 of the Convention. In these circumstances, there is a direct causal link between the violation of Article 2 and the loss by his widow and children of the financial support which he provided for them. The Court notes that the Government have not queried the amount claimed by the applicant. Having regard therefore to the detailed submissions by the applicant concerning the actuarial basis of calculation of the appropriate capital sum to reflect the loss of income due to Ahmet Çakıcı's death, the Court awards the sum of GBP 11,534.29 to be held by the applicant on behalf of his brother's surviving spouse and children.

B. Non-pecuniary damage

128. The applicant claimed GBP 40,000 for non-pecuniary damage in relation to the violations of the Convention suffered by his brother, referring to previous awards made for unlawful detention, torture and lack of effective investigation.

129. The Government submitted that awards should not be a means of enrichment for applicants and should properly take into account the socio-economic circumstances of the region as well as the age and social situation of the alleged victim and applicant. There was no justification, in their view, to award the colossal sums claimed by the applicant.

130. The Court recalls that in the Kurt judgment (cited above, p. 1195, §§ 174-75) the sum of GBP 15,000 was awarded for violations of the Convention under Articles 5 and 13 in respect of the disappearance of the applicant's son while in custody, which sum was to be held by the applicant for her son and his heirs, while the applicant received an award of GBP 10,000 in her own favour, due to the circumstances of the case which had led the Court to find a breach of Articles 3 and 13. In the present case, the Court has held, in addition to breaches of Articles 5 and 13, that there has been a violation of the right to respect for life guaranteed under Article 2 and torture contrary to Article 3. Noting the awards made in previous cases from south-east Turkey concerning these provisions (see, concerning Article 3, the Aksoy judgment cited above, pp. 2289-90, § 113, the Aydın judgment cited above, p. 1903, § 131, the Tekin judgment cited above, pp. 1521-22, § 77; and, concerning Article 2, the Kaya judgment cited above, p. 333, § 122, the Güleç v. Turkey judgment of 27 July 1998, *Reports* 1998-IV, p. 1734, § 88, the Ergi v. Turkey judgment of 28 July 1998, *Reports* 1998-IV, p. 1785, § 110, the Yaşa judgment cited above, pp. 2444-45, § 124, and *Oğur v. Turkey* [GC], no. 21594/93, § 98, ECHR 1999-III) and having regard to the circumstances of this case, the Court has decided to award the sum of GBP 25,000 in total in respect of non-pecuniary damage to be held by the applicant for his brother's heirs. As regards the applicant, the Court has not found a breach of Article 3 in his own regard (see paragraph 99 above). However, he undoubtedly suffered damage in respect of the violations found by the Court and may be regarded as an "injured party" for the purposes of Article 41. Having regard to the gravity of the violations and to equitable considerations, it awards GBP 2,500 to the applicant.

C. Costs and expenses

131. The applicant claimed a total of GBP 32,205.17 for fees and costs incurred in the application. This included fees and costs incurred in respect of attendance at the taking of evidence before Commission delegates at a hearing in Ankara and a hearing in Strasbourg and attendance at the hearing

before the Court in Strasbourg. A sum of GBP 3,520 is listed as incurred fees and administrative costs in respect of the Kurdish Human Rights Project (KHRP) in its role as liaison between the legal team in the United Kingdom and the lawyers and the applicant in Turkey, as well as a sum of GBP 3,600 in respect of work undertaken by three lawyers in Turkey. The applicant requested that the Court provide reasons for the award which it gave, or at least for departing from the sums claimed, in order to promote legal certainty and assist future applicants and their legal representatives.

132. The Government disputed that any sum should be awarded in respect of the KHRP, whose function is insufficiently elaborated. They contested the appropriateness of awarding high fees and costs in respect of lawyers from outside Turkey and also contended that the fees claimed in respect of work done by lawyers in Turkey were excessive in comparison with local rates, in particular the claimed hourly rate of GBP 60 which contrasted markedly with the hourly rate of GBP 25 claimed by domestic lawyers in the Kurt case cited above. They also challenged that they should be liable to fund case-law research and analysis which the applicant's lawyers would be able to utilise in other cases.

133. In relation to the claim for costs, the Court, deciding on an equitable basis and having regard to the details of the claims submitted by the applicant, awards him the sum of GBP 20,000, together with any value-added tax that may be chargeable, less the 7,000 French francs received by way of legal aid from the Council of Europe.

C. Default interest

134. The Court considers it appropriate to take the statutory rate of interest applicable in the United Kingdom at the adoption of adotion of the present judgment, namely 7.5% per annum.

FOR THESE REASONS, THE COURT

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

2. *Holds* unanimously that there has been a violation of Article 2 of the Convention;

3. *Holds* unanimously that there has been a violation of Article 3 of the Convention in respect of the applicant's brother;

4. *Holds* by fourteen votes to three that there has been no violation of Article 3 of the Convention in respect of the applicant;

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

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

7. *Holds* unanimously that there has been no violation of Article 14 of the Convention;

8. *Holds* unanimously that there has been no violation of Article 18 of the Convention;

9. *Holds* unanimously
(a) that the respondent State is to pay the applicant, within three months, the following sums, to be converted into Turkish liras at the rate applicable at the date of settlement:
(i) 11,534 (eleven thousand five hundred and thirty-four) pounds sterling and 29 (twenty-nine) pence for pecuniary damage to be held by the applicant for his brother's surviving spouse and heirs;
(ii) 25,000 (twenty-five thousand) pounds sterling for non-pecuniary damage, which sum is to be held by the applicant for his brother's heirs, and 2,500 (two thousand five hundred) pounds sterling for non-pecuniary damage in respect of the applicant;
(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* by twelve votes to five
(a) that the respondent State is to pay the applicant, within three months, in respect of costs and expenses, 20,000 (twenty thousand) pounds sterling together with any value-added tax that may be chargeable, less 7,000 (seven thousand) French francs to be converted into pounds sterling at the 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 applicant's claims for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 8 July 1999.

Luzius WILDHABER
President

Maud DE BOER-BUQUICCHIO
Deputy Registrar

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

(a) partly dissenting opinion of Mrs Thomassen joined by Mr Jungwiert and Mr Fischbach;

(b) partly dissenting opinion of Mr Gölcüklü.

L.W.
M.B.

PARTLY DISSENTING OPINION OF JUDGE THOMASSEN JOINED BY JUDGES JUNGWIERT AND FISCHBACH

The majority found no violation of Article 3 of the Convention in relation to the applicant himself. I am unable to share this view and voted for a violation.

The Government were responsible for the disappearance, torture and death of the applicant's brother. The applicant was convinced, as may be regarded as reasonable in the circumstances, that his brother was tortured while he was in the custody of the security forces. Afterwards his brother disappeared. The Government did not respond to the applicant's requests for information and even denied that his brother was ever in custody. When the applicant's brother was allegedly found dead, the Government claimed after some time that he was killed in a clash. Nevertheless, they made no contact at all with the family as regards identification or arrangements for burial. All the efforts of the applicant to find out what happened to his brother were callously disregarded by the authorities, thus leaving him in uncertainty and pain for over five and a half years. In such a case, I do not doubt that the applicant felt that he was being subjected by the Turkish Government to inhuman treatment.

The majority indicate that for a violation of Article 3 of the Convention it is not enough that a member of the family of a person who has disappeared should experience emotional distress, since this may be regarded as an inevitable consequence for the relatives of a victim of a serious human-rights violation. Whether a family member is a victim will, in the majority's view, depend on the existence of special factors which give the applicant's suffering a dimension and character distinct from that emotional distress (see paragraph 98 of the judgment). Without going into the merits of this criterion, I am not convinced that these special factors are not present in this case.

In the judgment, the majority draws a distinction between the instant case and the Kurt case (see the Kurt judgment of 25 May 1998, *Reports of Judgments and Decisions* 1998-III), in which the Court found a violation of Article 3 in relation to the mother of a person who had disappeared. It is obvious that the pain of a mother who sees her son arrested and then has to live in uncertainty about his fate because of the acts and negligence of the authorities must be unbearable. However, a brother can also suffer deeply in face of the uncertainty of the fate of a sibling. In this context, I also do not find convincing the reference made in the judgment to the fact that the applicant was not present when the security forces took his brother, as he lived with his own family in his own town. Nor do I find it persuasive that reliance is placed on the circumstance that, while the applicant was involved in making various petitions and enquiries to the authorities,

he did not bear the brunt of this task, his father taking the initiative in presenting the petition of 22 December 1993 to the Diyarbakır National Security Court. As far as the latter is concerned, I am more impressed by the fact that from the moment of the disappearance of his brother the applicant was actively involved in submitting various petitions and enquiries to the authorities and that he made the application to our Court.

The Turkish Government have been found responsible for one of the gravest possible violations of human rights, a failure to respect the right to life. Moreover, they left the applicant in uncertainty, doubt and apprehension about his brother for more than five and a half years. In doing so, they demonstrated a cruel disregard for his feelings and his efforts to find out about his brother's fate. Apart from failing in their obligation to respect his brother's right to life, the Government must also be held responsible for the severe mental distress and anguish the applicant has suffered for a prolonged and continuing period of time as a consequence of their acts and negligence. I find that these are factors which do amount to a violation of Article 3 in relation to the applicant himself.

PARTLY DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

(*Translation*)

To my great regret, I cannot agree on certain points with the opinion of the majority, for the following reasons.

As I explained in my partly dissenting opinion in the case of Ergi v. Turkey (judgment of 28 July 1998, *Reports of Judgments and Decisions* 1998-IV), when the Court finds a violation of Article 2 of the Convention on the ground that no effective inquiry has been conducted into the death complained of I consider that no separate issue arises under Article 13, because the fact that there was no satisfactory and appropriate inquiry into the death forms the basis of the applicant's complaints under both Article 2 and Article 13. In that connection, I refer to my dissenting opinion in the Kaya v. Turkey case (judgment of 19 February 1998, *Reports* 1998-I) and the opinion expressed by a large majority of the Commission on the question (see Aytekin v. Turkey, application no. 22880/93, 18 September 1997; Ergi v. Turkey, application no. 23818/94, 20 May 1997; Yaşa v. Turkey, application no. 22495/93, 8 April 1997).