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

FOURTH SECTION

CASE OF AKDENİZ v. TURKEY

(Application no. 25165/94)

JUDGMENT

STRASBOURG

31 May 2005

FINAL

31/08/2005

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Akdeniz v. Turkey,

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

Sir Nicolas BRATZA, *President,*
Mr J. CASADEVALL,
Mr M. PELLONPÄÄ,
Mr R. MARUSTE,
Mr K. TRAJA,
Mrs L. MIJOVIĆ, *judges,*
Mr F. GÖLCÜKLÜ, ad hoc *judge,*
and Mr M. O'BOYLE, *Section Registrar,*

Having deliberated in private on 10 May 2005,

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

PROCEDURE

1. The case originated in an application (no. 25165/94) against the Republic of Turkey lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Mrs Mevlüde Akdeniz ("the applicant"), on 18 August 1994.

2. The applicant was represented by Mr Mark Muller, a lawyer practising in London. The Turkish Government ("the Government") did not designate an agent for the purposes of the proceedings before the Court.

3. The applicant alleged, in particular, that her son Mehdi Akdeniz had been taken into the custody of the soldiers who had come to her village on 20 February 1994 and that nothing has been heard from him since that date. She invoked Articles 3, 5, 6, 13 and 14 of the Convention.

4. The application was declared admissible by the Commission on 1 December 1997 and transmitted to the Court on 1 November 1999 in accordance with Article 5 § 3, second sentence, of Protocol No. 11 to the Convention, the Commission not having completed its examination of the case by that date.

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

6. The applicant, but not the Government, filed observations on the merits (Rule 59 § 1).

7. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Fourth Section (Rule 52 § 1).

8. On 10 May 2005 the Chamber decided, in the light of the principles laid down in Grand Chamber's judgment in the case of *Tahsin Acar v. Turkey* (preliminary objection) [GC], no. 26307/95, ECHR 2003-VI, to reject the Government's request to strike the case out of its list of cases on the basis of the unilateral declaration submitted by them on 9 January 2002.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant, a Turkish citizen of Kurdish origin, was born in 1955 and lives in Diyarbakır.

A. Introduction

10. The facts of the case, particularly concerning events which took place on 20 February 1994, are disputed by the parties.

11. The facts as presented by the applicant are set out in Section B below (paragraphs 12-18). The Government's submissions concerning the facts are summarised in Section C below (paragraphs 19-21). Documentary evidence submitted by the parties is summarised in Section D (paragraphs 22-67).

B. The applicant's submissions on the facts

12. At the time of the events giving rise to the present application the applicant and her family were living in the Sesveren hamlet of Karaorman village, located within the administrative jurisdiction of the town of Kulp, near Diyarbakır, south-east Turkey.

13. On 20 February 1994 approximately 200 soldiers from the Kulp District Gendarme Headquarters came to the applicant's hamlet and forced the villagers out of their houses. The villagers were herded together into the village square and the soldiers began to burn the villagers' houses.

14. One of the soldiers then read out a list of names of six male villagers: Halit Akdeniz (35 years old), İrfan Akdeniz (18 years old), Mehmet Şirin Allahverdi (35 years old), Ziya Çiçek (22 years old), Faik Akdeniz (35 years old), and finally the applicant's son Mehdi Akdeniz (22 years old)

(hereinafter "the six persons"). The six persons seemed to have been identified by a masked man who was with the gendarme officers. The soldiers then beat up the six persons; the applicant's son was the subject of the worst treatment. The six persons were then taken away, out of sight of the villagers.

15. The soldiers stayed in the village for approximately two hours and then walked with the group of six persons to another hamlet, approximately 1.5 kilometres away, where they got into waiting vehicles and drove away.

16. Eye-witnesses, who were held in detention together with the applicant's son, subsequently informed the applicant that Mehdi Akdeniz had been held at Kulp District Gendarme Headquarters for five days. He had been tortured whilst being detained and according to the eye-witnesses, he had received the worst treatment of the six persons.

17. Eye-witnesses confirmed that in Silvan, where he was held for one week before being taken to Diyarbakır, he was also in a very poor condition.

18. The applicant has heard nothing further about the whereabouts or fate of her son since that time. She has brought several applications, both orally and in writing, to the Chief Public Prosecutor at the Diyarbakır State Security Court (hereinafter "the Diyarbakır Court") and tried, unsuccessfully, to obtain information about her son.

C. The Government's submissions on the facts

19. No operation was carried out in the Kulp-Sesveren area on 20 February 1994 and, according to the custody records, neither the applicant's son nor any of the other five persons mentioned were taken into custody or detained.

20. Between 1992 and 1993 the Sesveren hamlet was attacked by members of the PKK and the inhabitants of the hamlet fled from their homes because of intimidation by the PKK.

21. On 11 May 1994 the applicant was informed by the Diyarbakır Court that, according to the custody records, Mehmet Şen (*sic*.) had not been taken into custody.

D. Documentary evidence submitted by the parties

22. The following information appears from the documents submitted by the parties.

23. According to a record of arrest, drawn up on 28 February 1994 and signed by three gendarme officers and four gendarme soldiers from the Kulp gendarmerie, five of the six persons, namely, Halit Akdeniz, M. Şirin Allahverdi, Ziya Çiçek, Faik Akdeniz and İrfan Akdeniz were arrested in an operation carried out by the gendarmerie. The reason for the operation was the fact that the gendarmerie had been informed, by reliable sources, that these persons had been aiding and abetting the PKK. The report further states

that the five men had various injuries on their bodies obtained as a result of their attempts at escape and also of the use of force.

24. On unspecified dates these five persons were questioned by a gendarme commander. All but Faik Akdeniz denied ever having been members of the PKK. Faik Akdeniz stated that he had been a member briefly. All five men stated that Karaorman village had often been visited by PKK members who forced the villagers to give them food.

25. On 8 March 1994 the five men were questioned by a judge at the Diyarbakır Court. The judge then ordered the release of four of them. Faik Akdeniz's detention on remand was ordered by the judge.

26. The applicant, in a petition she submitted to the Chief Public Prosecutor at the Diyarbakır Court on 11 May 1994, informed the Prosecutor that her son had been detained by members of the security forces on 20 February 1994 in her hamlet of Sesveren. She further stated that she had not heard from him since that date and that she was concerned for his life. She asked to be informed about her son's fate.

27. According to a handwritten note, written by the Chief Public Prosecutor at the Diyarbakır Court on the applicant's above mentioned petition of 11 May 1994, the applicant's son was not recorded in custody records.

28. On 29 December 1994 the Ministry of Justice's International Law and Foreign Relations Directorate (hereinafter "the Directorate") sent a letter to the Chief Public Prosecutor at the Diyarbakır Court and informed him about the application introduced with the Commission by the applicant. The Prosecutor was requested to question the applicant in relation to her complaints and to open an investigation into her allegations.

29. In his letter of 30 December 1994 the Chief Public Prosecutor at the Diyarbakır Court requested the Prosecutor in the town of Kulp to take the steps requested in the letter of the Directorate.

30. The commander of the Kulp District Gendarme Headquarters was requested on 6 January 1995 by the Kulp Prosecutor to summon the applicant, as well as the five persons who had allegedly been detained together with the applicant's son (see paragraph 14 above), to the prosecutor's office. The Prosecutor also asked for a certain Cevdet Yılmaz and one Reşat Pamuk, both of whom were apparently living in the applicant's village, to be summoned.

31. According to a report, which was drawn up on 17 March 1995 by three gendarme soldiers from the Sivrice gendarme station – located near the applicant's village of Karaorman – and which was submitted to the Kulp Prosecutor, the persons referred to in the Kulp Prosecutor's letter of 6 January 1995 had left the village for an unknown destination because of terrorist incidents. This report was subsequently sent to the Prosecutor's office at the Diyarbakır Court.

32. On 26 July 1995 the Kulp Prosecutor sent a letter, this time to the commander of the Kulp Gendarme Brigade, and asked for the applicant and the other seven persons mentioned above to be summoned to his office.

33. According to a report, drawn up on 27 August 1995 by two gendarme soldiers and sent to the Kulp Prosecutor, the persons referred to in the Kulp Prosecutor's letter of 26 July 1995 had left the village for an unknown destination three years previously because of terrorist incidents.

34. Similar correspondence between the Prosecutors and the gendarmerie setting out the former's unsuccessful attempts to find the applicant and the other seven persons continued until June 1996, when Halit Akdeniz, one of the six persons who was allegedly detained at the same time as the applicant's son, was located.

35. In a statement taken by the Kulp Prosecutor on 13 June 1996, Halit Akdeniz stated that a large number of soldiers had come to the village in February 1994 and gathered the villagers outside the village. They then set fire to the houses in the village. He, his son İrfan, the applicant's son Mehdi, and the other three persons had been singled out by the soldiers and ill-treated in the village. They had then been taken to the Sivrice gendarme station where they had stayed that evening. The following morning they had been taken to the Kulp Commando Brigade where they had been detained for four days during which they were blindfolded, beaten up and questioned. At the end of the four days they had been brought to the Kulp Central gendarme Station where the applicant's son Mehdi had been separated from the rest of them and he had not been seen again. They had continued to be detained for another 15 days and at the end of their detention all but Faik Akdeniz had been released.

36. Also on 13 June 1996 the Kulp Prosecutor questioned İrfan Akdeniz who confirmed the version of events as set out by his father above. He also added that Mehdi Akdeniz had been beaten up more severely than the rest of them.

37. On 20 June 1996 the Kulp Prosecutor took a statement from Mehmet Şirin Allahverdi, another one of the six persons allegedly detained together with the applicant's son. Mr Allahverdi, who gave a remarkably similar statement to that of Halit and İrfan Akdeniz, added that the applicant's son Mehdi Akdeniz had been identified by the *itirafçı*[1] who had came to the village with the soldiers in February 1994.

38. On 2 August 1996 Cevdet Yılmaz (see paragraph 30 above) was found in a prison in Elazığ. He refused to go to the Prosecutor's office to make a statement on the ground that he was protesting against the Turkish courts.

39. The Kulp Prosecutor took a statement from the applicant on 15 August 1996. In her statement the applicant confirmed her account of

1. *İtirafçı* (confessor): a term used to describe a member of an illegal organisation who provides the authorities with information about that organisation.

events as set out above (see paragraphs 13 to 18 above). She finally asked the Prosecutor for information about her son's fate.

40. On 19 August 1996 the statements taken by the Kulp Prosecutor from Halit Akdeniz, İrfan Akdeniz and Mehmet Şirin Allahverdi were forwarded to the Prosecutor's office at the Diyarbakır Court. The Kulp Prosecutor further stated that his efforts to find Faik Akdeniz and Ziya Çiçek would continue.

41. Faik Akdeniz was questioned on 16 September 1996 by the Kulp Prosecutor. Mr Akdeniz also gave a remarkably similar statement to those made by Halit Akdeniz, İrfan Akdeniz**,** Mehmet Şirin Allahverdi and the applicant.

42. On 5 December 1996 the Kulp Prosecutor sent a letter to the Kulp District Gendarme Headquarters and asked whether an operation had been conducted in Karaorman village in February 1994.

43. On 27 December 1996 the deputy commander of the Kulp District Gendarme Headquarters replied to the Kulp Prosecutor in writing, stating that according to the records at the Headquarters, no operation had been conducted in Karaorman village or in Sesveren hamlet in February 1994.

44. Another statement was taken from the applicant on 12 May 1997 by the Kulp Prosecutor. The applicant confirmed, once more, her allegations and added that she had made an application to the Commission.

45. On 26 May 1997 the Kulp Prosecutor informed the Prosecutor at the Diyarbakır Court that he had taken another statement from the applicant and that she still had not heard from her son. He further informed him that his efforts to find Cevdet Yılmaz, Ziya Çiçek and Reşat Pamuk, who had allegedly seen Mehdi Akdeniz in the custody of gendarmes, would continue.

46. The applicant was questioned on 21 July 1997, this time by the Prosecutor in the town of Silvan. She confirmed her allegations.

47. On 15 December 1997 the applicant was questioned once more by the Kulp Prosecutor. She repeated her allegations and added that she had nothing to add to her previous statements.

48. On that same day the Kulp Prosecutor also took a statement from Ziya Çiçek, the fifth person who had allegedly been detained together with the applicant's son. Mr Çiçek confirmed the version of events given by the other four persons who claimed to have been detained with the applicant's son.

49. The Kulp Prosecutor informed the Prosecutor at the Diyarbakır Court on 16 December 1997 that he had taken yet another statement from the applicant and that he had found out from her that her son was still missing.

50. On 14 January 1998 the Kulp Prosecutor asked the Kulp and Silvan District Gendarme Headquarters, the Diyarbakır Provincial Gendarme Headquarters and also the Diyarbakır Police Headquarters to send to his office copies of custody records showing the names of persons who had been taken into custody between 20 February 1994 and 10 January 1995 at their respective Headquarters.

51. On 24 January 1998 the commander of the Kulp District Gendarme Headquarters forwarded to the Kulp Prosecutor's office the names of those persons detained between 20 February 1994 and 10 January 1995. According to this letter, Halit Akdeniz, Ziya Çiçek, Mehmet Allahverdi, İrfan Akdeniz and Faik Akdeniz had been taken into custody on 28 February 1994 on suspicion of collaborating with the PKK. No information was provided in the column showing dates of release.

52. On 27 January 1998 the Directorate asked the Prosecutor at the Diyarbakır Court for information about the investigation into the disappearance of the applicant's son.

53. The Prosecutor at the Diyarbakır Court was informed on 2 February 1998 by the Kulp Prosecutor that the statements taken from Halit Akdeniz, İrfan Akdeniz, Mehmet Şirin Allahverdi, Faik Akdeniz and Ziya Çiçek corroborated the allegations of the applicant. His efforts to obtain information from the gendarme as to whether the applicant's son had indeed been detained by them were still continuing. The applicant's son was still missing.

54. On 16 February 1998 the Kulp Prosecutor took a statement from Reşat Pamuk. Mr Pamuk stated that he used to live in the village of Yayık, near the town of Kulp. He and a number of his friends had been taken into detention by soldiers in the town of Silvan during the month of Ramadan in 1994. During his time in detention he had not seen Mehdi Akdeniz, the applicant's son; in any event, he did not know who Mehdi Akdeniz was.

55. In a reply of 24 February 1998 to the Kulp Prosecutor's letter of 14 January 1998, the chief of the Diyarbakır Police Headquarters stated that Mehdi Akdeniz had not been detained by the police.

56. Also on 24 February 1998 the Directorate asked the Prosecutor's office at the Diyarbakır Court to verify the accuracy of the contents of the statements given by the persons who claimed to have been detained together with the applicant's son. This letter was forwarded to the Kulp Prosecutor the same day.

57. On 25 February 1998 the Kulp Prosecutor drew the attention of the commander of the Kulp District Gendarme Headquarters to the fact that the release dates of the five persons detained on 28 February 1998 did not appear in the form he had received (see paragraph 51 above). The Prosecutor asked the commander to inform his office as to what action had been taken in relation to these persons. It appears that the gendarme commander subsequently complied with this request. According to the custody records of the Kulp Central Gendarme Station, Halit Akdeniz, Ziya Çiçek, Mehmet Allahverdi, İrfan Akdeniz and Faik Akdeniz had been detained there from 8 p.m. on 28 February 1994 until 9 a.m. on 5 March 1994 when they had been transferred to the Diyarbakır Court.

58. According to a set of custody records, showing the names of those detained at the Diyarbakır Provincial Gendarme Headquarters between 24 February 1994 and 21 March 1994, the five men had been detained there

on 5 March 1994 until their release was ordered by the Diyarbakır Court on 8 March 1994.

59. On 16 March 1998 the Prosecutor at the Diyarbakır Court forwarded to the Directorate a number of documents concerning the criminal proceedings which had been brought against İrfan Akdeniz, Mehmet Allahverdi and Faik Akdeniz following their detention in February 1994 (see paragraph 23 above). According to these documents, the three persons had been tried and acquitted of the offence of aiding and abetting a terrorist organisation.

60. On 25 March 1998 the Kulp Prosecutor once again asked the Kulp District Gendarme Headquarters for the names of those detained in Karaorman village since 20 February 1994.

61. On 11 April 1998 the commander of the Sivrice Gendarme Station stated in a report that no operation had been conducted in Karaorman village on 20 February 1994 by soldiers from his station.

62. Mehmet Nuri Sansar, the headman (*muhtar*) of the Karaorman village at the time of the alleged events, was questioned by the Kulp Prosecutor on 15 April 1998. Mr Sansar stated that on 20 February 1994 he had been in the Karaorman village mosque praying, when two soldiers had come in and asked those present to leave the mosque. Mr Sansar and the villagers in the mosque had complied with this order and left the mosque. Mr Sansar had then seen that the village had been surrounded by soldiers and that the villagers had been gathered outside the village. The commander of the soldiers had called Mr Sansar over and told him that food supplies had been brought to the Karaorman village by vehicles and that, from the village, they had been taken by mules to the PKK in the mountains. The commander asked Mr Sansar for the identity of the villagers who had carried the foodstuff to the PKK. When Mr Sansar replied that he did not know, the soldiers had taken him away and beaten him. Among the soldiers there had also been an *itirafçı,* whose face was covered. The *itirafçı* had not spoken a word but pointed to the six persons. All six persons had been taken away and all but Mehdi Akdeniz had been released some time later.

63. Cevdet Yılmaz (see paragraphs 30 and 38 above) was questioned by a Prosecutor on 29 April 1998. Mr Yılmaz stated that he used to live in Yayık village, near Sesveren hamlet where Mehdi Akdeniz used to live. He further stated that in February 1994 he had been arrested and taken to a detention centre in Silvan where he had seen Mehdi Akdeniz. However, unlike all other detainees, Mehdi had not subsequently been brought before the judge at the Diyarbakır Court.

64. On 22 May 1998 the Kulp Prosecutor asked his opposite number in the town of Silvan to enquire with the Gendarme Headquarters in the latter's town to verify whether, as alleged by a number of eye-witnesses, Mehdi Akdeniz had ever been detained there.

65. On 22 May 1998 the Kulp Prosecutor also asked the Diyarbakır Provincial Gendarme Headquarters whether an operation had been carried out in Karaorman village where, according to the allegations, Mehdi Akdeniz was arrested by soldiers.

66. On 13 June 1998 the commander of the Silvan District Gendarme Headquarters informed the Silvan Prosecutor that, according to the custody records, Mehdi Akdeniz had not been detained at the Headquarters in February 1994.

67. On 29 June 1998 the deputy commander of the Diyarbakır Provincial Gendarme Headquarters replied to the Kulp Prosecutor's letter of 22 May 1998 and stated that no operation had been carried out in the region of Karaorman village in February 1994.

II. RELEVANT DOMESTIC LAW

68. A description of the relevant law may be found in *İpek v. Turkey*, no. 25760/94, §§ 92-106, ECHR 2004-... (extracts).

THE LAW

I. THE COURT'S ASSESSMENT OF THE EVIDENCE AND ESTABLISHMENT OF THE FACTS

A. Arguments of the parties

1. The applicant

69. In her observations submitted to the Commission prior to the decision on admissibility, the applicant submitted that her son had been beaten up and then taken away by a number of soldiers who had come to their village on 20 February 1994, and that nothing had been heard from him since that date. She invoked Articles 3, 5, 6, 13 and 14 of the Convention.

2. The Government

70. In their observations submitted to the Commission on 17 March 1995 and in their supplementary observations submitted on 29 November 1995, the Government contended that no operation had been carried out in the applicant's village in February 1994. They further submitted that according to the custody reports enclosed with their observations, neither the applicant's

son nor any of the other men referred to by the applicant had been taken into custody.

B. The Court's evaluation of the facts

71. The Court observes that the Government, in their two sets of observations submitted in 1995, i.e. prior to the admissibility of the application, submitted that neither the applicant's son nor any of the five men whom the applicant alleged had been detained together with her son, had ever been detained. In support of their submission, the Government appended to their observations copies of two pages of the custody ledger of the Diyarbakır Provincial Gendarme Headquarters. In these pages the names of those detained there between 24 January 1994 and 24 February 1994 are listed. Neither the name of the applicant's son, nor those of the other five persons feature in these two pages.

72. However, the Court observes that according to the next four pages of the same custody ledger, the five persons whose detentions was denied by the Government, were in fact detained there between 5 March 1994 and 8 March 1994. These four pages were submitted to the Commission by the Government on 22 April 1999.

73. Furthermore, according to the copies of the custody ledger of the Kulp Central Gendarmerie Station (see paragraphs 51 and 57 above), the five persons were detained there between 28 February 1994 and 5 March 1994.

74. Similarly, the Government's submission that no operation had been carried out in Karaorman village in February 1994 appears to be refuted by the record of arrest drawn up on 28 February 1994 by officers from the Kulp gendarmerie, according to which Halit Akdeniz, M. Şirin Allahverdi, Ziya Çiçek, Faik Akdeniz and İrfan Akdeniz were arrested in an operation carried out by the gendarmerie (see paragraph 23 above). A number of them were subsequently tried and acquitted (see paragraph 59 above).

75. Finally, the Court cannot but note that notwithstanding the existence of an arrest report which clearly states that there had been an operation on 28 February 1994 (see paragraph 23 above), both the commander of the Kulp District Gendarme Headquarters and the deputy commander of the Diyarbakır Provincial Gendarme Headquarters denied that such an operation had been carried out (see, respectively, paragraphs 43 and 67 above).

76. The Court is thus confronted with a situation where State agents, as well as the respondent Government in their observations, have provided conflicting information and documents relating to the facts of the case. No explanation, let alone a satisfactory one, has been given for this. The Court considers that such a serious contradiction directly affects the credibility of the version of the facts as presented by the Government and, moreover, justifies the drawing of inferences as to the well-foundedness of the

applicant's allegations (see *Timurtaş v. Turkey*, no. 23531/94, § 66, ECHR 2000-VI).

77. As regards the allegations made by the applicant in her application form, the Court observes that they are consistent with the petition she had already submitted to the Prosecutor at the Diyarbakır Court (see paragraph 26 above) and also with the four statements she subsequently made on various dates before a number of prosecutors (see paragraphs 39, 44, 46 and finally 47 above).

78. Furthermore, the accuracy of her allegations is corroborated by the statements given by the five men before the Kulp Prosecutor on various dates (see paragraphs 35, 36, 37, 41 and 48 above).

79. The applicant's allegations were also confirmed by Cevdet Yılmaz, who was detained in February 1994 in his own village located near to the applicant's hamlet. He confirmed in his statement to a Prosecutor that he had seen the applicant's son Mehdi Akdeniz in the custody of soldiers (see paragraph 63 above).

80. Finally, the applicant's allegations found confirmation in the statement of the *muhtar* of her village, Mr Mehmet Nuri Sansar. Mr Sansar, like the applicant, submitted that the soldiers had come to the village during prayer time (see paragraph 62 above). He confirmed that the applicant's son had been taken away by the soldiers.

81. The Court observes that all these statements, made by different persons on various dates, were made before public prosecutors. They are consistent with the applicant's allegations and consistent with each other. The Court finds them convincing. Indeed, on the basis of these statements, the Kulp Prosecutor himself reached the conclusion that they corroborated the applicant's allegation that her son had been taken into detention by the gendarmerie (see paragraph 53 above).

82. The Court, in the light of the above-mentioned statements, the authenticity and the accuracy of which have not been challenged by the Government, finds it established that the applicant's son was detained by the gendarme soldiers together with the five villagers.

83. On the basis of this finding, the Court will proceed to examine the applicant's complaints under the various Articles of the Convention.

II. ALLEGED VIOLATIONS OF ARTICLE 2 OF THE CONVENTION

84. The applicant argued in her observations submitted to the Court on 10 April 2002 that her son was arrested and detained by members of the Turkish security forces and that he is to be presumed dead, in violation of Article 2 of the Convention. She also submitted that the authorities had failed to carry out an effective investigation into the disappearance of her son.

85. The Government denied that the applicant's son had been detained by soldiers.

86. The Court observes at the outset that the applicant did not invoke Article 2 of the Convention in her application form; this Article was invoked for the first time in the applicant's above mentioned observations of 10 April 2002.

87. In this context, Article 32 of the Convention provides as follows:

> "1. The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34 and 47.
>
> 2. In the event of dispute as to whether the Court has jurisdiction, the Court shall decide."

88. The Court reiterates that since it is master of the characterisation to be given in law to the facts of the case, it does not consider itself bound by the characterisation given by an applicant, a government or the Commission. By virtue of the *jura novit curia* principle, it has, for example, considered of its own motion complaints under Articles or paragraphs not relied on by those appearing before it and even under a provision in respect of which the Commission had declared the complaint to be inadmissible while declaring it admissible under a different one. A complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on (see *Guerra and Others v. Italy*, judgment of 19 February 1998, *Reports* 1998-I, § 44; *Powell and Rayner v. the United Kingdom*, judgment of 21 February 1990, Series A no. 172, p. 13, § 29; see also, *Assenov and others v. Bulgaria*, judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII, § 132).

89. The Court has full jurisdiction only within the scope of the "case", which is determined by the decision on the admissibility of the application. Within the compass thus delimited, the Court may deal with any issue of fact or law that arises during the proceedings before it (see, among many other authorities, *Philis v. Greece (no. 1)*, judgment of 27 August 1991, Series A no. 209, p. 19, § 56).

90. In the instant case, while the applicant in her application to the Commission may not expressly have invoked Article 2 of the Convention, she has raised in substance – both before the national authorities and also in her observations submitted to the Commission – the basis of her complaint in relation to this Article.

91. In this regard the Court observes that in her petition submitted to the Chief Public Prosecutor at the Diyarbakır Court on 11 May 1994, the applicant submitted that she was concerned for her son's life (see paragraph 26 above). Furthermore, in her application form, the applicant alleged that her son had disappeared in circumstances in which there was every reason to fear for his life. Finally, in her observations submitted to the Commission, the applicant submitted that her serious complaint concerning the life of her son had not been properly investigated.

92. The Court would further emphasise that it has, since the adoption of its judgment in the above mentioned case of *Timurtaş*, taken into account the effective protection of the right to life as afforded by Article 2 of the Convention by holding that lengthy periods of unacknowledged detentions go beyond a mere irregular detention in violation of Article 5 of the Convention (see, *Timurtaş*, cited above, § 83). It has examined such allegations from the standpoint of Article 2 as well as Article 5 of the Convention (see, *inter alia, Orhan v. Turkey***,** no. 25656/94, §§ 328-332, 18 June 2002, and *İpek*, cited above, §§ 166-168).

93. It follows that it is open to the Court to consider the applicant's allegations concerning her son's detention in the light of the protection of the right to life within the meaning of Article 2 of the Convention which provides as follows:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

A. General considerations

94. Article 2, which safeguards the right to life and sets out the circumstances when deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention, from which no derogation is permitted. Together with Article 3, it also enshrines one of the basic values of the democratic societies making up the Council of Europe. The circumstances in which deprivation of life may be justified must therefore be strictly construed. The object and purpose of the Convention as an instrument for the protection of individual human beings also requires that Article 2 be interpreted and applied so as to make its safeguards practical and effective (*McCann and Others v. the United Kingdom,* judgment of 27 September 1995, Series A no. 324, §§ 146-147).

95. In the light of the importance of the protection afforded by Article 2, the Court must subject deprivations of life to the most careful scrutiny, taking into consideration not only the actions of State agents but also all the surrounding circumstances. Detained persons are in a vulnerable position and the authorities are under a duty to protect them. Consequently, where an

individual is taken into police custody in good health and is found to be injured on release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused (see, amongst other authorities, *Orhan*, cited above, § 326 and the authorities cited therein). The obligation on the authorities to account for the treatment of a detained individual is particularly stringent where that individual dies or disappears thereafter.

96. Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in detention, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (*Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII; *Çakıcı v. Turkey* [GC], no. 23657/94, § 85, ECHR 1999-IV, and *Timurtaş*, cited above, § 82).

B. Whether Mehdi Akdeniz can be presumed dead

97. In the *Timurtaş* judgment (cited above, §§ 82-83) the Court stated the following:

> (...) where an individual is taken into custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which an issue arises under Article 3 of the Convention (...). In the same vein, Article 5 imposes an obligation on the State to account for the whereabouts of any person taken into detention and who has thus been placed under the control of the authorities (...). Whether the failure on the part of the authorities to provide a plausible explanation as to a detainee's fate, in the absence of a body, might also raise issues under Article 2 of the Convention will depend on all the circumstances of the case, and in particular on the existence of sufficient circumstantial evidence, based on concrete elements, from which it may be concluded to the requisite standard of proof that the detainee must be presumed to have died in custody (...).
>
> In this respect the period of time which has elapsed since the person was placed in detention, although not decisive in itself, is a relevant factor to be taken into account. It must be accepted that the more time goes by without any news of the detained person, the greater the likelihood that he or she has died. The passage of time may therefore to some extent affect the weight to be attached to other elements of circumstantial evidence before it can be concluded that the person concerned is to be presumed dead. In this respect the Court considers that this situation gives rise to issues which go beyond a mere irregular detention in violation of Article 5. Such an interpretation is in keeping with the effective protection of the right to life as afforded by Article 2, which ranks as one of the most fundamental provisions in the Convention (...)."

98. The Court considers that there are a number of elements distinguishing the present case from cases such as *Kurt v. Turkey* (judgment of 25 May 1998, *Reports* 1998-III, § 108) in which the Court held that there were insufficient persuasive indications that the applicant's son had met his death in detention. Üzeyir Kurt had last been seen surrounded by soldiers in his own village, whereas Mehdi Akdeniz and five other villagers were seen

being taken away by soldiers. Furthermore, it has also been established that Mehdi Akdeniz was last seen in the hands of the security forces in various detention facilities**.**

99. The Court also notes that the Akdeniz family was suspected by the authorities of aiding and abetting the PKK, and a number of them were arrested at the same time as Mehdi Akdeniz and have subsequently been charged with and tried for that offence (see paragraph 59 above). Indeed, as established by the Court, the applicant's son was detained together with five others who were suspected of having aided and abetted the PKK. In the general context of the situation in south-east Turkey in 1994, it can by no means be excluded that an unacknowledged detention of such persons would be life-threatening (*Timurtaş,* cited above, § 85; *Orhan*, cited above, § 330; and finally *Çiçek v.* Turkey, no. 25704/94, § 146, 27 February 2001.

100. It is further to be recalled that the Court has held in previous judgments that defects undermining the effectiveness of criminal-law protection in the south-east during the period relevant also to this case, permitted or fostered a lack of accountability of members of the security forces for their actions (*Kılıç v. Turkey*, no. 22492/93, § 75, ECHR 2000-III, and *Mahmut Kaya v. Turkey*, no. 22535/93, § 98, ECHR 2000-III). This lack of accountability is evidenced in the present case by the fact that none of the gendarmes working in Kulp where the applicant's son was detained has been questioned by the Kulp Prosecutor despite the latter's conclusion that the applicant's allegation of her son having been detained by gendarmes was corroborated by the statements of a number of other detainees (see paragraph 53 above).

101. For the reasons above, and taking into account the fact that no information has come to light concerning the whereabouts of Mahdi Akdeniz for more than 11 years, the Court is satisfied that he must be presumed dead following an unacknowledged detention by the security forces. Consequently, the responsibility of the respondent State for his death is engaged. Noting that the authorities have not provided any explanation as to what occurred following Mehdi Akdeniz's detention, and that they do not rely on any ground of justification in respect of any use of lethal force by their agents, it follows that liability for his death is attributable to the respondent Government (*Timurtas*, § 86, *Orhan*, § 331, and *Çiçek*, § 147, all cited above).

102. Accordingly, there has been a violation of Article 2 on that account in respect of Mehdi Akdeniz.

C. The alleged inadequacy of the investigation

103. The Court reiterates that the obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", also

requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see, *mutatis mutandis*, *McCann and Others*, cited above, § 161, and *Kaya v. Turkey*, judgment of 19 February 1998, *Reports* 1998-I, § 105). The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving state agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigatory procedures (see, for example, *mutatis mutandis*, *İlhan v. Turkey* [GC], no. 22277/93, § 63, ECHR 2000-VII).

104. For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events (*Güleç v. Turkey*, judgment of 27 July 1998, *Reports* 1998-IV, §§ 81-82, and *Oğur v. Turkey* [GC], no. 21954/93, §§ 91-92, ECHR 1999-III). The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances (*Kaya*, cited above, § 87) and to the identification and punishment of those responsible (*Oğur,* cited above, § 88). This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eye-witness testimony (see, concerning witnesses, for example, *Tanrıkulu v. Turkey* [GC], no. 23763/94, § 109, ECHR 1999-IV). Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling foul of this standard.

105. There is also a requirement of promptness and reasonable expedition implicit in this context (*Yaşa v. Turkey*, judgment of 2 September 1998, *Reports* 1998-VI, § 102-104; Ç*akıcı,* cited above, at §§ 80, 87, 106; *Tanrıkulu*, cited above, § 109; and *Mahmut Kaya*, cited above, §§ 106-107). It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating a use of lethal force or disappearance may generally be regarded as essential in maintaining public confidence in their maintenance of the rule of law and in preventing any appearance of collusion in, or tolerance of, unlawful acts (see, in general, *McKerr v. the United Kingdom*, no. 28883/95, §§ 108-115, ECHR 2001-III). The need for promptness is especially important when allegations are made of a disappearance in detention.

106. The Court finds that the applicant's allegations were brought to the attention of the investigating authorities on 11 May 1994 (see paragraph 26 above). However, it appears that the fact that the name of the applicant's son did not feature in the custody records, was sufficient for the Prosecutor to conclude that he had not been taken into custody (see paragraph 26 above). The Prosecutor did not give any information as to which custody records he had consulted (see paragraph 27 above); neither does it appear that he had questioned anyone before reaching this conclusion. Noting that the relevant custody records were not submitted to the judicial authorities until 24 January 1998 (see paragraph 51 above), the Court cannot find it established that the Prosecutor had indeed taken note of these custody records on 11 May 1994.

107. No further action was taken until after the communication of the application by the Commission to the respondent Government. On 29 December 1994 the Directorate informed the Prosecutor at the Diyarbakır Court of the application introduced with the Commission, asked the Prosecutor to question the applicant in relation to her complaints and to open an investigation into her allegations (see paragraph 28 above).

108. The Kulp Prosecutor, who was entrusted with the duty to carry out the investigation, spent the first two years of the investigation taking statements from the applicant and also from eye-witnesses who all confirmed the applicant's allegations. It appears that it did not occur to this Prosecutor to verify with the security forces the accuracy of the applicant's allegations until 5 December 1996, that is almost two years after he had first started the investigation. Even then, this verification was limited to his asking the Kulp District Gendarme Headquarters – in a letter – whether an operation had been conducted in the applicant's village (see paragraph 42 above). The Court finds it incomprehensible that not a single member of the security forces was heard with regard to the allegations, despite the fact that – as was also noted by the Prosecutor – that they were corroborated by consistent eye-witness evidence.

109. In addition, it also took the Kulp Prosecutor more than three years to obtain the custody records of the Kulp District Gendarme Headquarters (see paragraph 51 above), even though this would seem to have been the logical starting point in an investigation of this nature.

110. The Court is further alarmed by the Kulp Prosecutor's failure to confront the commanders of the Kulp District Gendarme Headquarters and the Diyarbakır Gendarme Headquarters with the military report of 28 February 1994 which stated that an operation had been carried out, and which thus contradicted these commanders' letters of 27 December 1996 and 29 June 1998 respectively, in which they informed the Prosecutor that no operation had been conducted in the applicant's village in February 1994.

111. The Court finds that the investigation which was conducted into the disappearance of the applicant's son is similar to other investigations carried out at the relevant time in south-east of Turkey, that have been examined by

the Court in a number of cases. A common feature of these cases is a finding that the public prosecutor failed to pursue complaints by individuals, claiming that the security forces were involved in an unlawful act, by, for example, not interviewing or taking statements from implicated members of the security forces and accepting at face value the reports of incidents submitted by members of the security forces. However, the Court considers that the investigation carried out by the Kulp Prosecutor in the present case was exceptional in the sense that, despite the abundance of the evidence implicating the security forces in the disappearance of the applicant's son, no action was taken to question them (see also *Akkoç v. Turkey*, nos. 22947/93 and 22948/93, § 89, ECHR 2000-X, and the cases cited therein).

112. For the reasons outlined above, the Court finds that the investigation carried out into the disappearance of the applicant's son was seriously inadequate and deficient. There has accordingly been a violation of Article 2 of the Convention in respect of Mehdi Akdeniz on this account.

III. ALLEGED VIOLATIONS OF ARTICLE 3 OF THE CONVENTION

113. The applicant submitted that there was substantial evidence in the form of eye-witness statements that her son had been subjected to treatment amounting to torture whilst being held in custody by the gendarmerie.

114. She further submitted that she had suffered distress and anguish as a result of her inability to find out what had happened to her son and of the way in which the authorities responded and treated her in relation to her enquiries. She submitted that this treatment constituted inhuman treatment.

115. In respect of these two complaints the applicant invoked Article 3 of the Convention which provides as follows:

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

116. The Government, beyond denying the factual basis of the applicant's submissions, did not specifically deal with this complaint.

A. In respect of Mehdi Akdeniz

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

118. The Court recalls that it has found it established, on the basis of the statements given by the eye-witnesses – including the applicant –, that the

applicant's son was taken into custody. According to the statements given by these witnesses – including the five men who were detained at the same time as the applicant's son – the six persons were ill-treated and Mehdi Akdeniz in particular received the most severe beating at the time of arrests. These witnesses also stated that the ill-treatment had continued during their detention. Indeed, the allegations of ill-treatment at the time of arrest are supported by the arrest report drawn up on 28 February 1994 by the soldiers who had apprehended and detained the men. According to this report, the five men had various injuries on their bodies caused during their attempts at escape and also as a result of the use of force (see paragraph 23 above).

119. The Court, as it has already made clear above, does not doubt the accuracy of these statements. Indeed, it is to be noted that neither the authenticity nor the accuracy of the contents of these statements has been challenged by the Government. It concludes, therefore, that the applicant's son was subjected to ill-treatment, which, at the least, reaches the threshold of inhuman and degrading treatment and discloses in that respect a violation of Article 3 of the Convention (see, *mutatis mutandis*, *Akdeniz and Others v. Turkey*, no. 23954/94, § 98, 31 May 2001).

120. It follows therefore that there has been a violation of Article 3 in respect of the treatment to which the applicant's son was subjected.

B. In respect of the applicant

121. The Court reiterates that the question whether a family member of a "disappeared person" is a victim of treatment contrary to Article 3 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 (*İpek*, cited above, §§ 181-183, and the authorities cited therein). 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 (see *Çakıcı*, cited above, § 98).

122. In the present case, the Court notes that the applicant is the mother of the disappeared Mehdi Akdeniz. The applicant witnessed her son being taken away by soldiers eleven years ago and she has not heard from him since.

It further appears from the documents submitted by the Government that the applicant was asked to make numerous statements to the prosecutors and on many occasions she asked them to find out what had happened to her son (see paragraphs 39, 44, 46 and 47 above). Despite having approached the Prosecutor to inform him of the disappearance of her son and also of her concerns about his life, the Prosecutor took no action other than telling her that her son's name did not feature in the custody records (see paragraphs 26 and 27). The Prosecutors took action not on the basis of her petition but only on the basis of the Directorate's letter in which they were informed of the application introduced with the Commission (see paragraph 28 above).

123. The applicant has never received any plausible explanation or information from the authorities as to what became of her son following his apprehension by the soldiers. On the contrary, the authorities' reaction to the applicant's grave concerns was limited to denials that her son had ever been detained by the security forces (see paragraphs 27, 55 and 66 above).

124. In view of the above, the Court finds that the applicant suffered, and continues to suffer, distress and anguish as a result of the disappearance of her son and of her inability to find out what has happened to him. The manner in which her complaints have been dealt with by the authorities must be considered to constitute inhuman treatment contrary to Article 3.

125. The Court concludes therefore that there has been a violation of Article 3 of the Convention in respect of the applicant.

IV. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

126. The applicant submitted that the disappearance of her son gave rise to a violation of Article 5 of the Convention, which provides:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> (b) the lawful arrest or detention of a person for non- compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
>
> (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

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."

127. The applicant argued that this provision had been violated on account of the unlawful detention of her son, the failure of the authorities to inform her son of the reasons for his detention and to bring him before a judicial authority within a reasonable time, as well as his inability to bring proceedings to have the lawfulness of his detention determined.

128. The Government denied the detention of the applicant's son.

129. The Court stresses the fundamental importance of the guarantees contained in Article 5 for securing the rights of individuals in a democracy to be free from arbitrary detention at the hands of the authorities. It has stressed in that connection that any deprivation of liberty must not only have been effected in conformity with the substantive and procedural rules of national law but must equally be in keeping with the very purpose of Article 5, namely to protect the individual from arbitrary detention. In order to minimise the risks of arbitrary detention, Article 5 provides a corpus of substantive rights intended to ensure that the act of deprivation of liberty is amenable to independent judicial scrutiny and secures the accountability of the authorities for that measure. The unacknowledged detention of an individual is a complete negation of these guarantees and discloses a most grave violation of Article 5. Bearing in mind the responsibility of the authorities to account for individuals under their control, Article 5 requires them to take effective measures to safeguard against the risk of disappearance and to conduct a prompt and effective investigation into an arguable claim that a person has been taken into custody and has not been seen since (*Kurt*, cited above, §§ 122-125; see also *İpek,* cited above, §§ 187-191 and the authorities cited therein).

130. The Court has already found that the applicant's son was apprehended and taken away from his village by security forces in February 1994 and that he was last seen in the hands of those forces at a military

detention facility. His detention there was not logged in the relevant custody records and there exists no official trace of his subsequent whereabouts or fate. In the view of the Court, this fact in itself must be considered a most serious failing since it enables those responsible for an act of deprivation of liberty to conceal their involvement in a crime, to cover their tracks and to escape accountability for the fate of a detainee. Furthermore, the absence of holding data recording such matters as the date, time and location of detention, the name of the detainee as well as the reasons for the detention and the name of the person effecting it must be seen as incompatible with the very purpose of Article 5 of the Convention (see judgments of *Kurt*, § 125; *Timurtaş*, § 105; *Çakıcı*, § 105; *Çiçek*, § 165, and *Orhan*, § 371, cited above).

131. The Court further considers that the authorities should have been alert to the need to investigate more thoroughly and promptly the applicant's complaints that her son was taken away in life-threatening circumstances and held in detention by the security forces. However, its reasoning and findings in relation to Article 2 above leave no doubt that the authorities failed to take effective measures to safeguard Mehdi Akdeniz against the risk of disappearance.

132. In view of these considerations, the Court concludes that the authorities failed to provide a plausible explanation for the whereabouts and fate of Mehdi Akdeniz after he had been taken away from his village, and that the investigation carried out into his disappearance was neither prompt nor effective. It considers that it is confirmed in this conclusion by the prosecuting authorities' failure to take statements from members of the security forces and by their unwillingness to go beyond the military authorities' assertion that the custody records showed that Mehdi Akdeniz had neither been apprehended nor held in detention. The unreliability and inaccuracy of custody records must also be considered of relevance in this connection.

133. Accordingly, the Court finds that Mehdi Akdeniz was held in unacknowledged detention with a complete absence of the safeguards contained in Article 5 and that there has been a violation of the right to liberty and security of person guaranteed by that provision.

V. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

134. The applicant alleged a breach of Article 6 of the Convention on behalf of her son on the ground that he had not had a trial before an independent and impartial tribunal established by law, in the event that the Government were to claim that the arrest and detention of her son were lawful and that he was guilty of an offence under domestic law. The relevant parts of Article 6 of the Convention provide as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal..."

135. The Court observes that the Government have not claimed that the applicant's son was lawfully arrested or detained or that he was guilty of an offence under domestic law. It follows that the applicant's complaint under Article 6 does not fall to be examined.

VI. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

136. The applicant submitted that she had no effective remedy in south-east Turkey in respect of her Convention claims. She invoked Article 13 of the Convention which provides as follows:

> "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."

137. The Government, beyond denying the factual basis of the applicant's submissions, did not specifically deal with this complaint.

138. The Court recalls that Article 13 guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or the omissions of the authorities of the respondent State (see *Aksoy v. Turkey*, judgment of 18 December 1996, *Reports* 1996-VI, § 95; and *Kaya*, cited above, § 89).

139. In addition, where the relatives of a person have an arguable claim that the latter has disappeared at the hands of the authorities, the notion of an effective remedy for the purposes of Article 13 entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure (see *mutatis mutandis*, the above-mentioned *Aksoy*, *Aydın* and *Kaya* judgments, § 98, § 103 and §§ 106-107, respectively). The Court further reiterates that the requirements of Article 13 are broader than a Contracting State's obligation under Article 2 to conduct an effective investigation into the disappearance of a person last seen in the hands of the authorities (see *Kılıç*, cited above, § 93).

140. The Court has found that the applicant's son was taken away from his village by the gendarme soldiers and held in unacknowledged detention

at a military detention facility by the security forces and that he can be presumed to be dead (see paragraphs 82 and 101 above). It has also established that the distress and anguish suffered by the applicant on account of the disappearance of her son and the manner in which the authorities dealt with her complaint constituted inhuman treatment (see paragraph 124 above). The complaints under Articles 2, 3 and 5 are therefore clearly arguable for the purposes of Article 13 of the Convention (see *Boyle and Rice v. the United Kingdom* judgment of 27 April 1988, Series A no. 131, § 52, together with *Kaya* and *Yaşa* judgments, § 107 and § 113, respectively, cited above).

141. The authorities thus had an obligation to carry out an effective investigation into the disappearance of Mehdi Akdeniz. Having regard to its findings under Article 2 (see paragraphs 106-112 above), the Court concludes that no effective investigation was conducted into the applicant's complaints in accordance with Article 13.

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

VII. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

143. The applicant complained that she and her son had been discriminated against on the ground of their Kurdish origin in violation of Article 14 of the Convention, which provides:

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

144. The Government did not address these issues beyond denying the factual basis of the substantive complaints.

145. Having regard to its findings under Articles 2, 3 and 13 above, the Court does not find it necessary to determine whether the applicant and her son were also subjected to discriminatory treatment in the enjoyment of their Convention rights.

VIII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

146. Article 41 of the Convention provides:

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

A. Pecuniary damage

147. The applicant submitted that her son was 22 years old at the time of his disappearance and, as the oldest son of the family, he was looking after the family. He was a farmer and was involved in stockbreeding with his family. As a result of his disappearance the family was deprived of his loss of earnings in the amount of 67,838 euros (EUR).

148. The Government submitted that there was no causal link between the damage claimed by the applicant and her complaints. Furthermore, the Government disputed the applicability of the actuarial tables relied on by the applicant which were designed for use in the United Kingdom. They also submitted that the sum claimed was excessive and devoid of any basis. The Government lastly argued that the amounts awarded by the Court should not lead to unjust enrichment.

149. As regards the applicant's claim for loss of earnings, the Court's case-law has established 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 appropriate cases, include compensation in respect of loss of earnings (see, among other authorities, *Barberà, Messegué and Jabardo v. Spain* (*Article 50*), judgment of 13 June 1994, Series A no. 285-C, pp. 57-58, §§ 16-20, and *Çakıcı*, cited above, § 127). The Court has found (see paragraphs 101-102 above) that the authorities were liable under Article 2 of the Convention for the death of the applicant's son. It also notes that the applicant's submission that her son had been looking after the family was not disputed by the Government. In these circumstances, a direct causal link has been established between the violation of Article 2 and the applicant's loss of the financial support provided by her son.

150. In the light of the foregoing the Court, deciding on an equitable basis, awards the applicant the sum of EUR 16,500. It holds that this sum is to be converted into new Turkish liras (YTL) at the rate applicable at the date of payment.

B. Non-pecuniary damage

151. The applicant, without specifying any amount, also claimed non-pecuniary damages.

152. The Government submitted that it was unnecessary to make any award in respect of non-pecuniary damage since, in their opinion, any finding of a violation would afford sufficient redress.

153. The Court observes that it has found that the authorities were accountable for the death of the applicant's son and also for the ill-treatment to which he was subjected both before and during his unacknowledged detention. In addition to the violation of Articles 2, 3 and 5 in those respects, it has further found that the authorities failed to undertake an effective investigation or to provide a remedy in respect of those violations, contrary to the procedural obligation under Article 2 of the Convention and in breach of Article 13 of the Convention. In these circumstances, and having regard to the awards made in comparable cases, the Court, on an equitable basis, awards the applicant the sum of EUR 20,000 for non-pecuniary damage, to be held by her for the heirs of her deceased son.

154. It also awards the applicant the sum of EUR 13,500 for non-pecuniary damage sustained by her in her personal capacity in relation to the violations of Articles 3 and 13 of the Convention.

155. Finally the Court determines that the above sums are to be converted into new Turkish liras at the rate applicable at the date of payment.

C. Costs and expenses

156. The applicant claimed EUR 8,479.39 and 6,457.50 pounds sterling (GBP) for the fees and costs incurred in bringing the application. Her claim comprised:

(a) GBP 5,582.50 for the fees of her lawyers working for the Kurdish Human Rights Project (KHRP) in the United Kingdom;

(b) EUR 4,410.91 for the fees of her lawyers based in Turkey;

(c) GBP 875 for administrative costs incurred by the United Kingdom-based lawyers; and

(d) EUR 4,068.48 for administrative costs incurred by the lawyers based in Turkey.

157. In support of her claims for the fees of her lawyers the applicant submitted a detailed schedule of costs.

158. The Government submitted that the applicant had failed to submit any documents to support her request for the fees and costs incurred by her lawyers based in Turkey. They submitted, in particular, that the applicant had not submitted any invoices for telephone calls, fax, postal and stationary expenses.

159. As regards the applicant's claim for the fees and the costs incurred by her lawyers employed by the KHRP, the Government argued that there was no justification for awarding costs and expenses to the KHRP.

160. Having regard to the sums above and making its own estimate based on the information available, the Court awards the applicant EUR 15,000 in respect of costs and expenses, plus any tax that may be chargeable, to be paid in pounds sterling into the bank account of the applicant's representatives in the United Kingdom, as identified by the applicant.

D. Default interest

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

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been a violation of Article 2 of the Convention on account of the presumed death of the applicant's son;

2. *Holds* unanimously that there has been a violation of Article 2 of the Convention on account of the failure of the authorities of the respondent State to conduct an adequate and effective investigation into the disappearance of the applicant's son and his subsequent presumed death;

3. *Holds* unanimously that there has been a violation of Article 3 of the Convention in respect of the treatment to which the applicant's son was subjected at the time of his arrest and during his detention;

4. *Holds* unanimously that there has been a 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 in respect of the applicant's son;

6. *Holds* unanimously that it is not necessary to examine the complaint under Article 6 of the Convention;

7. *Holds* unanimously that there has been a violation of Article 13 of the Convention in respect of the applicant and her son;

8. *Holds* unanimously that it is unnecessary to determine whether there has been a violation of Article 14 of the Convention;

9. *Holds* by six votes to one
(a) that the respondent State is to pay the applicant for pecuniary damage, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the sum of EUR 16,500 (sixteen thousand five hundred euros) and any tax that may be chargeable on this amount, to be converted into new Turkish liras at the rate applicable at the date of settlement;
(b) that the respondent State is to pay the applicant in respect of non-pecuniary damage, within the same three month period, the following sums, to be converted into new Turkish liras at the rate applicable at the date of settlement:
(i) EUR 20,000 (twenty thousand euros) to be held for the heirs of her deceased son;
(ii) EUR 13,500 (thirteen thousand five hundred euros) in her personal capacity; and
(iii) any tax that may be chargeable on the above amounts;
(c) that the respondent State is to pay the applicant, within the same three month period, and into the bank account identified by her in the United Kingdom, EUR 15,000 (fifteen thousand euros) in respect of costs and expenses, together with any value-added tax that may be chargeable, to be converted into pounds sterling at the rate applicable at the date of settlement;
(d) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

10. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 31 May 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President

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

N.B.
M.O.B.

PARTLY DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

(Translation)

To my great regret, I do not share the views of the majority concerning the application of Article 41 with regard to the compensation awarded for non-pecuniary damage. Allow me to explain.

I assume that the majority reasoned as though the missing son were alive. In that case an award would certainly have been made [to the applicant] for non-pecuniary damage.

Unfortunately, however, the missing son is presumed dead. He was not married; he had neither wife nor child. Accordingly, his heirs have been awarded EUR 20,000 in his stead. According to the case file, the sole heir is none other than his mother, in other words, the applicant (see paragraph 152 of the judgment).

At the same time, however, the applicant has been awarded, under the same head, EUR 13,500 “in her own right” (see paragraph 153).

Thus, the applicant has been granted two separate but cumulative awards of compensation in respect of one and the same event. This is a conclusion which I am unable to accept, and is nothing other than pure speculation and supposition.