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

FIRST SECTION

CASE OF TİMURTAŞ v. TURKEY

(Application no. 23531/94)

JUDGMENT

STRASBOURG

13 June 2000

In the case of Timurtaş v. Turkey,

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

Mrs E. PALM, *President*,
Mrs W. THOMASSEN,
Mr L. FERRARI BRAVO,
Mr J. CASADEVALL,
Mr B. ZUPANČIČ,
Mr R. MARUSTE, *judges*,
Mr F. GÖLCÜKLÜ, ad hoc *judge*,
and Mr M. O'BOYLE , *Section Registrar*,

Having deliberated in private on 23 November 1999 and 23 May 2000,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 8 March 1999, within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 23531/94) against the Republic of Turkey lodged with the Commission under former Article 25 of the Convention by a Turkish national, Mr Mehmet Timurtaş, on 9 February 1994.

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 and under former Article 25 of the Convention.

2. On 31 March 1999 a panel of the Grand Chamber decided, pursuant to Article 5 § 4 of Protocol No. 11 to the Convention and Rules 100 § 1 and 24 § 6 of the Rules of Court, that the application would be examined by one of the Sections. It was, thereupon, assigned to the First Section.

3. The Chamber constituted within that Section included *ex officio* Mr R. Türmen, the judge elected in respect of Turkey (Article 27 § 2 of the Convention and Rule 26 § 1 (a)) and Mrs E. Palm, President of the Section (Rules 12 and 26 § 1 (a)). The other members designated by the latter to complete the Chamber were Mr J. Casadevall, Mr L. Ferrari Bravo, Mr B. Zupančič, Mrs W. Thomassen and Mr R. Maruste.

4. Subsequently Mr Türmen withdrew from sitting in the Chamber (Rule 28). The Turkish Government ("the Government") accordingly appointed Mr F. Gölcüklü to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

5. On 6 July 1999 the Chamber decided to hold a hearing.

6. In accordance with Rule 59 § 3 the President of the Chamber invited the parties to submit memorials on the issues in the application. The Registrar received the Government's and the applicant's memorials on 1 July and 12 July 1999 respectively.

7. On 10 June 1999 the President of the Chamber granted leave to the Center for Justice and International Law (CEJIL), a non-governmental human rights organisation in the Americas, to submit written comments relating to the jurisprudence of the Inter-American Court of Human Rights on the issue of forced disappearances (Article 36 § 2 of the Convention and Rule 61 § 3). These comments were received on 9 July 1999.

8. In accordance with the Chamber's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 23 November 1999.

There appeared before the Court:

(a) *for the Government*
Mr Ş. ALPASLAN, *Agent*,
Ms M. GÜLSEN,
Mr N. GÜNGÖR,
Mr F. POLAT, *Advisers*;

(b) *for the applicant*
Ms F. HAMPSON, Lawyer *Counsel*.

The Court heard addresses by Ms Hampson and Mr Alpaslan.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The applicant

9. The applicant, Mr Mehmet Timurtaş, is a Turkish citizen who was born in 1928 and is at present living in Istanbul. At the time of the events giving rise to his application to the Commission he was living in Cizre in south-east Turkey. His application to the Commission was brought on his own behalf and on behalf of his son, Abdulvahap Timurtaş, who, he alleges,

has disappeared in circumstances engaging the responsibility of the respondent State.

B. The facts

10. The facts surrounding the disappearance of the applicant's son are disputed.

11. The facts as presented by the applicant are set out in paragraphs 15 to 21 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)[1] adopted on 29 October 1998 and his previous submissions to the Commission.

12. The facts as presented by the Government are set out in paragraph 22 below.

13. A description of the material submitted to the Commission will be found in paragraphs 23 to 29 below. A description of the proceedings before the domestic authorities regarding the disappearance of the applicant's son as established by the Commission is set out in paragraphs 30 to 38 below.

14. The Commission, in order to establish the facts in the light of the dispute over the circumstances surrounding the alleged disappearance of the applicant's son, 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 a hearing conducted in Ankara on 21 and 23 November 1996. The Commission's evaluation of the evidence and its findings are summarised in paragraphs 39 to 47 below.

1. Facts as presented by the applicant

15. On 14 August 1993 the applicant received a telephone call from someone who did not identify himself. The caller said that the applicant's son, Abdulvahap, had been apprehended that day near the village of Yeniköy, in the district of Silopi, Şırnak province, by soldiers attached to Silopi central gendarmerie headquarters. Abdulvahap had been apprehended together with a friend, who was said to be Syrian, as well as with the *muhtar* and the latter's son in front of all the villagers. The *muhtar* was released soon afterwards. The applicant later heard that Abdulvahap and his friend had been taken round a number of villages to see if the villagers recognised them. Moreover, within a week of Abdulvahap being apprehended, the *muhtars* from the surrounding villages were called to Silopi gendarmerie headquarters to see if they recognised the two men.

1. *Note by the Registry*. The report is obtainable from the Registry.

16. The applicant was worried about Abdulvahap because another son, Tevfik, had died in custody in Şırnak in 1991. The applicant made various attempts to obtain news of Abdulvahap's fate. He submitted petitions to the Silopi prosecutor's office which initially were not registered. At the Silopi gendarmerie headquarters he was told that his son was not in detention. When he took a photograph of Abdulvahap to the gendarmerie headquarters, the commander, Hüsam Durmuş, said that he did not recognise Abdulvahap and he advised the applicant to look for his son in the mountains, thereby suggesting that Abdulvahap had joined the PKK (Workers' Party of Kurdistan).

17. The applicant also telephoned a relative, Bahattin Aktuğ, who was the mayor of the district of Güçlükonak. The latter subsequently informed the applicant that he had spoken to Sadık Erdoğan and Nimet Nas, two "confessors"[1] from his village who were at that time being detained in Şırnak. They had told Bahattin Aktuğ that Abdulvahap was being detained in Şırnak, that they were doing what they could to look after him and that Abdulvahap was refusing to make a statement.

18. After about forty-five days the applicant went to Güçlükonak to see Bahattin Aktuğ. Whilst there, he also met with Sadık Erdoğan and Nimet Nas, who had been given twenty days' leave from Şırnak. They told the applicant that when they left Şırnak, Abdulvahap was alive. Sadık Erdoğan and Nimet Nas also told the applicant that they had been with Abdulvahap for quite some time and that they had also seen the Syrian friend who had been apprehended at the same time as Abdulvahap.

19. Whilst the applicant was in Güçlükonak, Bahattin Aktuğ spoke to a gendarmerie captain there who telephoned Şırnak for information but was told that Bahattin Aktuğ should stop asking questions about Abdulvahap. The same message was given when a major whom Bahattin Aktuğ knew in İğdır telephoned Şırnak.

20. The applicant again went to the Silopi prosecutor's office and named Sadık Erdoğan and Nimet Nas as his witnesses. At that point, his statement was taken. The applicant also went repeatedly to Şırnak to make enquiries about his son.

21. In the spring of 1995 the applicant saw Sadık Erdoğan again. The latter told him that he had gone to court, where he had said that he had seen Abdulvahap in Şırnak. Upon this, his interrogator had got very angry and he had become scared. For that reason, on the second occasion he was asked about Abdulvahap, he said that he had seen a man who looked similar but that he did not know whether it was Abdulvahap.

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1. Persons who cooperate with the authorities after confessing to having been involved with the PKK.

2. Facts as presented by the Government

22. The Government stated that, by the applicant's own admission, his son Abdulvahap had left the family home in Cizre two years previously and the applicant had not heard from his son since that time. In the course of the preliminary investigation carried out by public prosecutors at Silopi and Şırnak, statements had been taken from persons named as witnesses by the applicant. None of these statements corroborated the applicant's allegations that Abdulvahap Timurtaş had been apprehended by the security forces on 14 August 1993 and that he had been held in detention over any subsequent period of time.

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

23. In the proceedings before the Commission, the applicant and the Government submitted statements which the applicant had made to the Human Rights Association in Diyarbakır and to the public prosecutor at Silopi. According to this last statement of 21 October 1993, the applicant told the public prosecutor that his son Abdulvahap had left his house two years previously and that he had learnt from other people that his son had gone to Syria. However, the applicant had received information to the effect that his son had been apprehended by the security forces in Yeniköy and this might have been witnessed by the *muhtars* of Yeniköy and Esenli. The applicant had also heard that his son had been seen in Şırnak by the detainees Nimet Nas and Sadık Erdoğan.

24. The Government also provided statements taken by a public prosecutor on 26 January 1994 from the *muhtars* of the villages of Yeniköy and Esenli. Both stated that they did not know and had never seen either the applicant or the applicant's son, but whereas the *muhtar* of Yeniköy professed to have no knowledge of two individuals having been apprehended near his village, the *muhtar* of Esenli had heard that someone had been arrested near Yeniköy approximately four to five months previously. In a further statement of 22 January 1997, this *muhtar* also said that during his term of office two or three persons had gone missing.

25. In two statements, dated 5 May and 28 December 1995 respectively, taken by a public prosecutor whilst Nimet Nas was serving a prison sentence in Diyarbakır, the latter said that he knew Abdulvahap Timurtaş and that Abdulvahap was a PKK militant who had been responsible for contacts with Syria but that he had not seen Abdulvahap in detention.

Sadık Erdoğan also made two statements to the authorities. In the first, taken by gendarmes on 15 August 1995, he said that he did not know Abdulvahap Timurtaş and that he had never even heard of that name. In the second statement, made before a public prosecutor on 2 April 1996, Sadık

Erdoğan said that although he had never met Abdulvahap Timurtaş he knew his mother, who had mentioned her son's name. In this statement, Sadık Erdoğan also said that he did not know whether Abdulvahap had been detained.

26. On 13 August 1995 Bahattin Aktuğ was interviewed by gendarmes about "investigating Abdulvahap Timurtaş and informing his father Mehmet Timurtaş on the detention of his son". Bahattin Aktuğ stated that he did not know these individuals and that he had never met them. In a subsequent statement made before a public prosecutor on 22 April 1996, Bahattin Aktuğ repeated that he did not know Abdulvahap Timurtaş.

27. On 7 and 8 March 1996 nine residents of Yeniköy and hamlets attached to Yeniköy were asked by gendarmes whether they knew a person by the name of Abdulvahap Timurtaş, if they knew where he was and whether he had been taken into custody. All the witnesses stated that they did not know Abdulvahap, that they had never heard his name and that, therefore, they did not know whether Abdulvahap had been detained.

The son of the *muhtar* of Yeniköy made a statement on 11 March 1996 before a public prosecutor in which he said that he was not acquainted with either the applicant or the applicant's sons Mehmet and Abdullah (*sic*).

28. At the hearing before the Commission's delegates, the applicant's representatives produced a document said to be a photocopy of an operation report drawn up and signed by Hüsam Durmuş, the commander of Silopi district gendarmerie headquarters. The report, dated 14 August 1993 and bearing a reference number, describes how on that date Abdulvahap Timurtaş and a man with Syrian nationality had been apprehended near the village of Yeniköy. The initial interrogation of the apprehended persons had established that they were the leaders of the PKK's Silopi lowlands section. According to the applicant's representatives, this document had been copied in 1993 from an original report at the public prosecutor's office in Cizre but that original had subsequently been removed from the files.

At the request of the Commission's delegates, a search for the original of the report was carried out by the authorities, but this proved unsuccessful which, according to the Government, cast doubt on the authenticity of the report. In addition, the original document which bore the reference number that appeared on the photocopied document was classified as secret and could therefore not be provided to the Commission.

29. Apart from the above material, the Commission also had regard to copies of custody records with which it had been provided. These concerned the Silopi district gendarmerie headquarters (entries for the period 10 March-19 December 1993), the Silopi police headquarters (31 July-2 December 1993), the Şırnak provincial central gendarmerie headquarters (23 September-30 December 1993) and the interrogation unit at the Şırnak provincial gendarmerie headquarters (31 July 1993-13 January 1994). The name of Abdulvahap Timurtaş is not included in any of these records.

The Government provided copies of entries in the custody ledger of the above-mentioned interrogation unit, which showed that Sadık Erdoğan had been detained there from 3 April 1993 to 1 May 1993 and Nimet Nas from 16 June 1992 to 16 July 1992. Both men were said by the Government to have subsequently been transferred to the Diyarbakır E-type prison. The Commission requested the Government to submit copies of the relevant entries in the records of that prison, but these were not produced.

D. Proceedings before the domestic authorities

30. On 15 October 1993 the applicant submitted a petition to a Silopi public prosecutor requesting information as to the fate of his son Abdulvahap Timurtaş whom he had heard had been apprehended on 14 August 1993. On the same date the prosecutor sent the petition to both the Silopi district gendarmerie headquarters and the police headquarters with a cover letter requesting examination of the matter. By letter dated 20 October 1993, Hüsam Durmuş, the commander of Silopi district gendarmerie headquarters, informed the Silopi public prosecutor that Abdulvahap Timurtaş had not been detained by his headquarters and that Abdulvahap's name did not appear in their records.

31. On 21 October 1993 a Silopi prosecutor took a statement from the applicant in which the latter described how his son Abdulvahap had left the family home two years previously and that he had learnt from other people that Abdulvahap had gone to Syria. According to the latest information obtained by the applicant, however, Abdulvahap had been detained by the security forces in Yeniköy and had been seen in detention in Şırnak by Sadık Erdoğan and Nimet Nas. Also on 21 October 1993 letters were sent by the public prosecutor's office to the Silopi district gendarmerie headquarters with a request to secure the presence at the prosecutor's office of the *muhtars* of Yeniköy and Esenli in order for their statements to be taken, and to the office of the public prosecutor in Şırnak for statements to be taken from Sadık Erdoğan and Nimet Nas. The prosecutor's office at Şırnak was informed by the Şırnak provincial gendarmerie headquarters on 29 December 1993 that they had been unable to comply with the request to summon Sadık Erdoğan and Nimet Nas since the former was being detained at Diyarbakır E-type prison and the latter was participating in operations in Güçlükonak. On 26 January 1994 the *muhtars* of Esenli and Yeniköy made statements before the Silopi prosecutor Ahmet Yavuz (see paragraph 24 above).

32. On 10 March 1994 the Silopi prosecutor Ahmet Yavuz wrote to the prosecutor's office in Cizre requesting them to ensure that the applicant would go to the prosecutor's office in Silopi. This request was passed on to the Cizre police headquarters, which replied on 28 March 1994 that the applicant and his family had left Cizre and that their present whereabouts

were unknown. On 10 August 1994 the Silopi prosecutor Sedat Erbaş again requested the public prosecutor at Cizre to ensure the applicant's appearance at his office in Silopi. On the same date Sedat Erbaş also requested the public prosecutor at Güçlükonak to ask Bahattin Aktuğ whether the latter personally knew Abdulvahap Timurtaş and whether he had been approached by the applicant and had discussed the fate of the applicant's son. Sedat Erbaş also wrote to the prosecutors of Diyarbakır and Güçlükonak concerning Sadık Erdoğan and Nimet Nas respectively, who were to be asked whether they had been kept in custody along with Abdulvahap Timurtaş.

33. On 23 August 1994 the Silopi prosecutor Sedat Erbaş informed his counterpart in Şırnak of the state of the investigation, saying that it appeared from his examinations that Abdulvahap Timurtaş had been detained neither by the gendarmerie headquarters nor by the police headquarters in the district. In view of the facts that the applicant had moved from Cizre to an unknown destination and that he had not applied to the Silopi prosecutor's office since 21 October 1993, the impression had been created that Abdulvahap Timurtaş had been found. For that reason, the applicant had been summoned on 10 August 1994 to the Silopi prosecutor's office in order to close the file.

34. The case file also contains a series of letters written mainly by public prosecutors at Silopi and Eruh aimed at securing the presence of Bahattin Aktuğ, Sadık Erdoğan and Nimet Nas in order for their statements to be taken.

35. On 5 May 1995 Nimet Nas made a statement to a Diyarbakır public prosecutor (see paragraph 25 above).

36. On 13 July 1995 the Silopi prosecutor Ahmet Yavuz issued a decision of lack of jurisdiction and referred the case to the prosecutor's office at Şırnak since the applicant's son was alleged to have been detained there.

37. Özden Kardeş, public prosecutor at Şırnak, commenced his investigation by requesting, on 24 July 1995, the Şırnak police headquarters and the provincial central gendarmerie headquarters to examine their records for August 1993 to see if Abdulvahap Timurtaş had been detained by them. By letter of 9 August 1995 the commander of the Şırnak provincial central gendarmerie headquarters replied that the name Abdulvahap Timurtaş did not appear in their records.

On 13 and 15 August 1995 statements were taken from Bahattin Aktuğ and Sadık Erdoğan respectively by a gendarmerie officer (see paragraphs 25 and 26 above). On 28 December 1995 Nimet Nas made a statement to a Diyarbakır public prosecutor (see paragraph 25 above).

On 26 February 1996 a different prosecutor at Şırnak asked the prosecutor's office at Silopi to question the residents of the villages of Yeniköy, Germik, Kartık and Kutnıs about their knowledge of Abdulvahap

Timurtaş and a detention undergone by the latter. Statements were taken from nine villagers on 7 and 8 March 1996 (see paragraph 27 above).

Sadık Erdoğan made a statement to the Şırnak prosecutor Özden Kardeş on 2 April 1996 (see paragraph 25 above). A public prosecutor at Siirt took a statement from Bahattin Aktuğ on 22 April 1996 (see paragraph 26 above).

38. On 3 June 1996 the Şırnak prosecutor Özden Kardeş issued a decision not to prosecute. The decision lists the various enquiries that had been made in the course of the investigation and gives a summary of the statements that had been obtained. The conclusion not to continue was reached "in view of the abstract nature of the applicant's complaint". Account was also taken of the fact that the applicant had left for an unknown destination following the lodging of his complaint. In addition, the likelihood that Abdulvahap Timurtaş was a member of the PKK terrorist organisation was found to be strengthened by the facts that he was alleged to have been in charge of the PKK in Syria and that he was wanted by the prevention of terrorism branch of Şırnak police headquarters.

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

39. Since the facts of the case were disputed, the Commission conducted an investigation, with the assistance of the parties, and accepted documentary evidence, including written statements and oral evidence taken from six witnesses: the applicant; Bahattin Aktuğ; Azmi Gündoğan, the commander of Silopi district gendarmerie headquarters until 4 August 1993; Hüsam Durmuş, the commander of Silopi district gendarmerie headquarters between 17 July 1993 and 1995; Erol Tuna, the commander of Şırnak provincial central gendarmerie headquarters at the relevant time; and Sedat Erbaş, public prosecutor at Silopi between 4 July 1994 and October 1996.

A further five witnesses had been summoned but did not appear: the *muhtars* of Yeniköy and Esenli; Özden Kardeş, public prosecutor at Şırnak; Sadık Erdoğan; and Nimet Nas. The Government stated that the *muhtar* of Yeniköy had not been seen for a year and that he had allegedly been kidnapped by the PKK. Following the hearing, the Government submitted a statement taken from the *muhtar* of Esenli who explained that he had not been able to attend the hearing due to his old age and insufficient financial resources. Özden Kardeş had informed the Commission by letter that he had nothing to add to the information contained in the file and that for this reason he did not consider himself obliged to attend. During the hearing in Ankara, the Commission's delegates were informed that both Sadık Erdoğan and Nimet Nas were in prison in Diyarbakır.

The Commission made a finding in its report (at paragraph 267) that the respondent State had fallen short of its 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 produce copies of the entries in the records of the Diyarbakır E-type prison concerning the detention there of Sadık Erdoğan and Nimet Nas (see paragraph 29 above);

(ii) the Government's failure to secure the attendance of the witness Özden Kardeş.

40. 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 prevailing in the region. Moreover, the Commission had no power to compel witnesses to appear and testify. In the present case, while eleven witnesses had been summoned to appear, only six, including the applicant, gave evidence. The Commission was therefore faced with the difficult task of determining events in the absence of potentially significant evidence.

The Commission's findings may be summarised as follows.

1. The alleged apprehension and detention of Abdulvahap Timurtaş

41. In its analysis of the photocopied operation report submitted by the applicant's representatives (see paragraph 28 above) the Commission observed in the first place that the alleged author of the report, Hüsam Durmuş, had stated before the delegates that the signature on the photocopy looked like his. Furthermore, the style and format of the report corresponded to that of a blank operation report produced by the Government. Since it followed from the system of reference numbers used by the gendarmerie that, if the submitted photocopy was a forgery, there should be another document bearing the same reference number as the one on the photocopy, it had been incumbent on the Government, pursuant to former Article 28 § 1 (a) of the Convention, to produce that document. The Commission did not accept that it had been denied access to that document for the reason that it was said to have been classified as secret. Finally, the Commission was not convinced by the Government's argument that a report relating to an operation carried out in Silopi would not have been sent to the public prosecutor's office in Cizre (where, according to the applicant's representatives, the original was found from which the photocopy had been taken – see paragraph 28 above). In this respect, the Commission had regard

to the oral evidence of Hüsam Durmuş to the effect that he had told the applicant to report his son's disappearance to the authorities in Cizre as that was where Abdulvahap was from and the procedures could be followed there. In addition, the applicant stated that he had filed a petition with the public prosecutor's office in Cizre and that he had been informed by the Şırnak brigade that the reply to his enquiries would be sent to Cizre.

The Commission concluded that the document submitted was a photocopy of an authentic operation report from which it appeared that Abdulvahap Timurtaş had been apprehended on 14 August 1993.

42. Evaluating the other material before it, the Commission observed that certain aspects of the applicant's account were corroborated by witnesses. Thus, Hüsam Durmuş had acknowledged before the delegates that the applicant had brought him a photograph of his son and he had also confirmed that persons detained for PKK-related offences could be shown around villages or be presented to *muhtars* for identification purposes. The Commission considered, moreover, that Abdulvahap Timurtaş's alleged involvement with the PKK, as referred to by Nimet Nas as well as by the Şırnak public prosecutor Özden Kardeş (see paragraphs 25 and 38 above), might have constituted the reason for his apprehension.

The Commission found that the available evidence did not allow the conclusion to be drawn that Sadık Erdoğan and Nimet Nas had indeed, as submitted by the Government, been detained at the Diyarbakır E-type prison at the time when they, according to the applicant, had seen Abdulvahap in detention in Şırnak. It noted in this respect that the Government had failed to provide copies from the relevant custody ledgers (see paragraph 29 above).

The Commission further found that it was unsafe to rely on the statements made by Sadık Erdoğan and Nimet Nas to the domestic authorities, in which they had denied having seen the applicant's son in detention. Before the delegates, the applicant had given an account of a conversation he had had with Sadık Erdoğan, during which the latter had informed the applicant that in his first interview with the gendarmes he had confirmed having seen Abdulvahap but that this statement had been met with incredulity and anger. Sadık Erdoğan had told the applicant that for that reason he had stated in his second interview that he had not seen Abdulvahap. The Commission considered it significant that the applicant had related this conversation in his oral testimony prior to the records of Sadık Erdoğan's statements having been put before the applicant by the delegates. Whereas in the first statement Sadık Erdoğan was reported as having said that he had never heard of the name of Abdulvahap Timurtaş, according to the second statement he was familiar with that name. These statements thus contained a startling contradiction which, in the opinion of the Commission, would not appear in two truthful statements.

The Commission also preferred the evidence of the applicant, whose oral testimony was largely consistent with his various other statements and who was found to be credible and convincing by the delegates, to that of Bahattin Aktuğ. According to the record of Bahattin Aktuğ's statement of 13 August 1995, he had denied all knowledge of the applicant and the applicant's son although it was clear that he knew at least the applicant quite well. In addition, before the delegates Bahattin Aktuğ had been unable to provide a convincing explanation of why the applicant would have wished to harm him, as he had told the gendarmes in his statement.

43. The statements taken from the nine villagers and the son of the *muhtar* of Yeniköy could not serve to establish that Abdulvahap Timurtaş had not been apprehended as alleged, since these persons had only been asked if they knew Abdulvahap Timurtaş. The statements of the *muhtars* of Yeniköy and Esenli were contradictory.

44. Finally, the Commission examined the copied custody ledgers with which it had been provided. It was disturbed by the number of anomalies these were found to contain, and it noted that it had previously had occasion to doubt the accuracy of custody registers submitted in other cases involving events in south-east Turkey. In the light of the anomalies found in the registers in the present case, the Commission concluded that these ledgers could not be relied upon to prove that Abdulvahap Timurtaş had not been taken into detention.

45. Given that it had not been presented with evidence to disprove the applicant's allegations but that some of the evidence corroborated his claims, and having accepted that the operation report was authentic, the Commission reached the finding that on 14 August 1993 Abdulvahap Timurtaş had been apprehended near the village of Yeniköy by gendarmes attached to the Silopi district gendarmerie headquarters and taken into detention at Silopi. At some stage thereafter he had been transferred to a place of detention at Şırnak which was probably the interrogation unit at the provincial central gendarmerie headquarters.

2. The alleged ill-treatment of Abdulvahap Timurtaş in detention

46. The Commission considered that there was an insufficient evidentiary basis to reach a conclusion that Abdulvahap Timurtaş had been subjected to torture or ill-treatment whilst in detention.

3. The investigation into the alleged disappearance of Abdulvahap Timurtaş

47. The Commission accepted that the applicant had started to contact various authorities in order to obtain news of his son within a week of having been informed about Abdulvahap's apprehension on 14 August 1993; yet the first documented action on the part of the

authorities dated only from 15 October 1993. It then took a long time before statements were obtained from the witnesses named by the applicant. A considerable number of these statements were of limited value in that the witnesses had merely been asked whether they knew the applicant or his son, rather than if they were aware of two persons, whose names they might not know, having been apprehended. Where a witness (the *muhtar* of Esenli) did hint to such an incident having occurred, this was not followed up and even denied: in the decision not to prosecute, Özden Kardeş wrote that the *muhtar* of Esenli was not aware of an incident involving detention. Moreover, official enquiries into whether or not Abdulvahap might have been detained at detention facilities in Şırnak were not made until nearly two years after his alleged apprehension. The public prosecutors involved in the investigation failed to inspect personally either the detention areas in the various gendarmerie and police headquarters or the corresponding custody ledgers. The Silopi district gendarmerie, allegedly responsible for the apprehension of the applicant's son, were not asked whether they had carried out any operations at the relevant time and place.

II. RELEVANT DOMESTIC LAW AND PRACTICE

48. 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

49. 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.

50. 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.

51. 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

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

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

53. 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.

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

C. Criminal law and procedure

55. 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).

56. 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

57. 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 awards may be made for non-pecuniary or moral damage under Article 47.

E. Impact of Decree no. 285

58. 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.

59. 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 50 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.

FINAL SUBMISSIONS TO THE COURT

60. The applicant requested the Court in his memorial to find that the respondent State was in violation of Articles 2, 5, 13 and 18 of the Convention on account of his son's “disappearance” and that he himself was a victim of a violation of Article 3. He further contended that the respondent State had failed to comply with its obligations under former Articles 25 and

28 § 1 (a). He requested the Court to award him just satisfaction under Article 41.

61. The Government, for their part, argued in their memorial that the applicant's complaints were not substantiated by the evidence. In their opinion, the application had been brought with the aim of discrediting the security forces engaged in combating separatist terrorist violence.

THE LAW

I. SCOPE OF THE CASE

62. In his application to the Commission the applicant had, *inter alia*, alleged a violation of Article 3 of the Convention in respect of his son and of Article 14 taken in conjunction with Articles 2, 3 and 5. The applicant did not pursue those complaints in the proceedings before the Court, which sees no reason to consider them of its own motion (see, *mutatis mutandis*, the United Communist Party of Turkey and Others v. Turkey judgment of 30 January 1998, *Reports* 1998-I, p. 28, § 62). The case before the Court therefore concerns allegations under Articles 2, 3 (in respect of the applicant), 5, 13, 18 and 34 of the Convention.

II. THE COURT'S ASSESSMENT OF THE FACTS

63. The Court reiterates its settled case-law that under the Convention system prior to 1 November 1998 the establishment and verification of the facts was primarily a matter for the Commission (former Articles 28 § 1 and 31). 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, among other authorities, the Akdivar and Others v. Turkey judgment of 16 September 1996, *Reports* 1996-IV, p. 1214, § 78).

64. In the present case the Court points out that the Commission reached its findings of fact after a delegation had heard evidence in Ankara (see paragraphs 14 and 39 above). It notes that the applicant's allegations of the apprehension of his son together with a man of Syrian nationality near the village of Yeniköy on 14 August 1993 find confirmation in the document submitted on his behalf to the Commission's delegates (see paragraph 28 above). Since the Commission was not presented with any eyewitness evidence of this apprehension or of Abdulvahap Timurtaş's alleged subsequent detention, the question whether this document is a photocopy of

an authentic operation report is of paramount importance to the establishment of the facts and their assessment.

65. Whereas the Commission concluded that the document was indeed a photocopy of an authentic operation report (see paragraph 41 above), the Government disputed this finding. In their memorial they argued that a document of this nature could not have been found at the public prosecutor's office in Cizre where, according to the applicant, the original had been found from which the copy had been taken. In the first place, an operation report, being a document drawn up solely for military purposes, would not be sent to a public prosecutor and, secondly, no file concerning the alleged apprehension of Abdulvahap Timurtaş existed at the public prosecutor's office in Cizre. Moreover, any document put in a file by a public prosecutor would not only bear the mention "*dosyasına*" ("to its file"), but also the signature of the public prosecutor – which this document lacked.

Furthermore, the authenticity of a document could not be established from a photocopy. In order for a photocopy to have any legal value in Turkey, it should be certified as a true copy of the original. The document in question bore no such certification. In addition, photocopied documents could be manipulated, either electronically or chemically, without detection. This was illustrated by the representative of the Government who submitted a number of copies of the document during the hearing to which, with the use of a personal computer, a scanner and a photocopier, he had made slight changes – such as moving the handwritten remark "*dosyasına*" from the bottom to the middle of the document and replacing the name of the apprehended Syrian man by his own.

Finally, the real report bearing the reference number which appeared on the submitted photocopy was a different document which could not be produced to the Convention organs as it contained military secrets.

66. The Court considers, as did the Commission, that a photocopied document should be subjected to close scrutiny before it can be accepted as a true copy of an original, the more so as it is undeniably true that modern technological devices can be employed to forge, or to tamper with, documents. Nevertheless, it is also true that the means at the disposal of the former Commission to carry out an examination capable of detecting forgeries, even assuming this to be technically possible, were limited.

More importantly, the Court would emphasise that Convention proceedings do not in all cases lend themselves to rigorous application of the principle of *affirmanti incumbit probatio* (he who alleges something must prove that allegation). The Court has previously held 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) that States should furnish all necessary facilities to make possible a proper and effective examination of applications (see, for example, *Tanrıkulu v. Turkey* [GC], no. 23763/94, § 70, ECHR 1999-IV). It

is inherent in proceedings relating to cases of this nature, where an individual applicant accuses State agents of violating his rights under the Convention, that in certain instances solely the respondent State has access to information capable of corroborating or refuting these allegations. A failure on a Government's part to submit such information as is in their hands without a satisfactory explanation may not only reflect negatively on the level of compliance by a respondent State with its obligations under Article 38 § 1 (a) of the Convention (former Article 28 § 1 (a)), but may also give rise to the drawing of inferences as to the well-foundedness of the allegations. In this respect, the Court reiterates that the conduct of the parties may be taken into account when evidence is being obtained (see the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, pp. 64-65, § 161).

67. It is for the above reasons that the Court is of the opinion that in the particular circumstances of the present case the Government were in a first line position to assist the Commission within the meaning of former Article 28 § 1 (a) by providing access to the document which they claim is the genuine document bearing the reference number which appears on the photocopy. It is insufficient for the Government to rely on the allegedly secret nature of that document which, in the Court's opinion, would not have precluded it from having been made available to the Commission's delegates, none of whom are Turkish (see paragraph 11 of the Commission's report), so that they could have proceeded to a simple comparison of the two documents without actually taking cognisance of the contents. Consequently, the Court finds it appropriate to draw an inference from the Government's failure to produce the document without a satisfactory explanation.

68. Noting, furthermore, that in its assessment of the photocopy the Commission also had regard to the fact that the alleged author of the document, Hüsam Durmuş, acknowledged that the signature on the document looked like his, that the style and format of the document corresponded to those of a standard operation report, and that there were several reasons why this document may have been found in Cizre (see paragraphs 216 and 218 of the Commission's report), the Court agrees with the Commission's finding that this document was indeed a photocopy of an authentic operation report.

69. The Court considers that the Commission also approached its task of assessing the other evidence with the requisite caution, giving detailed consideration to the elements which supported the applicant's account and to those which cast doubt on its credibility. It thus considers that it should accept the facts as established by the Commission.

70. 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 which it considered essential for

discharging its functions. The Commission found that the Government had failed to provide specific detention records relating to Sadık Erdoğan and Nimet Nas and that they had failed to secure the attendance before the delegates of a State official, Mr Özden Kardeş, a public prosecutor (see paragraph 39 above). It considered in this respect that the respondent State had failed to furnish all necessary facilities to the Commission in its task of establishing the facts of the case within the meaning of former Article 28 § 1 (a) of the Convention.

71. The applicant had invited the Commission to make a similar finding with regard to the fact that Hüsam Durmuş had lied on oath to the delegates when he (Hüsam Durmuş) stated that the applicant's son had not been apprehended. Although the Commission qualified Hüsam Durmuş's conduct as reprehensible, it found that it did not entail a failure on the part of the respondent State to comply with its obligations under former Article 28 § 1 (a) (see paragraph 268 of the Commission's report).

72. The Court observes that the Government have not advanced any explanation to account for the omissions relating to documentary evidence and the attendance of a witness. Referring to the importance of a respondent Government's cooperation in Convention proceedings as outlined above (paragraph 66), the Court confirms the finding reached by the Commission in its report that in this case the respondent State fell short of its obligation under former Article 28 § 1 (a) of the Convention to furnish all necessary facilities to the Commission in its task of establishing the facts.

The Court, like the Commission, cannot find in the circumstances of the present case that the nature of the testimony of Hüsam Durmuş raises an issue under former Article 28 § 1 (a).

III. ALLEGED VIOLATIONS OF ARTICLE 2 OF THE CONVENTION

73. The applicant alleged that his son died whilst in unacknowledged detention and submitted that the respondent State should be held responsible for failing to protect the right to life of his son in 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 before the Court

1. The applicant

74. Although the applicant acknowledged that the silence surrounding his son's fate following the latter's apprehension did not, in itself, constitute proof beyond reasonable doubt of Abdulvahap's death, he argued that to hold that this absence of information did not establish that Abdulvahap was dead amounted to rewarding the lack of any explanation on the part of the Government. He submitted that account should be taken not only of the specific context in which the disappearance of his son occurred, but also of the broader context of a large number of such disappearances in south-east Turkey in 1993.

75. The applicant further asserted that an analogous application of the Court's reasoning in the cases of Tomasi v. France (judgment of 27 August 1992, Series A no. 241-A) and Ribitsch v. Austria (judgment of 4 December 1995, Series A no. 336) would impose a positive obligation on a respondent State to account for anyone in a place of detention. Where no, or no plausible, explanation was given as to why a detainee could not be produced alive, and a certain amount of time had elapsed, the State concerned should be presumed to have failed in its obligation under Article 2 to protect the right to life of the detainee.

76. Finally, the applicant submitted that the investigation carried out into the disappearance of his son had been so inadequate as to amount to a violation of the procedural obligations of the State to protect the right to life under Article 2.

2. The Government

77. The Government did not specifically address this issue, beyond maintaining that in the investigation at the domestic level all the available evidence had been collected, and this did not corroborate the applicant's allegation that his son had been apprehended.

3. The Commission

78. The majority of the Commission considered that there was indeed a strong probability that Abdulvahap Timurtaş had died whilst in unacknowledged detention. Nevertheless, it held that in the absence of concrete evidence that Abdulvahap had in fact lost his life or suffered known injury or illness, this probability was insufficient to bring the facts of the case within the scope of Article 2.

4. CEJIL

79. In its written comments, CEJIL (see paragraph 7 above) presented an analysis of the jurisprudence of the Inter-American Commission and Court of Human Rights concerning forced disappearances, *inter alia*, in relation to the right to life.

80. The Inter-American Court has on several occasions pronounced that forced disappearances frequently involve the violation of the right to life[1]. In the inter-American system, a violation of the right to life as a consequence of a forced disappearance can be proved in two different ways. Firstly, it may be established that the facts of the case at hand are consistent with an existing pattern of disappearances in which the victim is killed. Secondly, the facts of an isolated incident of a fatal forced disappearance may be proved on their own, independently of a context of an official pattern of disappearances. Both methods are used to establish State control over the victim's fate which, in conjunction with the passage of time, leads to the conclusion of a violation of the right to life.

B. The Court's assessment

1. Whether Abdulvahap Timurtaş should be presumed dead

81. The Court recalls at the outset that it has accepted the Commission's establishment of the facts in this case, namely, that Abdulvahap Timurtaş was apprehended on 14 August 1993 by gendarmes attached to the Silopi district gendarmerie headquarters and taken into detention at Silopi, after which he was transferred to a place of detention at Şırnak. More than six and a half years have passed without information as to his subsequent whereabouts or fate. The question arises whether, as the applicant submits, the authorities of the respondent State should be considered to have failed in their obligation to protect his son's right to life under Article 2 of the Convention.

82. The Court has previously held that where an individual is taken into custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which an issue arises under Article 3 of the Convention (see the Tomasi judgment cited above., pp. 40-41, §§ 108-11; the Ribitsch judgment cited above., pp. 25-26, § 34; and *Selmouni v. France* [GC], no. 25803/94, § 87, ECHR 1999-V). In the same vein, Article 5 imposes an obligation on the State to account for the whereabouts of any

1. Velásquez Rodríguez case, judgment of 29 July 1988, Series C no. 4, § 157; Godínez Cruz case, judgment of 20 January 1989, Series C no. 5, § 165; Blake case, judgment of 24 January 1998, § 66; Fairén Garbi and Solís Corrales case, judgment of 15 March 1989, Series C no. 6, § 150.

person taken into detention and who has thus been placed under the control of the authorities (see the Kurt judgment cited above., p. 1185, § 124). 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 (see *Çakıcı v. Turkey* [GC], no. 23657/94, § 85, ECHR 1999-IV, and *Ertak v. Turkey*, no. 20764/92, § 131, ECHR 2000-V).

83. 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 (see, among other authorities, *Çakıcı* cited above, § 86).

84. Turning to the particular circumstances of the case, the Court observes that according to the applicant, who was found credible and consistent by the Commission's delegates, he was initially able to obtain some news of his son through his relative Bahattin Aktuğ. However, some forty-five days after Abdulvahap's apprehension, Bahattin Aktuğ was told to stop making enquiries (see paragraph 19 above). The applicant's official enquiries were met with denials, and it may be deduced from the fact that the operation report could not be produced from the files that the need was felt to conceal the apprehension and detention of Abdulvahap Timurtaş.

85. There are also a number of elements distinguishing the present case from the Kurt case, in which the Court held that there were insufficient persuasive indications that the applicant's son had met his death in custody (loc. cit., p. 1182, § 108). In the first place, six and a half years have now elapsed since Abdulvahap Timurtaş was apprehended and detained – a period markedly longer than the four and a half years between the taking into detention of the applicant's son and the Court's judgment in the Kurt case. Furthermore, whereas Üzeyir Kurt was last seen surrounded by soldiers in his village, it has been established in the present case that Abdulvahap Timurtaş was taken to a place of detention – first at Silopi, then at Şırnak – by authorities for whom the State is responsible. Finally, there

were few elements in the Kurt case file identifying Üzeyir Kurt as a person under suspicion by the authorities, whereas the facts of the present case leave no doubt that Abdulvahap Timurtaş was wanted by the authorities for his alleged PKK activities (see paragraph 38 above). In the general context of the situation in south-east Turkey in 1993, it can by no means be excluded that an unacknowledged detention of such a person would be life-threatening. It is recalled that the Court has held in two recent judgments that defects undermining the effectiveness of criminal law protection in the south-east region during the period relevant also to this case permitted or fostered a lack of accountability of members of the security forces for their actions (see *Kılıç v. Turkey*, no. 22492/93, § 75, and *Mahmut Kaya v. Turkey*, no. 22535/93, § 98, ECHR 2000-III).

86. For the above reasons, the Court is satisfied that Abdulvahap Timurtaş 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 after Abdulvahap Timurtaş's apprehension 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 State (see *Çakıcı*, loc. cit., § 87). Accordingly, there has been a violation of Article 2 on that account.

2. The alleged inadequacy of the investigation

87. The Court reiterates that the obligation to protect life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention "to secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see, *mutatis mutandis*, the McCann and Others v. the United Kingdom judgment of 27 September 1995, Series A no. 324, p. 49, § 161, and the Kaya v. Turkey judgment of 19 February 1998, *Reports* 1998-I, p. 329, § 105).

88. While the Government maintained that all the available evidence had been gathered and that this did not corroborate the applicant's allegations but pointed rather to the possibility that Abdulvahap Timurtaş was either in Syria or amongst the ranks of the PKK, the Commission in its report analysed the investigation as dilatory, perfunctory, superficial and not constituting a serious attempt to find out what had happened to the applicant's son (paragraph 264 of the Commission's report). The findings of the Commission have been summarised in paragraph 47 above.

89. The Court perceives no cause to assess the investigation differently from the Commission. It notes the length of time it took before an official investigation got under way and before statements from witnesses were obtained, the inadequate questions put to the witnesses and the manner in

which relevant information was ignored and subsequently denied by the investigating authorities. The Court is in particular struck by the fact that it was not until two years after the applicant's son had been taken into detention that enquiries were made of the gendarmes in Şırnak. However, it is not in dispute that the applicant had apprised the authorities long before then of the information he had obtained through Bahattin Aktuğ, to the effect that his son had been transferred to Şırnak and had been seen there by Sadık Erdoğan and Nimet Nas. Moreover, there is no evidence to suggest that the public prosecutors concerned made any attempt to inspect custody ledgers or places of detention for themselves, or that the Silopi district gendarmerie were asked to account for their actions on 14 August 1993.

The lethargy displayed by the investigating authorities poignantly bears out the importance of the prompt judicial intervention required by Article 5 §§ 3 and 4 of the Convention which, as the Court emphasised in the Kurt case, may lead to the detection and prevention of life-threatening measures in violation of the fundamental guarantees contained in Article 2 (loc. cit., p. 1185, § 123).

90. In the light of the foregoing, the Court finds that the investigation carried out into the disappearance of the applicant's son was inadequate and therefore in breach of the State's procedural obligations to protect the right to life. There has accordingly been a violation of Article 2 of the Convention on this account also.

IV. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

91. The applicant complained that the disappearance of his son constituted inhuman and degrading treatment in violation of Article 3 of the Convention in relation to himself. Article 3 provides:

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

92. The applicant submitted that, as the father of the disappeared Abdulvahap Timurtaş, he suffered severe mental distress and anguish as a result of the way in which the authorities responded and treated him in relation to his enquiries.

93. At the hearing, the Government queried how the uncertainty in which the applicant was living could amount to inhuman treatment given that, by the applicant's own admission, his son had left the family home for Syria two years prior to the alleged disappearance and during that time he had not received word from him.

94. The majority of the Commission considered that the uncertainty, doubt and apprehension suffered by the applicant over a prolonged and continuing period of time caused him severe mental distress and anguish. In view of its conclusion that the disappearance of the applicant's son was

imputable to the authorities, the Commission found that the applicant had been subjected to inhuman and degrading treatment within the meaning of Article 3.

95. In *Çakıcı*, the Court held 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. In *Çakıcı*, the Court also emphasised that the essence of such a violation does not so much lie in the fact of the "disappearance" of the family member but rather concerns the authorities' reactions and attitudes to the situation when it is brought to their attention. It is especially in respect of the latter that a relative may claim directly to be a victim of the authorities' conduct (loc. cit., § 98).

96. In the present case, the applicant is the father of the disappeared person. It appears from the summary of the applicant's oral evidence to the delegates contained in the Commission's report (paragraph 128), as well as from his statement to the Silopi public prosecutor on 21 October 1993 (see paragraph 23 above), that his son left the family home in Cizre some two years prior to being apprehended and that during that time the applicant received no word from him. However, the Court finds that this element by no means precluded the applicant from feeling grave concern upon receipt of the news of his son's apprehension. This is borne out by the many enquiries which he then proceeded to make in order to find out what had happened to his son. The Court also has no doubt that the applicant's anguish about the fate of his son would have been exacerbated, on the one hand, by the fact that another son had died whilst in custody (see paragraph 16 above) and, on the other, by the conduct of the authorities to whom he addressed his multiple enquiries.

97. In this last respect, the Court observes that not only did the investigation into the applicant's allegations lack promptitude and efficiency, certain members of the security forces also displayed a callous disregard for the applicant's concerns by denying, to the applicant's face and contrary to the truth, that his son had been taken into custody. In the case of Hüsam Durmuş, the author of the operation report, this even extended to allowing the applicant to submit a photograph of his son only to make out he had never seen the person in that photograph (see paragraphs 16 and 42 above).

98. Noting, finally, that the applicant's anguish concerning his son's fate continues to the present day, the Court considers that the disappearance of his son amounts to inhuman and degrading treatment contrary to Article 3 of the Convention in relation to the applicant.

V. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

99. The applicant submitted that the disappearance of his son gave rise to multiple violations of Article 5 of the Convention, the relevant parts of which provide:

> "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."

100. The applicant argued that this provision had been violated on account of the fact that his son's detention had not been recorded and there had been no prompt or effective investigation of his allegations. Since the authorities denied that Abdulvahap Timurtaş had been taken into detention and since this detention had not been recorded, it automatically followed

that there would be no effective judicial control of the lawfulness of the detention and no enforceable right to compensation.

101. The Government reiterated that no issue could arise under Article 5 since it had clearly been shown from the investigation carried out by the domestic authorities that the applicant's son had not been detained.

102. In the opinion of the Commission the responsibility of the respondent State was engaged due to the fact that the Government had failed to provide a satisfactory explanation for the disappearance of the applicant's son and to the fact that no effective investigation had been conducted into the applicant's allegations. The Commission concluded that the applicant's son had been arbitrarily deprived of his liberty contrary to Article 5 and in disregard of the guarantees of that provision concerning the legal justification for such deprivation and requisite judicial control. Inaccurate custody records and a defective investigation process had subsequently combined to effectuate the "disappearance" of Abdulvahap Timurtaş. The Commission considered that a particularly serious violation of Article 5 had occurred.

103. The Court would at the outset refer to its reasoning in the Kurt case and *Çakıcı*, where it stressed the fundamental importance of the guarantees contained in Article 5 for securing the right of individuals in a democracy to be free from arbitrary detention at the hands of the authorities. It reiterated in that connection that any deprivation of liberty must not only have been effected in conformity with the substantive and procedural rules of national law but must equally be in keeping with the very purpose of Article 5, namely to protect the individual from arbitrary detention. In order to minimise the risks of arbitrary detention, Article 5 provides a corpus of substantive rights intended to ensure that the act of deprivation of liberty 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 (see the Kurt judgment cited above, pp. 1184-86, § 122-25, and *Çakıcı*, loc. cit., § 104).

104. The Court notes that its reasoning and findings in relation to Article 2 above leave no doubt that Abdulvahap Timurtaş's detention was in breach of Article 5. Thus, it is recalled that he was apprehended on 14 August 1993 by gendarmes attached to the Silopi district gendarmerie headquarters and taken into detention at Silopi, following which he was transferred to a place of detention in Şırnak. The authorities have failed to provide a plausible explanation for the whereabouts and fate of the

applicant's son. The investigation carried out by the domestic authorities into the applicant's allegations was neither prompt nor effective.

105. With regard to this last element, the Court notes that one of the criticisms levelled at the investigation process was the failure of the public prosecutors concerned to inspect personally the relevant custody ledgers. While this would indeed appear to have been a logical step in an investigation of this nature, it is nevertheless clear that it would have been fruitless in the present case since the detention of Abdulvahap Timurtaş was not recorded other than in the operation report, the existence of which was officially denied. This is an illustration of the serious failing which the absence of records constitutes, since it enables those responsible for the act of deprivation of liberty to escape accountability for the fate of the detainee (see the Kurt judgment cited above, p. 1185, § 125).

This failing is further aggravated by the Commission's findings as to the general unreliability and inaccuracy of the records submitted to it by the Government (see paragraph 44 above).

106. Accordingly, the Court concludes that Abdulvahap Timurtaş 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

107. The applicant asserted that he had been denied access to an effective domestic remedy and alleged a breach of Article 13 of the Convention, 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."

108. The applicant submitted that there had been a conspiracy to conceal the fact of his son's detention from him. The investigation that had eventually been conducted into his allegations had been superficial and incapable of uncovering the truth.

109. The Government reaffirmed that all the necessary enquiries had been made and all the witnesses named by the applicant interviewed, but that the available evidence had not corroborated the applicant's allegations.

110. Referring to its findings that the investigation in the present case had been dilatory, perfunctory and superficial, the Commission was not persuaded that the applicant's concerns received sufficiently serious attention by the authorities. It accordingly held that there had been a breach of Article 13.

111. The Court reiterates that Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of

the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. Article 13 thus requires the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief, although the Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision. The scope of the obligation under Article 13 also varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State (see *Çakıcı*, loc. cit., § 112, and the other authorities cited there).

The Court has also previously held that where the relatives of a person have an arguable claim that the latter has disappeared at the hands of the authorities, or where a right with as fundamental an importance as the right to life is at stake, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure (see the Kurt judgment cited above, p. 1189, § 140, and the Yaşa v. Turkey judgment of 2 September 1998, *Reports* 1998-VI, p. 2442, § 114).

112. Turning to the facts of the case, the Court considers that there can be no doubt that the applicant had an arguable complaint that his son had been taken into custody. The applicant went to the authorities with specific information as to where, when and with whom his son was alleged to have been apprehended, and he followed this up by providing names of persons who had seen his son whilst in detention. In view of the fact, moreover, that the Court has found that the domestic authorities failed in their obligation to protect the life of the applicant's son, the applicant was entitled to an effective remedy within the meaning as outlined in the preceding paragraph.

113. Accordingly, the authorities were under an obligation to conduct an effective investigation into the disappearance of the applicant's son. Having regard to paragraph 89 above, the Court finds that the respondent State has failed to comply with this obligation.

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

VII. ALLEGED PRACTICE BY THE AUTHORITIES OF INFRINGING ARTICLES 5 AND 13 OF THE CONVENTION

114. The applicant contended that a practice of "disappearances" existed in south-east Turkey in 1993 as well as an officially tolerated practice of violating Article 13 of the Convention, which aggravated the breaches of which he and his son had been a victim. Referring to other cases concerning events in south-east Turkey in which the Commission and the Court had

also found breaches of these provisions, the applicant submitted that they revealed a pattern of denial by the authorities of allegations of serious human-rights violations as well as a denial of remedies.

115. The Court considers that the scope of the 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 failings identified in this case are part of a practice adopted by the authorities.

VIII. ALLEGED VIOLATION OF ARTICLE 18 OF THE CONVENTION

116. The applicant argued that the respondent State has allowed a practice of "disappearances" to develop which subverts the operation of its laws, and that it has failed to take any effective action to bring it to an end. According to the applicant, the failure by the authorities to follow their own legal requirements constitutes a breach of the principle of good faith as enshrined in Article 18 of the Convention, which provides:

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

117. The Government did not address this issue, whereas the Commission found that there had been no violation of Article 18.

118. Having regard to its findings above the Court does not consider it necessary to examine this complaint separately.

IX. ALLEGED VIOLATION OF ARTICLE 34 OF THE CONVENTION

119. Finally, the applicant submitted that the lying on oath by a Government witness to the Commission's delegates constituted an interference with the exercise of his right of individual petition as laid down, following the entry into force of Protocol No. 11, in Article 34 of the Convention, which provides:

> "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

120. In support of his argument, the applicant argued that the conduct of the gendarmes at Silopi and Şırnak, as exemplified by Hüsam Durmuş, was calculated to frustrate the effective operation of the right of individual petition. Had it not been for the fortuitous discovery of a document, he would not have been able to prove the claims in his application beyond reasonable doubt.

121. The Government refuted this allegation, maintaining that Hüsam Durmuş had spoken the truth.

122. The Commission did not find it established that the conduct of the gendarmes concerned, however reprehensible, had as such hindered the applicant in the exercise of his right of individual petition.

123. The Court does not consider that in the circumstances of the present case the conduct of the authorities or, more specifically, of Hüsam Durmuş, constituted a failure on the part of the respondent State to comply with the obligation of Article 34 *in fine*.

X. APPLICATION OF ARTICLE 41 OF THE CONVENTION

124. Article 41 of the Convention provides:

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

A. Non-pecuniary damage

125. The applicant claimed, having regard to the severity and number of violations, 40,000 pounds sterling (GBP) in respect of his son and GBP 10,000 in respect of himself for non-pecuniary damage.

126. The Government claimed that these amounts were exaggerated and would lead to unjust enrichment.

127. As regards the claim made in respect of non-pecuniary damage for the applicant's son, the Court notes that awards have previously been made to surviving spouses and children and where appropriate, to applicants who were surviving parents or siblings. It has only awarded sums as regards a deceased where it was found that there had been arbitrary detention or torture before that person's disappearance or death, such sums to be held for the person's heirs (see the Kurt judgment cited above, p. 1195, §§ 174-75, and *Çakıcı*, loc. cit., § 130). The Court notes that there have been findings of violations of Articles 2, 5 and 13 in respect of the unacknowledged detention and failure to protect the life of Abdulvahap Timurtaş and it considers that an award of compensation should be made in his favour. It awards the sum of GBP 20,000, which amount is to be paid to, and held by, the applicant for his son's heirs.

128. As regards the applicant, the Court has found a breach of Article 3 in his own regard due to the conduct of the authorities in relation to his search for the whereabouts and fate of his son. The Court considers that an award of compensation is also justified in his favour. It accordingly awards the applicant the sum of GBP 10,000.

B. Costs and expenses

129. The applicant claimed a total of GBP 29,041.28 for fees and costs incurred in bringing the application, less the amounts received by way of Council of Europe legal aid. This included fees and costs incurred in respect of attendance at the taking of evidence before the Commission's delegates at a hearing in Ankara and attendance at the hearing before the Court in Strasbourg. A sum of GBP 5,165 is listed as fees and administrative costs incurred in respect of the Kurdish Human Rights Project 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 4,020 in respect of work undertaken by lawyers in Turkey.

130. The Government regarded the professional fees as exaggerated and unreasonable and submitted that regard should be had to the applicable rates for the Bar in Istanbul.

131. 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 10,245.06 French francs received by way of legal aid from the Council of Europe, such sum to be paid into the applicant's sterling bank account in the United Kingdom as set out in his just satisfaction claim.

C. Default interest

132. According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 7.5% per annum.

FOR THESE REASONS, THE COURT

1. *Holds* by six votes to one that the respondent State is liable for the death of Abdulvahap Timurtaş in violation of Article 2 of the Convention;

2. *Holds* by six votes to one that there has been a violation of Article 2 of the Convention on account of the failure of the authorities of the respondent State to conduct an effective investigation into the circumstances of the disappearance of Abdulvahap Timurtaş;

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

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

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

6. *Holds* unanimously that it is not necessary to decide on the applicant's complaint under Article 18 of the Convention;

7. *Holds* unanimously that the respondent State has not failed to comply with its obligations under Article 34 *in fine* of the Convention;

8. *Holds* unanimously that the respondent State is to pay the applicant in respect of his son, within three months, by way of compensation for non-pecuniary damage, GBP 20,000 (twenty thousand pounds sterling) to be converted into Turkish liras at the rate applicable at the date of settlement, which sum is to be held by the applicant for his son's heirs;

9. *Holds* by six votes to one that the respondent State is to pay the applicant, within three months, in respect of compensation for non-pecuniary damage, GBP 10,000 (ten thousand pounds sterling) to be converted into Turkish liras at the rate applicable at the date of settlement;

10. *Holds* by six votes to one that the respondent State is to pay the applicant, within three months and into the latter's bank account in the United Kingdom, in respect of costs and expenses, GBP 20,000 (twenty thousand pounds sterling) together with any value-added tax that may be chargeable, less FRF10,245.06 (ten thousand two hundred and forty-five French francs six centimes) to be converted into pounds sterling at the rate applicable at the date of delivery of this judgment;

11. *Holds* unanimously that simple interest at an annual rate of 7.5% shall be payable on these sums from the expiry of the above-mentioned three months until settlement;

12. *Dismisses* unanimously the remainder of the applicant's claims for just satisfaction.

Done in English, and notified in writing on 13 June 2000, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Elisabeth PALM
President

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

E.P.
M.O'B.

PARTLY DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

(Translation)

1. To my great regret, I am unable to share the opinion of the majority of the Court, in particular, as to a violation of Article 2 on the ground that "... the Court is satisfied that Abdulvahap Timurtaş must *be presumed* dead [emphasis added] following an unacknowledged detention by the security forces" (see paragraph 86 of the judgment). Thus, according to the judgment, the basis for the finding of a "violation" is a mere – unfounded – "presumption". Nor do I agree with that statement by the Court, which, in order to justify applying Article 2, refers to other Turkish cases. The Court cannot assert that unproven allegations are true by referring to a precedent which, as a mere guide to interpretation when applying the Convention, is incapable of "creating" non-existent events or a presumption that they occurred.

2. That conclusion is quite irreconcilable with the principles previously laid down unanimously by the Commission and the Court in the identical case of Kurt v. Turkey (judgment of 25 May 1998, *Reports of Judgments and Decisions* 1998-III). In my opinion, there has been a major departure from precedent.

3. In order to differentiate the Kurt case cited above, the majority – wrongly in my view – refers to certain features distinguishing the present case from the Kurt case and justifying a different conclusion being reached in this one. Allow me to explain.

4. "In the first place," says the Court in the present judgment, "six and a half years have now elapsed since Abdulvahap Timurtaş was apprehended and detained – a period markedly longer than the four and a half years between the taking into detention of the applicant's son and the Court's judgment in the Kurt case. Furthermore," confirms the Court, "whereas Üzeyir Kurt was last seen surrounded by soldiers in his village, it has been established in the present case that Abdulvahap Timurtaş was taken to a place of detention ... by authorities for whom the State is responsible. Finally," says the majority, "there were few elements in the Kurt case identifying Üzeyir Kurt as a person under suspicion by the authorities, whereas the facts of the present case leave no doubt that Abdulvahap Timurtaş was wanted by the authorities for his alleged PKK activities ..." (see paragraph 85).

Those are artificial and superficial arguments, assertions unsupported by fact, a sort of *trompe-l'œil*. In cases of forced disappearance, what difference does it make whether the period has been six and a half years or four and a half years?

In the Kurt case, the Court, like the Commission, also made a finding of fact regarding "... the detention of the applicant's son by soldiers and village

guards on 25 November 1993" (judgment cited above, p. 1159, § 15, and pp. 1181-82, §106). Must I add that in the Kurt case, both the Commission and the Court held that the only Article applicable in the case was Article 5 of the Convention (which was not the same thing as saying that Üzeyir Kurt had in fact been arrested and detained by the security forces).

Lastly, the Commission's investigation clearly showed that Üzeyir Kurt and Abdulvahap Timurtaş had been accused of collaborating with PKK terrorists and were wanted in that connection. When the security forces arrived in the village and did not find Üzeyir Kurt among the villagers assembled in the square, they immediately asked where he was and arrested him in a house where he had been hiding (see the Kurt judgment, p. 1159, § 15, and p. 1162, § 28).

5. I reiterate that the present case is indistinguishable from the Kurt case (in which, as in this case, it was not established beyond all reasonable doubt that the applicant's son, Üzeyir Kurt, died in detention) and has nothing in common with *Çakıcı* (in which both the Commission and the Court found that the applicant's brother, Ahmet Çakıcı, had died in detention). Here is the conclusion of the Commission in the present case: "The Commission considers, therefore, that the application falls to be distinguished from [*Çakıcı*]. In the circumstances of the present case it finds it more appropriate to follow the approach adopted by the Commission and the Court in the case of Kurt v. Turkey" (see paragraphs 278 et seq. of the report of the Commission; see also *Çakıcı v. Turkey* [GC] no. 23657/94, ECHR 1999-IV, to the same effect).

6. Thus the backdrop to the present judgment is the Commission's report and the Court's judgment in the Kurt case, and the Commission's report in the present case. Both of those institutions unanimously concluded in these two cases that it was not Article 2 of the Convention that was applicable, but Article 5.

7. In view of their importance for a proper understanding of my dissenting opinion, I have decided to reproduce *in extenso* the relevant paragraphs of the Kurt judgment cited above and of the opinion expressed by the Commission in this case, which merely repeats my opinion and the Court's judgment in the Kurt case.

8. In its Kurt judgment, the Court said:

> "105. The Commission found that in the absence of any evidence as to the fate of Üzeyir Kurt subsequent to his detention in the village, it would be inappropriate to draw the conclusion that he had been a victim of a violation of Article 2. It disagreed with the applicant's argument that it could be inferred that her son had been killed either from the life-threatening context she described or from an alleged administrative practice of disappearances in the respondent State. In the Commission's opinion, the applicant's allegation as to the apparent forced disappearance of her son and the alleged failure of the authorities to take reasonable steps to safeguard him

against the risks to his life attendant on his disappearance fell to be considered under Article 5 of the Convention.

106. The Court recalls at the outset that it has accepted the Commission's findings of fact in respect of the detention of the applicant's son by soldiers and village guards on 25 November 1993. Almost four and a half years have passed without information as to his subsequent whereabouts or fate. In such circumstances the applicant's fears that her son may have died in unacknowledged custody at the hands of his captors cannot be said to be without foundation. She has contended that there are compelling grounds for drawing the conclusion that he has in fact been killed.

107. However, like the Commission, the Court must carefully scrutinise whether there does in fact exist concrete evidence which would lead it to conclude that her son was, beyond reasonable doubt, killed by the authorities either while in detention in the village or at some subsequent stage. It also notes in this respect that in those cases where it has found that a Contracting State had a positive obligation under Article 2 to conduct an effective investigation into the circumstances surrounding an alleged unlawful killing by the agents of that State, there existed concrete evidence of a fatal shooting which could bring that obligation into play (see the above-mentioned McCann and Others judgment; and the Kaya v. Turkey judgment of 19 February 1998, *Reports* 1998-I).

108. It is to be observed in this regard that the applicant's case rests entirely on presumptions deduced from the circumstances of her son's initial detention bolstered by more general analyses of an alleged officially tolerated practice of disappearances and associated ill-treatment and extra-judicial killing of detainees in the respondent State. The Court for its part considers that these arguments are not in themselves sufficient to compensate for the absence of more persuasive indications that her son did in fact meet his death in custody. As to the applicant's argument that there exists a practice of violation of, *inter alia*, Article 2, the Court considers that the evidence which she has adduced does not substantiate that claim.

109. Having regard to the above considerations, the Court is of the opinion that the applicant's assertions that the respondent State failed in its obligation to protect her son's life in the circumstances described fall to be assessed from the standpoint of Article 5 of the Convention.

9. Here is the opinion of the Commission in the present case:

The Commission questioned

"... whether that strong probability [that Abdulvahap died whilst in unacknowledged detention] is sufficient to trigger the applicability of Article 2 in the absence of concrete evidence that Abdulvahap has in fact lost his life or suffered known injury or illness."

It went on:

"In the case of Çakıcı v. Turkey, the Commission did reach the conclusion that Article 2 applied, finding that the 'very strong probability' that the applicant's brother Ahmet Çakıcı was dead arose in the context of an unacknowledged detention and findings of ill-treatment (op. cit., § 253).

279. However, even though the Commission did not find that Ahmet Çakıcı had been killed as alleged by the Government, he was regarded officially as dead (op. cit.,

§§ 239 and 253). In the present case, there is no official claim that Abdulvahap Timurtaş is presumed to be no longer alive. In addition, the Commission accepted evidence from a co-detainee of Ahmet Çakıcı's to the effect that he had seen Ahmet Çakıcı in the Diyarbakır provincial gendarmerie headquarters with injuries, that Ahmet Çakıcı had told him that he had been tortured and that he himself had also been subjected to torture (op. cit., § 252). The Commission recalls that in the present case it was unable to reach a finding that Abdulvahap Timurtaş was tortured or ill-treated (§ 251).

280. The Commission considers, therefore, that the application falls to be distinguished from the Çakıcı case. In the circumstances of the present case it finds it more appropriate to follow the approach adopted by the Commission and the Court in the case of Kurt v. Turkey (op. cit.).

281. The Court held in that case [Kurt] that it was not necessary to decide on the applicant's complaint under Article 2 since there was no concrete evidence capable of proving beyond reasonable doubt that her son had been killed by the authorities either while in detention or at some subsequent stage. The Court further held that

'... in those cases where it has found that a Contracting State had a positive obligation under Article 2 to conduct an effective investigation into the circumstances surrounding an alleged unlawful killing by the agents of that State, there existed concrete evidence of a fatal shooting which could bring that obligation into play' (op. cit., § 107).

282. The Commission notes that the present case [Timurtaş] similarly discloses no such concrete evidence of the killing of Abdulvahap Timurtaş. It observes in addition that the applicant has submitted the same 'more general analyses of an alleged officially tolerated practice of disappearances and associated ill-treatment and extra-judicial killing of detainees in the respondent State' as those on which Koçeri Kurt relied and which were deemed by the Court to be not 'sufficient to compensate for the absence of more persuasive indications that her son did in fact meet his death in custody' (op. cit., § 108).

283. Consequently, the Commission considers that the applicant's allegations of the State's failure to safeguard his son from disappearance fall to be examined in the context of Article 5 of the Convention."

10. Must I add, lastly, that in *Ertak v. Turkey* the same Chamber of the Court as sat in this case acknowledged that the Kurt case was distinguishable from *Ertak* in that the latter concerned a violation of Article 2 as a result of the death of the applicant's son caused by State agents (see *Ertak v. Turkey*, no. 20764/92, § 131, ECHR 2000-V). That amounted to saying that the Kurt case and the present one were similar and could thus be distinguished from *Ertak*.

11. In conclusion, as it has not been established beyond all reasonable doubt that Abdulvahap Timurtaş died in detention, Article 2 of the Convention is not applicable in the instant case.

12. In the light of the aforementioned considerations it is unnecessary for me to respond to the issues concerning the merits of the case.

13. As regards the applicant's position, unlike the majority of the Court, I find it difficult to accept that he genuinely suffered distress when, as a father, he showed no concern for his son's welfare after he left home and therefore disappeared from the scene two years before his alleged forced disappearance to join, or so it would seem, the PKK in Syria (see paragraphs 23 and 25 of the judgment).

14. *As regards the violation of Article 13 of the Convention*, I refer to my dissenting opinion in the case of Ergi v. Turkey (judgment of 28 July 1998, *Reports* 1998-IV, p. 1788):

> "The Court having reached the conclusion that there has been a breach of Article 2 of the Convention on the ground that no effective inquiry was conducted into the death complained of, I consider, like the Commission, that no separate issue arises under Article 13, because the fact that there was no satisfactory and effective 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 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)."

15. *As regards the application of Article 41*, I cannot accept that the legal costs should be paid into the applicant's "bank account in the United Kingdom".

This is one of the points arising under the general issue of reimbursement of "costs and expenses". So that my views on this subject may be properly understood, I must refer to previous events and developments on this subject. The use of former Article 50 (now Article 41) for legal costs (including counsel's fees) was the subject of a full debate by the former Court because certain lawyers (always the same ones) acting for the applicants repeatedly insisted on direct payment of the legal costs into a foreign bank account and in foreign currency. The Court consistently rejected such requests other than in one or two cases in which it allowed payment in a foreign currency, provided it was made in the respondent State. Following the deliberations, the Court decided that legal costs should be paid:

– to the applicant,
– in the respondent State, and
– in the currency of the respondent State (if, owing to the high level of inflation in the country, the amount is expressed in a foreign currency it is converted into local currency on the date of payment).

In line with that decision, all other requests were categorically rejected. Thereupon, lawyers acting for applicants began to request that legal costs be paid into the applicants' overseas bank accounts in foreign currency, despite the fact that the applicants were nationals of the respondent State and lived there. Those requests have also been consistently rejected by the Court.

Despite many similar requests (once again by the same lawyers), to date not a single decision has been given in their favour.

16. Is it not astonishing to find that virtually all the applicants living in small villages or isolated hamlets in remote parts of south-east Anatolia – people of modest means – have bank accounts in a town of another European State?

17. The fact that certain lawyers have problems with their clients is no concern of the respondent State. Contracts between lawyers and their clients are private-law agreements and concern only them; the respondent State should not be affected by any dispute between them.

18. I must add that, under the system established by the Convention, the Court has no jurisdiction to give Contracting States orders about how its judgments should be executed.

I am of the opinion that all payments under Article 41 should be made, as in the past, to the applicant in the local currency and in that country.