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

FORMER FIRST SECTION

CASE OF ORHAN v. TURKEY

(Application no. 25656/94)

JUDGMENT

STRASBOURG

18 June 2002

FINAL

06/11/2002

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

In the case of Orhan v. Turkey,

The European Court of Human Rights (Former 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,
Mr F. GÖLCÜKLÜ, ad hoc *judge*,
and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 6 February and 15 May 2001 and on 27 May 2002,

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

PROCEDURE

1. The case originated in an application (no. 25656/94) against Turkey lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Turkish national, Mr Salih Orhan ("the applicant"), on 24 November 1994.

2. The applicant, who was granted legal aid in April 2001, was represented before the Court by Mr Kevin Boyle and Ms Françoise Hampson, lawyers practising in the United Kingdom who delegated their representation to Mr Timothy Otty, a barrister. Those representatives engaged the assistance of Mr Philip Leach, a lawyer with the Kurdish Human Rights Project ("KHRP"), a non-governmental organisation based in London and of lawyers practising in Turkey. The Turkish Government ("the Government") were represented mainly by their Agent, Mr Bahadır Kaleli.

3. The applicant alleged, in particular, that soldiers burned and evacuated the hamlet where he lived in South-East Turkey and had apprehended and killed his two brothers (Selim and Hasan) and his son (Cezayir) – "the Orhans". He invokes, *inter alia*, Articles 2, 3, 5, 8, 13 and 14 of the Convention, together with Article 1 of Protocol No. 1 to the Convention.

4. The application was declared admissible by the Commission on 7 April 1997 and transmitted to the Court on 1 November 1999 in accordance with Article 5 § 3, second sentence, of Protocol No. 11 to the Convention, the Commission not having completed its examination of the case by that date.

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

6. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 15 May 2001 (Rule 59 § 2).

There appeared before the Court:

(a) *for the Government*
Mr M. ÖZMEN, *Agent*,
Mr H. MUTAF, *Adviser.*

(b) *for the applicant*
Mr T. OTTY, *Counsel*,
Ms R. YALÇINDAĞ, *Counsel*,
Mr P. LEACH, Solicitor.

8. The Court heard addresses by Mr Otty and Ms Yalçindağ, for the applicant, and by Messrs Özmen and Mutaf, for the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The case mainly concerns events which took place in May 1994 at Deveboyu hamlet of Çağlayan village in the Kulp district of the Diyarbakır province in south-east Turkey. From Çağlayan village the road goes to Zeyrek, to whose gendarme station Çağlayan village and its hamlets are attached. Zeyrek is on the main road between the towns of Kulp and Lice.

The applicant alleges that on 6 May 1994 the State's security forces burned and evacuated the hamlet of Deveboyu and that on 24 May 1994 the same soldiers returned to Deveboyu detaining the applicant's brothers (Selim and Hasan Orhan) and his son (Cezayir Orhan), after which those three relatives ("the Orhans") disappeared.

10. The facts being disputed by the parties, the Commission appointed Delegates who took evidence in Ankara from 6 to 8 October 1999.

They heard the following witnesses: the applicant; Adnan Orhan (son of Selim Orhan); Mehmet Emre (the applicant's cousin from the neighbouring hamlet of Gümüşsuyu of Emalı village); Mehmet Can (son-in-law of Selim Orhan who lived in Diyarbakır at the relevant time); Ahmet Potaş (Commander of Zeyrek Gendarme station); Ali Ergülmez (Commander of Kulp District Gendarme Station); Ümit Şenocak (Deputy Commander of Kulp District Gendarme Station); Kamil Taşcı (Commander of Kulp Central Gendarme Station); Şahap Yaralı (Commander of Lice District Gendarme Station); Hasan Çakır (Commander of Lice Central Gendarme Station); Aziz Yıldız (succeeded Hasan Çakır); Mustafa Atagün (prosecutor in the office of Diyarbakır Chief Public Prosecutor); and Mehmet Yönder (a Kulp public prosecutor).

11. The transcripts of the oral evidence, together with the documentary evidence provided by the parties to the Commission, have been transmitted to the Court. Additionally, the parties have provided further documents to the Court which had been requested by the Commission.

The submissions by the parties on the facts (Sections A and B), the material submitted by the parties in the present case (Sections C and D), relevant material submitted by the Government in the *Çiçek* case (*Çiçek v. Turkey*, no. 25704/94, ECHR 2001 – Section E below) together with the oral evidence to the Delegates (Section F) are summarised below.

A. The applicant's submissions on the facts

12. Between 1992-1994 a large number of disappearances and unexplained killings occurred in south-eastern Turkey in the context of counter-insurgency measures against the PKK. The province of Diyarbakır and its districts of Lice and Kulp were particularly affected.

13. The applicant, Salih Orhan, was born in 1955. Selim and Hasan Orhan (born in 1954) and were his only brothers. His eldest son, Cezayir, was born in 1977. At the relevant time, all lived in Deveboyu, the applicant and his brothers each owning separate houses.

14. On 20 April 1994 military forces of 300-400 men with over 100 vehicles pitched camp near Deveboyu.

15. On 6 May 1994 at around 6.00 a.m. a number of the soldiers entered the village. The village *imam* announced that their Commander required the villagers to assemble in front of the mosque, which they did. The Commander then announced that Çağlayan village (including the Deveoboyu hamlet) was to be burnt, but that he would allow the villagers to remove their possessions. The applicant returned to his house and started to remove his possessions. As he was doing so, the soldiers set fire to his and

others' houses. Having completed this task and given the villagers three days to leave the village, the soldiers moved on.

16. The following day the applicant, together with other villagers, went to Kulp District Gendarme Command to report the incident and to seek permission to stay in the area long enough to harvest the crops. Ali Ergülmez, the commander of that station, told him that the soldiers had come from Bolu and that the villagers could remain until the harvest.

17. On 24 May 1994 more soldiers were seen in the vicinity of the village. The Orhans were repairing their houses and did not notice the soldiers arriving. Each of the three men was taken into custody by the soldiers. One of the soldiers explained that the Commander wanted to see them, that the soldiers did not know the way and that they could come back to the village afterwards. They left on foot up the hills. At around 4.30 p.m. on the same day, the soldiers and the Orhans were seen in the neighbouring hamlet of Gümüssuyu. They were smoking cigarettes and appeared to be in good health.

18. On 25 May 1994 the applicant went to Zeyrek Gendarme station and enquired about their whereabouts. Ahmet Potaş told him that the Orhans had been taken to Kulp. He went to Kulp and spoke to Ali Ergülmez.

19. Having obtained no information as to the whereabouts of the Orhans, the applicant made formal complaints to the Kulp Chief Public Prosecutor, the Diyarbakır State Security Court, the State of Emergency Regional Governor and to the Diyarbakır Public Order High Command.

20. Approximately one month after the Orhans' disappearance the applicant was put in contact with Ramazan Ayçiçek. The latter had been detained in Lice Boarding School with the Orhans before being transferred to Lice prison. He had seen the Orhans and he told the applicant that all three Orhans appeared to be "in a bad way".

21. The applicant received no further news about the Orhans or any response to his complaints about the burning of Deveboyu.

B. The Government's submissions on the facts

22. The Government did not dispute that there had been numerous counter insurgency military operations in the province of Diyarbakır at the relevant time.

23. However, they disputed three main questions of fact. In the first place, they maintained that there was no military operation on 6 or 24 May 1994 in Çağlayan village as alleged or at all and they referred in this respect to the operations' record submitted to the Court in August 2000 (see paragraph 124 below). Secondly, and consequently, the Orhans had not been taken into custody. The Orhans were not wanted for any offence. The military cannot take any person they apprehend into custody. They must turn such persons over to the gendarmes and the records of all relevant

gendarme stations show that they were not detained. Thirdly, full investigations were carried out by the appropriate authorities on foot of the applicant's complaints, which authorities concluded that there were no facts requiring to be further pursued or offences requiring prosecution.

24. The Government considered therefore that it has not been proved beyond reasonable doubt that Çağlayan village was burned, or that the Orhans were detained, by the security forces. Accordingly, they submitted that it had not been demonstrated that any such destruction or disappearances were attributable to the State.

C. The documentary evidence submitted by the applicant

1. Statement of the applicant dated 3 November 1994 made to Diyarbakır branch of the Human Rights Association ("HRA")

25. On 20 April 1994 between 300 and 400 soldiers with over 100 vehicles arrived in Deveboyu. The soldiers stayed near the hamlet. Along with other villagers, the applicant carried the soldiers' tents, backpacks and other equipment. During this time, Ahmet Potaş, the Zeyrek Gendarme Station Commander, and those under his command were bringing equipment to the soldiers. Ahmet Potaş had earlier told the villagers that the soldiers were from the Bolu Commando Unit, that no news had been received from persons who had been taken into custody earlier by that unit and that the villagers were to try not to be taken into custody and to be cautious.

26. After staying nearly 3 days beside the village, the soldiers went to the Bingöl Muş region on operation. At around 6.00 am on 6 May 1994, they returned to the hamlet and some of the soldiers gathered in front of the mosque. The village *imam* announced that the commander of the security forces required the villagers to assemble in front of the mosque. All villagers so assembled. The unit commander then told them to remove their belongings within one hour as the village would be burned. They went to their houses and began removing their belongings but, as they were doing so, the soldiers began burning the houses. After they burned the village, the soldiers gave them three days to evacuate the village and left in the direction of Kulp. After the soldiers left, the villagers managed to save a small part of their belongings, most of which were irreparably damaged by the fires.

27. On 7 May 1994 they went to Kulp District Gendarme Command and reported the incident. They were told that the soldiers had come from Bolu. They explained that they could live in tents until the harvest and were given permission to do so. They began to make preparations for the harvest and attempted to repair the houses which had not been completely destroyed. The soldiers were still on operations in the vicinity of the village and, on seeing them arrive, the villagers would hide outside the village.

28. On 24 May 1994 soldiers were seen in the vicinity of the village and the men hid. However, the Orhans were busy repairing the houses and did not see the soldiers. The women and children of the village saw the soldiers taking them away. The applicant hid from the soldiers that day but was told by the women and children of the village that the soldiers who took the Orhans were those who had burned the village. Neither of the Orhans had been in custody before and Selim was an honorary *imam*. At around 4.30 p.m. that day the soldiers and the Orhans had reached Gümüşsuyu and people from that hamlet saw the Orhans with the soldiers. The Orhans were smoking cigarettes with the soldiers and were fine.

29. On 25 May 1994 some villagers went to the Zeyrek Gendarme Station and recounted the incident to Ahmet Potaş who said that the Orhans had been taken to Kulp. They therefore went to Kulp. However, the Commander in Kulp told them that he had no information.

30. The applicant therefore filed, to no avail, applications with the Kulp Chief Public Prosecutor, the Public Prosecutor at the Diyarbakır State Security Court, the State of Emergency Regional Governor and the Public Order High Command in Diyarbakır.

31. One month later the applicant heard that a person called Ramazan Ayçiçek, who had previously been held in custody in Lice Boarding School, had been transferred to Lice Prison. The applicant went to see him there and Ramazan Ayçiçek told him that he had seen the Orhans during his detention in the Lice Boarding School and that they were in very bad condition.

2. Petition to the Chief Public Prosecutor at the State Security Court, Diyarbakır dated 16 June 1994

32. The Orhans had been arrested in Deveboyu during an operation by gendarmes on 24 May 1994 and no news had been received since then from them despite applications made. The applicant requested information.

3. Petition to the State of Emergency Regional Governor, Diyarbakır dated 6 July 1994

33. During a military operation in Çağlayan, the security forces had taken the Orhans with them, asking them to act as guides. The applicant had had no news since and he requested assistance in obtaining information.

4. Reports, statements and other published documents

34. The applicant also submitted:

– Public statement on Turkey of the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment (“CPT”), December 1992;

– Summary results concerning the inquiry on Turkey by the United Nations' (“UN”) Committee Against Torture (“CAT”), November 1993;

– Report of the Human Rights Watch World, 1994;
– Report of the Turkish Human Rights' Association, 1994;
– Report entitled "Advocacy and the Rule of Law in Turkey", of the KHRP, Medico International and the Human Rights' Committee of the Bar of England and Wales, January 1995;
– Amnesty International report entitled "Turkey: Mothers of disappeared take action", May 1995;
– Decision of the CAT in *Ismail Aslan v. Turkey*, 8 May 1996;
– Report of the KHRP and Medico International entitled "The destruction of villages in South-East Turkey", June 1996;
– Public statement on Turkey of the CPT, December 1996;
– Report of the KHRP entitled "A Report on Disappearances in Turkey", November 1996;
– UN Working Group Report on Disappearances in Turkey, 1996;
– Report of the Committee on Human Rights in Europe, September 1998;
– Report of the Committee on Migration, Refugees and Demography.

5. Statement of the applicant dated 5 January 1998 to the HRA

35. He confirmed his intention to continue with the present application and the contents of his statement of 3 November 1994.

36. On 24 April 1995 Diyarbakır police officers came to his house and told his wife that that a public prosecutor wanted to take his statement. Although he hesitated to do so, he eventually went to the Diyarbakır Chief Public Prosecutor's office and made a detailed statement. The prosecutor asked in an angry voice why he had taken his case to a foreign country and who had so advised him. The applicant did not know what the prosecutor wrote down in the statement as it was not read back to him. He was asked to sign the statement and he did.

6. Statement of Adnan Orhan dated 6 October 1999

37. In 1994 the witness was 12 years old. He attended Lice Boarding School from late 1993 until the end of April 1994. Otherwise he lived at home with his father (Selim Orhan) and family. Lice Boarding School had two main buildings: one for teaching and administration, and one for accommodation. The military building was about 200 metres away from the school accommodation buildings.

38. The witness saw many military vehicles coming to the military building. On one occasion, he saw people in plain clothes in one such vehicle and he and his friends believed that those people had been detained. He had also seen some soldiers with blue hats within the school compound.

39. Towards the end of April 1994 the witness returned to Deveboyu as he was unwell. There were many soldiers in the area and some of then had

blue berets. About 15 days thereafter 250-300 soldiers came and burned the village. Two or three soldiers burned his father's house with dry grass and some kind of powder.

40. Two weeks later soldiers came back to the village on foot at about 7-8.00 a.m. The witness was in a garden about 20-25 metres from his house. The soldiers asked his father (Selim) for his identity card and he gave it to them. When they asked if any other men were in the village, Hasan and Cezayir came forward. They were asked for their identity cards and they produced them. When the soldiers asked the witness' father to go with them, his father asked why and the witness then moved closer. The witness asked his father where he was going and his father said that the soldiers wanted a guide. The witness asked the commander where he was taking the Orhans, and the latter replied that they would be released.

41. At that stage his mother, brothers and sisters had arrived and all followed the soldiers as they took the Orhans away. They were crying. His uncle's wife produced her Koran and begged them not to take the Orhans. At that stage the witness heard the commander speak on his radio saying that the named persons were with him, but that the families were objecting to them being brought away and asking what to do. The voice on the radio said to bring the Orhans anyhow. The group followed the Orhans and the soldiers for a while until the commander said that, if they continued following, bad things would happen. That was the last time the witness saw his father.

7. Statement of Mehmet Can dated 6 October 1999

42. In May 1994 the witness was living in Diyarbakır. One day he returned home from work and his wife told him that Deveboyu had been burned. The following day he took his vehicle to Deveboyu to help the villagers, including his relatives. On his way there he saw a large number of soldiers in the area, about 300-400. The village was still burning when he arrived and he was told that the soldiers had burned the village. He helped about 8 families to remove their remaining possessions to Diyarbakır.

43. About 19 days later his wife told him that her father (Selim) together with Hasan and Cezayir Orhan had been taken into custody. He and his wife again then went to Deveboyu in his vehicle and were told when they arrived that the Orhans had been taken away by soldiers.

8. Statement of Mehmet Emre dated 6 October 1999

44. In May 1994 the witness was living in Gümüşsuyu. One day, he saw the Orhans in the custody of some soldiers in Gümüşsuyu. That evening, the applicant came to Gümüşsuyu and asked if anyone had seen the Orhans and he told the applicant what he had seen.

45. The next morning the witness went to Zeyrek Gendarme Station with an old man from Gümüşsuyu to ask what had happened to the Orhans. He spoke to Ahmet Potaş who said that the Orhans had been taken to Kulp. After leaving Zeyrek station, he met the applicant and told him what Ahmet Potaş had said.

9. Copy photographs of the Orhans

46. These were submitted to the Delegates during the taking of evidence.

10. Sketch of Lice Boarding School

47. The sketch was completed by Adnan Orhan while giving evidence before the Delegates.

D. Documentary evidence submitted by the Government

1. First investigation file: File No. 1994/66, Kulp Chief Public Prosecutor, 1994-1995

(a) Petition dated 8 June 1994 from the applicant to a Kulp public prosecutor

48. During a military operation conducted at Deveboyu on 24 May 1994, the Orhans were taken by soldiers who told them that they were needed as guides and that the soldiers' commander wanted them anyway. Since 15 days had passed without any news, the applicant requested reliable information about the Orhans' current circumstances.

(b) Statement dated 8 June 1994 of the applicant taken by a Kulp public prosecutor

49. The Orhans had been taken away from Deveboyu by soldiers on 24 May 1994. The soldiers asked them to act as guides and told them that, in any event, the soldiers' commander wanted them. Since then, the applicant had not heard from the Orhans and he requested an investigation into their fate.

(c) Letter dated 8 June 1994 from a Kulp public prosecutor to Kulp District Gendarme Command

50. The relatives of the Orhans of Deveboyu had made an application about the Orhans who were taken on 24 May 1994 by soldiers and about whom no news had been received. The addressee was requested to "investigate" and to revert within one week.

(d) Letter dated 11 July 1994 from a Kulp public prosecutor to the Lice Chief Public Prosecutor

51. Reference was made to the applicant's complaint about the Orhans' apprehension on 24 May 1994 and their subsequent disappearance. It had been reported that the Orhans were, at the time, detained by the military units billeted in Lice Boarding School. The addressee was requested to investigate whether the Orhans were detained by/in the company of the units billeted at the school and whether the Chief Public Prosecutor's Office had any current proceedings against the Orhans.

(e) Letter dated 22 July 1994 from Kulp Deputy District Gendarme Commander (Ümit Şenocak) to the Kulp Chief Public Prosecutor

52. Further to the Kulp public prosecutor's letter of 8 June 1994, an investigation and inquiry had been carried out. The Orhans had not been detained by his command and his command did not participate in an operation on or around the date indicated. The search for the Orhans would continue and further developments would be reported.

(f) Letter dated 18 August 1994 from a Kulp public prosecutor to Kulp District Gendarme Command

53. The addressee was requested to secure the presence of the applicant and of Kamil Ataklı (the *muhtar* of Çağlayan) at the office of the Kulp Chief Public Prosecutor as soon as possible.

(g) Statement of the applicant dated 22 August 1994 taken by a Kulp public prosecutor

54. The Orhans were apprehended by soldiers and were detained in Kulp overnight and then in Lice Boarding School for 20 days. The applicant had no news. He had petitioned, to no avail, the Diyarbakır State of Emergency Regional Governor, the Provincial Governor, the Provincial Gendarme Brigade Command and Kulp Central Gendarme Command. The soldiers had indicated that there was "complaint" against the Orhans.

(h) Letter dated 3 September 1994 from a Kulp public prosecutor to the Chief Public Prosecutor, Diyarbakır State Security Court

55. The addressee was to confirm whether the Orhans had been referred to the addressee to be detained.

(i) Statement of the *muhtar* of Çağlayan village dated 23 September 1994 taken by a Kulp public prosecutor

56. About four months previously Bolu Commando Brigade arrived in Deveboyu on operation. He was told about the Orhans being taken away by soldiers of that brigade a few days after it took place. He was told that the children of those taken away had followed the soldiers and the Orhans for

some time but were told by the commanding officer on the radio that the Orhans would be released. He went to Zeyrek station and was told that the soldiers had gone towards Lice on operation, accompanied by civilians.

(j) Statement of the applicant dated 23 September 1994 taken by a Kulp public prosecutor

57. He had already submitted a petition (8 June 1994) and made a statement (22 August 1994) to that office. He still had no news of the Orhans and his search continued. He requested that the Orhans be found and that those who detained them be punished.

(k) A letter dated 23 September 1994 from Ali Ergülmez, Kulp District Gendarme Commander to the Kulp Chief Public Prosecutor

58. The persons mentioned in the letter of 18 August 1994 had moved.

(l) Letter dated 30 September 1994 from a Kulp public prosecutor to the Public Order Branch Directorate, Diyarbakır

59. The addressee was asked whether it had detained the Orhans. Stamps on the letter, of the Chief of Administration and of the Prevention of Terrorism Directorate, dated October 1994, stated that the Orhans were not wanted and did not have criminal records.

(m) Letters dated 3 October 1994 from a Kulp public prosecutor to the Chief Public Prosecutor, Diyarbakır State Security Court and to the Diyarbakır Chief Public Prosecutor.

60. The addressees were asked to confirm, for the purposes of a preliminary investigation, whether the Orhans had been referred to them to be detained or whether they were under arrest. A stamp on the former letter indicates that the Chief Public Prosecutor of the Diyarbakır State Security Court did not find the Orhans' names in that office's records.

(n) Letter dated 3 October 1994 from the Diyarbakır Chief Public Prosecutor to the Kulp Chief Public Prosecutor

61. Pursuant to the letter of 3 October 1994, a search through the computer records for 1993 and 1994 did not reveal the Orhans' names. The addressee was referred to the Chief Public Prosecutor of the Diyarbakır State Security Court.

(o) Letter dated 20 October 1994 from the Director of the Public Order Division of the Security Directorate, Governor of Diyarbakır to the Kulp Chief Public Prosecutor

62. Pursuant to the Kulp Chief Public Prosecutor's letter of 30 September 1994, an inquiry had been carried out. The Orhans had not been detained and were not wanted by the Security Directorate.

(p) Letter dated 24 October 1994 from the Chief Public Prosecutor, Diyarbakır State Security Court to the Kulp Chief Public Prosecutor

63. The Orhans were not in that court's records.

(q) Letter dated 6 April 1995 from a Kulp public prosecutor to the Lice Chief Public Prosecutor

64. A response was requested to the unanswered letter of 11 July 1994.

(r) Statement of the applicant dated 2 May 1995 made to the Diyarbakır Chief Public Prosecutor (Mustafa Atagün)

65. The statement records that a letter of 20 April 1995 from the Ministry of Justice, which was read to the applicant, had referred to the applicant's Strasbourg application and requested the Diyarbakır Chief Public Prosecutor to ensure the investigation of the matter by the Lice Chief Public Prosecutor and to take the applicant's statement. The applicant was also to be asked whether the signature on the form of authority in favour of British lawyers was his. Consideration was to be given to the necessity of determining, as a matter of priority, whether or not an investigation was to be opened under Decree no. 285. The Ministry was to be kept informed. The applicant was then asked to make a statement.

66. Along with his two brothers (Selim and Hasan), the applicant had a house in Deveboyu. On 6 May 1994 300-400 soldiers arrived in Deveboyu. The applicant was in the fields. He heard, on the mosque loud-speaker, that the villagers were to gather at the mosque and ran back. At the mosque, the commander told them to remove their belongings from the houses and to evacuate the village in an hour. The houses were set on fire as persons attempted to remove their belongings. His and his brothers' houses were burned. Prior to leaving, the soldiers ordered the evacuation of the village.

67. The following day they went to the Kulp District Gendarme Command and reported the incident. They asked to be allowed to stay to harvest the crops and the commander agreed. They pitched tents in the hamlet and tended their livestock and crops. They hid when the soldiers subsequently came (twice or three times) by the village. When the soldiers came on 24 May 1994, the applicant was again in the fields. The Orhans were repairing their houses. The soldiers told them that the commander wanted to see them and that they were to show the soldiers the way after which they would come back. The applicant did not see them being taken away but was told about the incident when he returned to the village.

68. The following day the village *muhtar* and some villagers went to Zeyrek Gendarme station and enquired about the Orhans. They were told that the Orhans had been taken to Kulp. One or two days later, the applicant went to Kulp District Gendarme Station. He asked the Commander about the Orhans who responded that there were 50 operations in the area and that the Orhans had not been taken into his station.

69. The applicant therefore applied to the Kulp Chief Public Prosecutor and to the Chief Public Prosecutor of the Diyarbakır State Security Court, the latter of whom had told the applicant that the Orhans were not in custody. He then filed a petition with the State of Emergency Regional Governor, who referred the applicant to the Diyarbakır Provincial Governor, who referred him, in turn, to the Provincial Gendarme Command. The latter telephoned "Lice", but the response was that the Orhans were not there. Telephone calls to "Kulp" were not possible as the lines were down.

70. Approximately one month later the applicant was put in contact with Ramazan Ayçiçek who was in Lice prison and he went to see him. Ramazan Ayçiçek told him that he had been in custody in Lice Boarding School with the Orhans prior to being transferred to Lice Prison. Ramazan Ayçiçek was by then (May 1995) in Şanliurfa prison. Lice District Gendarme Command then told the applicant that the Orhans were not "there".

71. The applicant moved to Diyarbakır. On learning that some villagers had applied to the HRA, he applied and the HRA took his statement. He was shown his statement of 3 November 1994 and identified that statement and his signature. When his letter of authorisation appointing British lawyers was shown to him, he said that he had not been told, as such, that the HRA would appoint British lawyers, that he was only asked to sign a piece of paper and that he did not know that it was a letter of authorisation. He was only told that his statement would be sent to Ankara, but he was not told where in Ankara. His aim was to find the Orhans dead or alive, to be informed about their fate and to obtain compensation for the damage to his property. He had not commenced damage assessment proceedings in any court, although the village *muhtar* had informed the Regional Governor of the burning of the houses. The applicant therefore petitioned the Regional Governor for a house to replace the one which was burned. He wanted his rights granted by the Turkish authorities and did not want a case in Europe.

72. It is recorded that the statement was read out to the applicant, who confirmed the truth of it by signing it.

(s) Letter dated 3 May 1995 from a Diyarbakır public prosecutor (Mustafa Atagün) to the Kulp Chief Public Prosecutor

73. Referring to the letter of 20 April 1995 from the Ministry of Justice, Mustafa Atagün requested an investigation into the complaints of the applicant who had made a detailed statement and to revert with the results of that enquiry by 1 June 1995 for forwarding to the Ministry.

(t) Letter dated 16 May 1995 from a Kulp public prosecutor to the Diyarbakır Chief Public Prosecutor

74. An investigation had been commenced but the Orhans were still missing. Copies of the relevant investigation documents were enclosed.

(u) Letter dated 29 May 1995 from a Kulp public prosecutor to the Lice District Gendarme Command

75. The applicant had claimed that the Orhans had disappeared on 24 May 1994 and had been detained by military units in Lice Boarding School. The addressee was to investigate whether the Orhans had been detained and to revert with the findings.

(v) Letter dated 29 May 1995 from Lice District Gendarme Command to the Kulp Chief Public Prosecutor

76. A claim about the Orhans' disappearance and their detention in the boarding school had already been received and investigated. However, and according to the records of that gendarme command, the Orhans had not been detained and their names were not in those records.

(w) Letter dated 14 June 1995 from Lice District Gendarme Command to the Lice Chief Public Prosecutor

77. Referring to the Lice Chief Public Prosecutor's letter of 29 May 1995, that gendarme command had investigated. Since the Orhans' names were not in the records of that command, the conclusion was that that command had not detained them.

(x) Letter dated 14 July 1995 from the Diyarbakır Chief Public Prosecutor (Mustafa Atagün) to the Kulp Chief Public Prosecutor

78. The addressee was requested to furnish information on the preliminary investigation on the applicant's complaints.

(y) Letter dated 26 July 1995 from a Kulp public prosecutor to the Diyarbakır Chief Public Prosecutor

79. On 26 July 1995 the Kulp Chief Public Prosecutor decided that he lacked jurisdiction to pursue the investigation and transferred the matter to the Kulp District Governor.

(z) Decision of the Kulp Chief Public Prosecutor as to lack of jurisdiction of 26 July 1995

80. The decision referred to the applicant's complaint: the burning and evacuation of his village on 6 May 1994, the taking into custody of the Orhans by soldiers on 24 May 1994, their later disappearance and the reports of their detention in Lice Boarding School. Since the incident took place while the security forces were carrying out their administrative duties, it was the Kulp District Administrative Council that had jurisdiction to investigate, to which organ the case was transferred.

(aa) Statement of Hasan Sumer (undated) taken by a Kulp public prosecutor

81. On 24 May 1994 commando soldiers arrived in Çağlayan. He saw the soldiers take the Orhans. Since then, no news of them had been received.

(bb) Extract dated 24 June 1994 from the census record concerning Çağlayan village.

82. The applicant and the Orhans were registered as living in Çağlayan.

2. Second investigation file: Kulp District Administrative Council, 1997

(a) Letter dated 7 May 1997 from the Diyarbakır Deputy Provincial Governor to District Administrative Council, Kulp District Governor

83. The applicant had made an application to the European Commission of Human Rights claiming that the Orhans had been detained by security forces on 24 May 1994, that they had subsequently disappeared and that their houses had been burned. The addressee was to confirm by 9 May 1997 whether an investigation had been launched by the Provincial or District Administrative Councils. If so, a copy of the file was to be forwarded.

(b) Letter dated 9 May 1997 from the Kulp District Governor to the Diyarbakır Provincial Governor

84. The Kulp Chief Public Prosecutor's file and jurisdiction decision had been sent to the District Administrative Council which had appointed Ali Ergülmez as the Adjudicator in the investigation. He was appointed elsewhere and the file had been put on hold without further progress. The District Governor had appointed a new Adjudicator, the investigation was ongoing and the addressee would be informed of the outcome.

(c) Letter dated 9 May 1997 from the Kulp District Governor to Kulp District Gendarme Command

85. Kamil Kündüz was requested to investigate, as Adjudicator, the claims (outlined in the Kulp Chief Public Prosecutor's file) according to the law on the prosecution of civil servants and to report within 3 months.

(e) The Adjudicator's report (Kamil Kündüz) dated 15 May 1997

86. Deveboyu hamlet and Çağlayan village were empty and the residents had gone to Diyarbakır as a result of PKK pressure in 1993-1994. Since their addresses could not be established, more information about the Orhans and their alleged detention and disappearances could not be gathered. The applicant was not at his address in Diyarbakır, so his statement could not be taken. A search of the records showed that the Orhans had not been detained

by Kulp District Gendarme Command. In the absence of any perpetrators, there was no need to investigate further.

(f) Letters dated 15 and 20 May 1997 from Kulp District Gendarme Command to the Kulp District Governor, and from the latter to Diyarbakır Provincial Governor, respectively

87. The investigation report was submitted.

3. Third investigation file: Kulp District Administrative Council, 1999

88. By letter of 4 June 1999, the Diyarbakır Provincial Governor required the file to be re-opened and an investigation conducted. This letter has not been furnished

(a) Note to the file of the Kulp District Governor dated 7 June 1999

89. An investigation was to be opened into the applicant's claims pursuant to the law concerning the prosecution of civil servants and a report was to be submitted as soon as possible.

(b) Letters dated 7 June 1999 between Kulp District Governor and Kulp District Gendarme Command

90. The *muhtar* of Çağlayan was to be sent to the District Governor for his statement to be taken and the gendarme command confirmed that he would so attend.

(c) Letters dated 7 June 1999 from Kulp District Governor to Kulp District Gendarme Command

91. That gendarme command was requested to confirm before 9 June 1997 whether any operations had been carried out in April-July 1994 and, if so, whether they covered Çağlayan, whether gendarmes had taken part in the operation and who was in charge. The custody records from Zeyrek gendarme station and from Kulp Central Gendarme Command for April-July 1994 were also requested.

(d) Letter dated 7 June 1999 from Kulp District Gendarme Command to the Kulp District Governor

92. That gendarme command's records had been examined and it was concluded that in April – July 1994 operations had taken place in the Kulp region but no information, documentation or record had been found which indicated that such operations included Çağlayan village. Extracts of the security and custody records of Zeyrek gendarme station were enclosed. Those of the Kulp Central Gendarme Station for 1994 had been archived and could be obtained from the Provincial archive department.

(e) Letter dated 7 June 1999 from Kulp District Governor to Kulp District Gendarme Command

93. The addressee was to ensure the applicant's attendance before the Kulp District Governor for his statement to be taken.

(f) Letter dated 7 June 1999 from Kulp District Gendarme Command to the Kulp District Governor

94. The applicant's address was in Diyarbakır. Çağlayan village had been evacuated and, therefore, the applicant could not be contacted.

(g) Letters dated 7 June 1999 from Kulp District Governor to Lice District Gendarme Command

95. The Lice District Gendarme Command custody records for April-July 1994 were requested by 9 June 1999.

(h) Letters dated 7 June 1999 from Kulp District Governor to the Lice Chief Public Prosecutor

96. The Lice prison custody records for April-July 1994 were requested.

(i) Letter dated 8 June 1999 from Kulp District Governor to the Diyarbakır Provincial Governor

97. The applicant was to be summoned and sent to the Kulp District Governor for his statement to be taken.

(j) Statement dated 9 June 1999 of the *muhtar* of Çağlayan taken by the Adjudicator

98. The villagers from Deveboyu had told him in 1994 that military units belonging to the Bolu regiment, accompanied by Ali Ergülmez, had taken away the Orhans. He had asked Ahmet Potaş about their fate and he responded that the Orhans were not in Zeyrek Station and that he had no knowledge of them.

(k) Letter dated 10 June 1999 from the Kulp District Governor to the Chief Public Prosecutor, Şanliurfa

99. Given the applicant's allegations of 2 May 1995 that, *inter alia*, Ramazan Ayçiçek had seen the Orhans in detention and that he was in Şanliurfa prison, the addressee was to see if he was still in that prison, to take his statement if he was and to report back by 15 June 1999.

(l) Letter dated 11 June 1999 from the Şanliurfa prison director to the Şanliurfa Chief Public Prosecutor

100. Ramazan Ayçiçek's name was not in the prison records.

(m) Letter dated 17 June 1999 from Kulp District Governor to Lice District Gendarme Command

101. Given the applicant's allegations of 2 May 1995 that, *inter alia*, Ramazan Ayçiçek had seen the Orhans in detention and that he was in Lice prison, the addressee was to see if he was still in that prison, to take his statement if he was and to report back by 21 June 1999.

(n) Letter dated 17 June 1999 from Kulp District Governor to the Diyarbakır Provincial Governor

102. Reference was made to a letter of 4 June 1999 from the Ministry of the Interior, to the Diyarbakır Provincial Governor's letter of 4 June 1999 and to the Kulp District Governor's letter of 8 June 1999. An investigation would be carried out to establish the applicant's current address, and his statement would be taken and forwarded by 18 June 1999.

(o) Document signed by the applicant dated 22 June 1999

103. The applicant acknowledged that he had been informed that he had to appear before the Kulp District Governor urgently to make a statement.

(p) Letter dated 22 June 1999 from the Director of Lice prison to Lice District Gendarme Command

104. Ramazan Ayçiçek had been imprisoned by Lice Public Order Criminal Court on 10 June 1994 for aiding and abetting the PKK and he was transferred to Diyarbakır E Type secure prison on 25 July 1994.

(q) Report dated 22 June 1999 on Ramazan Ayçiçek completed by Lice District Gendarme Command

105. The report repeated the information in the preceding paragraph and added that Ramazan Ayçiçek's village had been evacuated due to terrorist incidents and that his current whereabouts were unknown. It was not possible therefore to take his statement.

(r) Statement of the applicant dated 23 June 1999 taken by the Adjudicator (Yunus Günes)

106. Nineteen days prior to 24 May 1994, military units said that the village was to evacuated in three days. The villagers began immediately evacuating. After three days they approached the Kulp District Gendarme Commander, Ali Ergülmez, in order to get permission to stay in the village to harvest the crops. Permission was granted.

107. On 24 May 1994 the applicant was told that the soldiers, who had been around the hamlet and acting on orders of their commander, had taken the Orhans to Ziyaret Tepe. He saw the soldiers taking the Orhans away as did other villagers. On the same day he learned that the soldiers had moved on to Gümüşsuyu hamlet of Emalı village. After dark, he went to

Gümüşsuyu and asked Hacı Havina (also known as Havine Emre and the applicant's aunt) (his aunt) and Hacı Mehmet about the Orhans. They said that they had seen the Orhans.

108. On 25 May 1994 Mehmet Emre (Hacı Havina's son and the applicant's cousin) and Hacı Mehmet went to Zeyrek and spoke to Ahmet Potaş who said that the Orhans had been taken to Kulp District Gendarme Command by the soldiers in the evening. On 25 May 1994 the applicant, Hasan Sumer, Suleyman Nergiz and Huseyin Can asked Ali Ergülmez about the fate of the Orhans. Ali Ergülmez said that there were about 50 operations in the area and that he did not know who had taken the Orhans.

109. Later, the applicant petitioned Kulp District Gendarme Command, Lice District Gendarme Command and Kulp Chief Public Prosecutor. Approximately one month after the incident, the applicant was in Diyarbakır and he met Esref from the Inkaya district who had a shop in Kulp. He said that the Orhans had been detained overnight with him in Kulp District Gendarme Command. In the morning, they were taken in a military vehicle to the Lice District Gendarme Command where the Orhans and Esref were in custody together for a week. Esref was released at the end of that week.

110. About 35-40 days after the Orhans had been detained, Ramazan Ayçiçek of Mehmetil village, Lice sent a message to the applicant suggesting that they meet. The applicant went to Lice prison and met the Ramazan Ayçiçek. The latter said that, while he was being detained in Lice Boarding School, he had spent one week with the Orhans. On the same date, and many times thereafter, the applicant went to the Lice District Gendarme Command to ask about the fate of the Orhans. He was told that the Orhans were not in Lice.

111. About 50 days after the Orhans' apprehension, he petitioned the State of Emergency Regional Governor. That petition was referred to the Diyarbakır Provincial Government and, in turn, to the Provincial Gendarme Command from where a sergeant major telephoned Lice District Gendarme Command. Their reply was that the Orhans were not there.

(s) Letter dated 25 June 1999 from the Lice District Gendarme Command to the Lice District Governor

112. A report on Ramazan Ayçiçek in Lice prison was enclosed.

(t) Letter dated 28 June 1999 from the Lice District Governor to the Kulp District Governor

113. Custody records of Lice District Gendarme Command for April–July 1994 were submitted.

(u) Letter dated 28 June 1999 from the Lice District Governor to the District Provincial Governor

114. The Lice District Gendarme Command report on Ramazan Ayçiçek was enclosed. The Adjudicator's decision (see paragraph 117 below) later detailed this report: the village of Ramazan Ayçiçek had been evacuated as a result of terrorist incidents and his whereabouts were not known.

(v) Letter dated 6 July 1999 from the Adjudicator of the Kulp District Governor to the Diyarbakır District Governor

115. The Adjudicator's report on his investigation was enclosed.

(w) The Adjudicator's investigation report dated 6 July 1999

116. The investigation had taken place between 7 June and 5 July 1999 and the list of documents attached were dated 7 June-July 1999.

117. The Adjudicator concluded that it was unnecessary to prosecute and make a decision. In the first place, the Orhans' names did not appear in the custody records of Zeyrek gendarme station or of Kulp or Lice District Gendarme Commands. Secondly, there were contradictions between the applicant's statement of 2 May 1995 and that of 23 June 1999 regarding whether he had personally seen his brothers being taken away. Thirdly, the *muhtar* was not a direct witness; he had been told by the villagers that the Orhans had been taken away. Fourthly, the applicant had said in his statement of 2 May 1995 that Ramazan Ayçiçek was in Şanliurfa prison but investigations indicated that he was not, his village had been evacuated due to terrorist activity and his whereabouts could not be established. There was a doubt whether the applicant had met Ramazan Ayçiçek. Fifthly, there existed no document, information or record in Kulp District Gendarme Command as to any operation conducted in April-July 1994.

(x) Decision of Kulp District Administrative Council, Kulp District Governor of 7 July 1999

118. The investigation file and the report were examined. In the absence of any information, documentation or witnesses indicating that the Orhans had been detained by military units or by the Lice or Kulp District Gendarme Commands, the Council decided unanimously not to prosecute pursuant to the law concerning the prosecution of civil servants.

4. Material concerning Ramazan Ayçiçek

(a) Letter from Lice District Gendarme Command to Lice District Governor dated 23 November 1999

119. Ramazan Ayçiçek had been arrested for possession of a weapon and for aiding and abetting the PKK. He had been referred to a public prosecutor on 10 June 1994. The Lice Boarding School had no gendarme

personnel stationed there for detention purposes. It was not possible for Ramazan Ayçiçek, who was detained by Lice District Gendarme Command on 7 June 1994, to have seen the Orhans as claimed as Lice Boarding School was 2 kilometres away from that command.

(b) Extract of the custody room records of Lice District Gendarme Command

120. Entry No. 43 refers to Ramazan Ayçiçek as having been detained on charges noted above. The fourth column notes that his detention was ordered by District Gendarme Command and the fifth column notes his detention on 7 June 1994 at 16.00. The entry spills over to a second line, noting that he departed from Lice District Gendarme Command on 10 June 1994 at 14.00 as he had been referred to a public prosecutor.

(c) The investigation file concerning Ramazan Ayçiçek

121. The incident location establishment report dated 7 June 1994 referred to a gendarme operation on that day, to their finding a rifle on Ramazan Ayçiçek's premises and to his arrest that day. In his statement of 9 June 1994 he stated that he had assisted the PKK and inherited the rifle.

122. In contrast, the "minutes of interrogation" dated 10 June 1994 noted that the applicant stated that he had been apprehended during a military operation around 22 May 1994 and taken "to District". It was there he had made the above-described statement which he denied, pointing out that he had been made to sign it without knowing what was in it. On 17 August 1995 the State Security Court decided that there was insufficient evidence of aiding and abetting the PKK and ordered his release. However, the illegal possession of firearms issue was retained for trial.

5. Gendarme Custody records: Zeyrek gendarme station together with Lice and Kulp District Gendarme Commands

123. The Lice records are dated February–August 1994, those of Zeyrek are dated March – November 1994 and those of Kulp are dated February-December 1994. There is no reference to the Orhans in those records.

6. Military operations records for the province of Diyarbakır May 1994

124. This is a one-page table-style document summarising 30 military operations in the Diyarbakır province which took place from 2 to 31 May 1994. No operations are noted for 6 May 1994, but many are recorded for the day before and after. Operations also took place on 23, 24 and 25 May 1994. No reference is made to Deveboyu, Çağlayan or to Gümüşsuyu, although two operations are noted as having taken place both in the Kulp (10 and 16 May) and Lice (11 and 13 May) districts.

E. Documents submitted by the Government in another application

125. Upon the request of the Delegates in the above-cited *Çiçek case,* the Government furnished plans of Lice Boarding School. These constituted three pages, each page covering a floor in one building.

F. The oral evidence

126. The Delegates heard the testimony summarised below.

1. Salih Orhan

127. He was born in 1955. Selim and Hasan Orhan are his elder and only brothers and Cezayir Orhan his eldest son. In April and May 1994 he was living in Deveboyu. Cezayir lived with him and he and his brothers each owned a house in that hamlet.

128. On 20 April 1994 300-400 troops arrived, passed the village and set up tents just above the village. The following day their provisions arrived by military vehicles. The villagers helped the soldiers take the provisions to their tents either on their backs or by using pack animals. The applicant first said that the force was made up of both gendarmes and regular infantry soldiers, he later affirmed that they were "ordinary soldiers" and then clarified that he could not distinguish between commandos and gendarmes. In any event, they were all dressed in military uniform. He did not know any of them. From time to time the village council and the *muhtar* visited Zeyrek gendarme station where Ahmet Potaş said that the soldiers were from the Bolu regiment.

129. After a week or two, the soldiers went on operation towards the Bingöl-Muş border. In the afternoon of 6 May 1994 they returned and surrounded the village. Using the loudspeaker of the village mosque, they called to villagers to gather at the mosque. The villagers assembled quickly. The commander said that the villagers had one hour to take their belongings after which the village would be burned and evacuated.

130. The villagers returned to their houses immediately, but as they were going back, the soldiers began burning the houses. A commander and a platoon of soldiers was assigned to each neighbourhood in the village. The applicant managed to move some of his family's possessions outside but soon after they started burning his house using hay he had stored. His house, those of his brothers, the majority of their possessions and most of the houses in Cağlayan village were burned.

131. The soldiers stayed in the village that night and left in the morning.

132. The following morning, 5 or 6 villagers (including Selim Orhan and the village *muhtar*) went to Zeyrek gendarme station to ask permission to stay to harvest the crops. Ahmet Potaş said that Kulp District Gendarme Commander had the authority to decide such things but he did not. At Kulp,

Ali Ergülmez gave them permission. They therefore stayed in make-shift shelters in Deveboyu until the harvest.

133. Some villagers started to repair their houses in the hope that they would be allowed to return someday. Every three or four days, soldiers went by the hamlet and proceeded up into the hills.

134. On 24 May 1994, in the early morning, the soldiers came back to the village. The applicant had gone to a work in a field some distance away. Most of the men had already left for the city, but his brothers and his son remained and were working on the houses. When a group of soldiers came into the village, the remaining men hid in the fields. The soldiers asked about the Orhans and took their identity cards. Everyone including the children were there, although it was a coincidence that Cezayir was there as he had just come home the previous day (for a religious holiday) from his work as a plasterer with a sub-contractor at Malatya İnönü University.

135. When they said that they would take the Orhans, the women implored them not to, but they responded that the commander was farther up the hill waiting, that the Orhans had to give a statement and that they were needed, in any event, as guides. They would be released later. A crowd gathered. The applicant saw, from where he was in the field, the soldiers accompanied by the Orhans going up the hill towards Gümüşsuyu. The women and children followed them for approximately 50-100 metres imploring the soldiers not to take the Orhans.

136. The hamlet of Gümüşsuyu is 15 minutes away from Deveboyu on foot on a rough tractor track. The villagers in Gümüşsuyu have fields in Deveboyu and so the villagers of both hamlets knew each other. The applicant's aunt, Hacı Hevina, lives in Gümüşsuyu. The soldiers arrived in Gümüşsuyu on foot with the Orhans. That evening, the applicant went to Gümüşsuyu to see if he could get some news from the villagers. He met Mehmet Emre who told him that, when the soldiers initially came, they had left their vehicles in Gümüşsuyu and then walked from there to Deveboyu. On the way back through Gümüşsuyu, they brought the Orhans where they were seen taking a rest by numerous villagers who took water to them. The Orhans appeared to be in good condition and were smoking cigarettes. Mehmet Emre and an old villager, Hacı Mehmet, spoke to the Orhans. Hacı Mehmet also asked the soldiers what the Orhans had done and the commander threatened to take him into custody instead. The Orhans were put into military vehicles and taken away in the direction of Zeyrek.

137. The next morning the applicant set out for Zeyrek Gendarme station. On the way, he met Mehmet Emre and Hacı Mehmet coming back from the station. They had seen Ahmet Potaş who had told them that the Orhans had passed through with soldiers the previous evening and had been taken to Kulp. The applicant then went to Zeyrek station with the village *muhtar* and other villagers, to ask what had become of the Orhans. Ahmet Potaş said that they had apparently been taken to Kulp.

138. On about 6 June 1994 the applicant went to Kulp District Gendarme Command where Ali Ergülmez said that there were 50 operations taking place, that he did not know which unit had taken the Orhans, that he would make enquiries and that the applicant should return in couple of days. The applicant went back many times, but obtained no news of the Orhans.

139. He identified the petitions he then lodged with the Kulp Chief Public Prosecutor, with the State Security Court prosecutor in Diyarbakır and with the State of Emergency Governor in June and July 1994.

140. Some time later the applicant was in Diyarbakır and bumped into "Eşref". He said he had been detained with the Orhans in Kulp District Gendarme Command for one night. The following morning they were taken by military vehicle to Lice "Central District" station where all were detained for three nights. Eşref was released and the Orhans remained. Subsequently, the applicant could not trace Eşref.

141. About a month after the Orhans were detained, Ramazan Ayçiçek sent word to the applicant to contact him. The applicant was allowed to see him in Lice prison as he told the prison officers that Ramazan Ayçiçek was a close acquaintance and that he was asking about his brothers and his son. Ramazan Ayçiçek told him that he and the Orhans had been detained in Lice Boarding School for a few days after which he was transferred to prison. The Orhans remained in the school. The applicant confirmed that Ramazan Ayçiçek had said nothing about the Orhans' condition. The applicant understood that Ramazan Ayçiçek was transferred from Lice to Şanilurfa prison, served his year sentence and was released after which he and his family left home. The applicant had been unable to trace him. This was the last information received by the applicant about the Orhans.

142. The applicant then returned to Lice District Gendarme Commander, who said that no one by the name of Orhan was in custody in his command.

143. The villagers stayed in Deveboyu for the harvest and left in late 1994. They spent the summer in make-shift shelters.

144. Having been summoned, on 2 May 1995 the applicant made a statement to a prosecutor of the Diyarbakır State Security Court. The prosecutor, the applicant and a typist were in a room. The prosecutor got very angry and shouted, wondering how the State could kidnap people and make them disappear and saying that people get the punishment they deserve. The applicant said that he was upset, grieving and sad. He broke down, became confused and completed the statement in that state. He did not remember giving a statement in which he said that he did not wish to take proceedings before the Commission.

145. He submitted copy photographs of the Orhans to the Delegates. He had never been asked for photographs or for the names of those in Deveboyu who had witnessed the Orhans being taken away. He had never received any information from the authorities about their investigations into the destruction of Deveboyu or the disappearance of the Orhans.

146. The applicant explained the sorrow and hardship suffered by him and the Orhans' families: their continuing wish was to find the Orhans, whether dead or alive.

2. Adnan Orhan

147. The witness was born in 1982. He is a nephew of the applicant and the eldest son of Selim Orhan. He lives in Diyarbakır with his family. He and his brothers and sisters were agricultural workers.

148. In April 1994 the witness was in the first year of junior high at Lice Boarding School, situate on the outskirts of Lice about 15-20 minutes walk from the centre of town. He had joined the school about 5 months earlier. There were roughly 10-12 classes with 70 to 80 students in each class. There were three buildings in the school complex each of three stories. One was the dormitory building, the second contained the classrooms and the third was the military housing. The complex was a large area surrounded by barbed wire with soldiers on guard duty and completing identity checks at the entrance. At the Delegates' request, the witness roughly sketched the three buildings in the complex.

149. The witness was shown the plans of the boarding school submitted by the Government in the above-cited *Çiçek* case. The plans covered the three floors of the classroom building. The classrooms were in the upper part of the building and the refectory *(yemekhane*) was on the lower floor (with a library and administrative offices). The plans did not therefore cover the military building.

150. The military building was not separated by any form of barrier or fencing from the other school buildings. While the witness could have gone to that building, he never had or wanted to. Soldiers were based permanently at the military building and soldiers also came and went frequently. Military vehicles (tanks, panzers and the like) would also come and go and were parked just next to the military housing. The witness did not recognise specific uniforms. All he knew was that they were soldiers. About 15-20 days before the witness left the school, he saw soldiers in blue berets for the first time. One day when the witness was sitting with his friends, he saw military vehicles entering the military building. The witness had wondered about certain persons in those vehicles in civilian clothing. Since he was not used to seeing civilians among soldiers, he asked a friend who said that the civilians had probably been taken into custody.

151. In April 1994 he was home from school in Deveboyu as he was ill. A few days later, about 250-300 soldiers arrived and went up the hill. They were dressed in the usual green uniforms. While he initially said they had blue berets, he confirmed later that he was not sure.

152. A few days after that, they returned to Deveboyu. They came into the village, set the houses on fire, including his home, and there was smoke everywhere. He was in his father's house when they set it on fire. The

soldiers surrounded the houses and two or three went inside to start the fire although he was not sure precisely how they started it. His family managed to throw some belongings outside before the fire caught. Other houses also burned and, while the smoke made it difficult to see precisely how many burned, his own and the applicant's houses burned. Having waited for the houses to burn, the soldiers left the village. Thereafter, he and his family lived in the garden under bits of nylon and plastic awaiting the harvest.

153. One or two weeks later, around sunrise, the soldiers came down the hill towards the tents of the applicant, Selim Orhan and of Hasan Orhan, which tents were next to each other. The soldiers stopped at the witness' family's tent which was the first in their path. The commander saw the witness' father (Selim), called him over (not by name) and asked for his identity card. The soldiers asked what other men were there and his father told them that his uncle (Hasan) and cousin (Cezayir) were. As ordered, his father called them over and their identity cards were taken. The Orhans were told that they were all needed as guides.

154. The witness went for a moment behind his nylon tent and, when he came out, the soldiers had started taking the Orhans up the hill. His brothers, his mother, his aunt and her children started to beg the soldiers not to take them away. His aunt even brought the Koran over and asked the soldiers, for the love of the Koran, not to take them away. But the soldiers did not pay any attention and said that they were not to be followed. The Orhans would be released, whereas if the villagers followed bad things could happen. More pleading led to the commander calling a more superior officer on the radio. The former said that he had “these people” and queried whether he should bring them in. The superior commander ordered the soldiers to bring the Orhans. The soldiers and the Orhans went up the hill on foot in the direction of Gümüşsuyu and the villagers went back. The hill is so high that the group was visible from the village and, indeed, from some of the families' fields where the applicant had gone that morning.

155. The witness never saw his father again. He could not return to school, something he enormously regretted: since he was the oldest surviving male in his family and had become the head of the family, he had to work to support his family.

3. Mehmet Can

156. The witness was born in 1971 in Deveboyu. He is the son-in-law of Selim Orhan. Since 1984 he had been a migrant worker, never spending more than a month per year in Deveboyu. The witness' father had a house in Deveboyu. The applicant, Selim Orhan and Hasan Orhan had houses close to each other in Deveboyu. Cezayir Orhan lived with the applicant.

157. In 1993 Güldiken and Derecik villages were destroyed. His brother-in-law and sister-in-law had lived in Güldiken and after its destruction they stayed with Selim Orhan for a while. Rabia and Mahmut Kaya stayed with

his father for a year after Derecik had been destroyed. Those villagers said that the soldiers had burned the villages because they had been accused of assisting and harbouring terrorists. The witness had considered that it was just a matter of time before the same would happen in Çağlayan, so he and his wife moved to Diyarbakır. He lived in Diyarbakır at the relevant time.

158. One evening in April 1994, when he returned home from work, his wife told him that their village had been destroyed by soldiers. The next morning he got up early, hired a lorry and went to the village. He went through a military check point in front of Zeyrek gendarme station where he saw innumerable tanks, panzers and other military vehicles.

159. From there to the centre of Çağlayan, the witness saw a large number of soldiers (300-400) walking on the side of the road in the direction of Zeyrek. They were 20-30 metres apart from each other and streached all the way from Zeyrek to Çağlayan. They were infantry soldiers and commandos. He did not remember seeing gendarmes among them. They were wearing the uniform of regular soldiers. The uniforms of the commandos are a lighter green, those of the infantry are a darker green and those of the gendarmes are the same as the infantry's except that the gendarmes have insignia on the neck and shoulders which are different to the infantry. He did not recall seeing those insignia or any distinctive caps. They had the usual weapons, G3s, MG3s, regular bombs and so on. The witness was able to recognise uniforms and weapons as he had done his military service in the infantry in Çukurca near the Iraqi border.

160. When he arrived, the village, even the mosque, was in ruins. He could only stay a couple of hours as he had to get back to work. Smoke was still coming out of some of the houses including his own father's house.

161. The witness did not see Selim or Hasan Orhan that day as he was concentrating on his own family's problems. He did not actually see the houses of the applicant, Selim Orhan or Hasan Orhan that morning: their houses were about 10 minutes walk away and were surrounded by an orchard. However, he saw smoke coming from the area in which those houses were located.

162. The witness' father, his uncle and cousins told him that the previous day the soldiers had come, had gathered everyone in front of the mosque and had told them that they had one hour to vacate their houses and take their belongings, as they were going to burn the village. The villagers had gone back to their houses and saw smoke coming from the mosque before the soldiers began burning their houses. They had rescued whatever they could but most things had burned.

163. He loaded his lorry with as much of the rescued belongings of certain families as he could and took them to Diyarbakır.

164. Two or three days later the witness returned to Deveboyu. The houses were not habitable. The villagers had built shelters out of cloth, rags, trees and leaves in the vineyards, gardens and orchards, on the road, by the

river and outside the village on the hills. He also saw Selim and Hasan Orhan and spoke to their families. They told him the same things as his own family about how the village had been burned. The witness tried to persuade Selim Orhan to leave but he wanted to stay as they had permission to do so until the harvest. On 8 May 1994 the witness went back to Diyarbakır.

165. 10-15 days after the village had been burned, his wife told him that they had taken the Orhans. The following morning, he and his wife went to the village. They stayed two or three days. His mother and father said that the soldiers had taken the Orhans. His wife did not stop at his father's house but went to Selim Orhan's house directly. Selim Orhan's wife and family said that the soldiers had come down the hill in the morning and had taken away the heads of their households, that they had gone after the soldiers all the way to the hill, that a soldier had even slapped a little girl who was following and that the soldiers did not let them follow any further.

166. During this stay in Deveboyu, the witness met certain villagers from Gümüşsuyu: Hacı Mehmet, an old man of 70-75 years old, Mehmet Emre and the latter's mother, Hacı Hevina. They confirmed the following: Numerous villagers saw the soldiers arrive with the Orhans to Gümüşsuyu. They gave them water, they rested 5-10 minutes and the Orhans were taken directly to Zeyrek station. The villagers of Deveboyu were informed that evening. That evening or the next morning, some villagers (including Mehmet Emre and Hacı Mehmet) went to Zeyrek gendarme station to enquire about the Orhans and they were told by Ahmet Potaş that the Orhans had been taken to Kulp. On their way back from Zeyrek, they met the applicant and told him what they had learned.

167. No village had been burned west or north of Çağlayan. But east and south countless villages burned within a short time including the hamlet of Gümüşsyu and the village to which it was attached, Elmalı. Demirli was also burned as were the hamlets of Karpuzlu (Kafan and Saban).

4. Mehmet Emre

168. The witness was born in 1965. He is the applicant's cousin. In April and May 1994 he lived in Gümüşsuyu a hamlet of about 45 houses. The applicant, Selim Orhan and Hasan Orhan, whom he knew as he had fields in Çağlayan, each had a house in Deveboyu at that time.

169. He initially appeared to be confused as to the order of events (the destruction of Çağlayan and the passage of the soldiers and the Orhans through Gümüşsuyu). However, he later confirmed and re-affirmed that the burning of Çağlayan took place 15-20 days before he saw the Orhans with the soldiers in Gümüşsuyu.

170. In 1994 the witness saw smoke coming from houses in Deveboyu. He asked certain military officers who were in the village at the time what was going on and if an operation was to be carried out in Gümüşsuyu so that they might leave beforehand. They said that they had come to protect the

villagers. The villagers in Deveboyu later said that soldiers had set their houses on fire.

171. The day after Deveboyu was burned, Gümüşsuyu was also burned by soldiers. The soldiers initially checked identity cards and then gave the villagers one hour to remove their belongings before burning their houses. Lighter items were removed but the heavier items burned. The witness asked the soldiers why they were burning the village and was told that it was to prevent the PKK from coming to seek shelter, that they would all be re-located by the State and that anybody caught in the village would be killed. The villagers obtained permission, from their local gendarme station, to stay in the village until the harvest, until which time they lived in shelters. The witness thought that they were regular soldiers, as opposed to gendarmes, because of their uniforms. The *muhtar* of Elmalı village had told the witness that the soldiers were from Bolu, the witness presuming that the *muhtar* had obtained this information from the gendarme station.

172. Approximately 15-20 days after Gümüşsuyu had been burned, soldiers arrived on foot with the Orhans. Practically all of the village saw them. The party stopped to rest near the village cemetery. They gave water and cigarettes to the Orhans and to the soldiers. The Orhans were free to move around and were not handcuffed. The witness, Hacı Mehmet and other villagers talked to them. The Orhans were upset saying that the soldiers had taken them. They asked for help and for their families to be told. Hacı Mehmet, an old man, enquired why the Orhans had been taken. They responded that they would take him instead. Having rested for 30 minutes approximately, the soldiers put the Orhans into a military vehicle and left. That evening, the applicant came to Gümüşsuyu and they told him what they had seen. The following morning Hacı Mehmet and the witness asked Ahmet Potaş at Zeyrek gendarme station what he knew. He told them that the Orhans had been taken to Kulp. On the way back from the station they met the applicant and filled him in.

173. The villagers left Gümüşsuyu in the autumn. The State never re-located them as the soldiers had promised.

5. Ahmet Potaş

174. The witness, born in 1965, was Commander of Zeyrek gendarme station during the relevant period until July 1994. His station was attached to Kulp District Gendarme Command so Ali Ergülmez was his commander.

175. Çağlayan was attached to his station, he went there from time to time and knew it well. Çağlayan and Gümüşsuyu were about 15-20 minutes walk apart. He knew the *muhtar* of Çağlayan personally, as he did almost all of the *muhtars*. He did not know Salih, Selim or Hasan Orhan personally. He did not recall that there had been a particular terrorist problem in Çağlayan at that time.

176. The witness initially said that he did not remember receiving a complaint or hearing about Çağlayan being burned by the security forces. He then accepted that the applicant had made this allegation to him in July 1994 when the Kulp Chief Public Prosecutor requested him to secure the applicant's attendance. However, since the prosecutor had already been seized of the matter, he had no power to investigate. He could not recall whether he had been to Çağlayan after May 1994. Nor could he recall ever seeing any village in the region burned.

177. He could not recall any complaint about the Orhans, or about any other three persons, being apprehended by the military and disappearing thereafter. He had no recollection of Hacı Mehmet or Mehmet Emre from Gümüşsuyu or of any conversation with them.

178. From time to time operations were carried out in the region by units from outside the area, but the gendarmes did not know the identity of the units. When operations were to be carried out in an area under his station's jurisdiction, Diyarbakır Provincial Gendarme Headquarters would give the co-ordinates to Kulp District Gendarme Commander (Ali Ergülmez) who would inform the witness orally so that gendarmes from his station would avoid the operation area. He was not informed of the identity of the relevant military unit and did not know if the District Gendarme Commander would have known. Since he was never informed of the identity of the units, he did not recall any operation on 20 April 1994 of the Bolu unit and he could not therefore have given this information to the *muhtar* of Çağlayan as alleged.

179. If military units from outside the region apprehended someone on operations, they had to surrender that person to the gendarme station in whose jurisdiction they operated. Therefore, if someone was apprehended within the jurisdiction of Zeyrek gendarme station, the detainee would be handed over to Zeyrek or directly to Kulp from where the person would be transferred to a public prosecutor as necessary. There was a small custody room at Zeyrek station (a capacity of 2 or 3 three people for 1 or 2 hours only). Generally, a military unit would have contact with Kulp District Gendarme Station rather than with his station. He did not recall any such contact even from units he saw passing his station and no detainees were ever handed over to him. If he had had any such contact, the witness said he would have remembered it.

180. Gendarme custody records would indicate by whom and on whose orders the person had been taken into custody. Accordingly, he confirmed that an examination of the Zeyrek custody records of the relevant period would demonstrate whether anyone had been handed over by the military. All detainees, whether kept in the custody room or elsewhere in the station, were entered in the custody record. The witness identified the custody records for the relevant period from his station. The date noted in that record was the date and time the person had been first taken into custody. Detainees for whom there was no space in the custody room, in

Kulp District Gendarme Command would be detained in the cafeteria of the same building. The fact that that station's facilities were full would not have been a concern of the military units.

181. He did not recall ever being asked any questions by a prosecutor about claims concerning the Orhans' disappearance or the destruction of Çağlayan. He had no recollection of taking statements from those villagers.

6. Ali Ergülmez

182. The witness was born in 1956. He was Kulp District Gendarme Commander from 1993 to 1995. Zeyrek gendarme station was attached to his station. His command was attached to Diyarbakır Provincial Gendarme Headquarters.

183. The witness knew Çağlayan: it was attached to Zeyrek gendarme station. Çağlayan was about 50 kilometres from Kulp and was one of the 52 villages in the Kulp region. At the relevant time there was a terrorist threat in the entire Kulp area, in all its villages and hamlets without exception. The PKK would threaten the locals to obtain what they wanted. He agreed that the security forces did not have any problem with the local population, but rather with the PKK. He could not recall the applicant or how many houses were in Çağlayan.

184. He confirmed that there was a commando regiment at Bolu at the time. Diyarbakır Provincial Gendarme Headquarters would let him know, generally orally, that an operation was to be carried out in a particular manner and place between certain dates. They were told not to go out on mission between those dates. No details, not even the name of the military unit, would be mentioned. Any gendarme records of those military operations would be retained by the Provincial Gendarme Headquarters. He did not recall if there had been any major troop movements in Çağlayan or indeed in his area in April-May 1994.

185. When informed that it was claimed that Ahmet Potaş had told the *muhtar* that the relevant troops were from Bolu, he stated that he did not believe that Ahmet Potaş would make such a statement and suggested a direct confrontation between him and the people making such an accusation, a suggestion of confrontation he repeated during his evidence.

186. He did not recall a visit from the *muhtar* on 7 May 1994. Nor did her recall any allegation that Çağlayan had been burned or giving permission to stay until the harvest. He insisted that between 1993 and 1995 innumerable incidents took place in Kulp every day and that it was not possible for him to recall each one.

187. He did not recall any complaint, by the applicant or anyone, about the Orhans' apprehension on 6 May 1994 or any complaint of the applicant to that effect. It was many years ago and it was not possible for him to remember every complaint by every person to his station: during his two years at Kulp District Gendarme Command, he spoke to an average of 100

or 150 people each day. 1993-1995 was a period of intense terrorist activity, everyone believed himself to have been wronged by the terrorists and everyone asked for help.

188. He did not recall ever being contacted by any prosecutor asking about the disappearance of the Orhans and he denied any knowledge of any investigation despite being shown the letter of 9 May 1997 from the Kulp District Governor to the Provincial Governor (see paragraph 84 above). He did not recall Ümit Şenocak, let alone an investigation conducted by that officer, even when it was pointed out to him that Ümit Şenocak had been his deputy in Kulp District Gendarme Command at the relevant time.

189. There were custody facilities in Kulp District Gendarme Command. Those facilities accommodated 2 to 3 persons. People who were taken into custody for any offence were first searched and were then referred to a doctor for a medical examination and report. When the medical report issued, the detainee was entered into the custody register of the custody room by the commander of the station himself. After the interrogation was completed they would be referred to the public prosecutor. A medical report for the public prosecutor would be obtained and the detainee's valuables would be handed over to the gendarmes against a receipt. He considered his custody record to be sound. If the military apprehended someone requiring detention, they would contact Provincial Gendarme Headquarters

190. He initially confirmed that a person is entered into the record when he or she is put into the custody room. On further questioning he clarified that, where there is no place in the custody room and the person is detained elsewhere in the building, the detainee will still be entered in the custody record. However, the witness had never come across such a situation during his career.

191. He agreed that, generally speaking, if he had heard a complaint that a village had been destroyed by security forces, he would have thought that the PKK were responsible and that the complaint was a propaganda exercise designed to blame the security forces. He cited one example, from the innumerable similar incidents he recalled, of İslam in the Kulp area which everyone knew had been burned down by the PKK in or around 1992 but which fire was attributed to the State. Was it not true that the PKK was asserting itself and its struggle? Had the PKK not attained that goal by killing 30,000 innocent people? Had the PKK not intimidated the people? The PKK, the witness asserted, had burned down thousands of villages and killed thousands of people.

192. This witness classed the applicant's accusations as “unfounded libels” aimed solely at safeguarding his interests. He fixed at 1,000 to 1 the possibility of the State destroying a village. As to the security forces detaining citizens, killing those persons and then disposing of the bodies, the witness exclaimed that he would not even give that possibility a 1,000 to 1 chance, as the military would never do such a thing.

7. Ümit Şenocak

193. The witness was born in 1966. He was temporarily assigned to Kulp District Gendarme Command from approximately mid-July to November 1994. During that period he deputised for his superior officer, Ali Ergülmez, for approximately 20 days. Otherwise he was on operations.

194. The witness emphasised this peripheral connection to Kulp District Gendarme Command to explain his small involvement in, and limited memory of, the Orhan investigation. He identified a letter from him to the Kulp Chief Public Prosecutor dated 22 July 1994: this was the sum of his memory of the Orhans' complaint. He clarified that his confirmation therein, that the Orhans had not been detained by "our command", included the stations attached to Kulp District Gendarme Command. Most of the investigation for that letter had been completed before he came to Kulp or had been done by subordinate officers while he was there. Accordingly, he had no idea of the concrete steps that had been taken during the investigation to which his letter referred. Indeed the letter he signed on 22 July 1994 would have been written by a subordinate officer and he may not even have looked at the letter of 8 June 1994 to which his own letter referred. He was unable to say who decided on what was "the necessary investigation" or whether some guidance would or could be sought or received from the relevant prosecutor's office. He could not describe the further investigative measures which his letter of 22 July 1994 promised.

195. The witness pointed out that an operations' unit does not normally apprehend people. They only do so when there has been a particular incident as, for example, someone found to be carrying a firearm without a licence. Once apprehended, a suspect is handed over to the relevant District Gendarme Command and that station that takes the suspect into custody.

196. He initially stated that one could tell from the custody records whether the gendarme or military had initially apprehended someone. However, on examining those records before the Delegates, he concluded that the custody records would not, in fact, yield such information.

197. He did not recall ever encountering any military units from outside the region carrying out an operation in the area during his time in Kulp. He too confirmed that District Gendarme Command is notified orally for security reasons of the co-ordinates of the area where a military operation would take place and asked to stay away.

198. Contrary to Ali Ergülmez, the witness would not even accept a 1000 to 1 possibility of a military unit being responsible for a village being burned and for persons disappearing: in his view it was simply not possible. In 1994 there was a great deal of PKK activity in the Kulp and Lice area and the witness had seen burned villages when out on operations in that area. He was of the view that the PKK was responsible, relying on his personal experience of two village raids by the PKK.

8. Kamil Taşçı,

199. The witness was born in 1966. He was Kulp Central Gendarme Station Commander at the relevant time. Since his station was attached to Kulp District Gendarme Command, Ali Ergülmez was his superior officer.

200. The Kulp central and district gendarme stations were located in the same building. Therefore there was only one custody room in that building, with a capacity of two or three detainees, and that facility was attached to and under the authority of the central station. Any excess detainees were detained somewhere inside the Central Gendarme Station's building but would still be entered in the custody records. Ultimate responsibility for keeping the records lay with the witness as station commander but if he was not there his two assistants would complete the record.

201. The witness knew Çağlayan by name only and had never been there. He could not recall whether there had been an operation in April and May 1994 around Çağlayan involving units from outside the region. There had been many operations in the region and he did not remember the precise dates or areas covered. Since they were never told of the identity of the units (only the area of operation), he could not specifically say whether the Bolu unit had been there. His gendarmes did not carry out joint operations with units from outside the region. Operation units were generally based outside populated areas.

202. He did not know where troops were based in Lice. He knew that Lice had, like every district, a boarding school. He had never heard that military units from outside the region billeted in Lice Boarding School. He had never heard any allegation about the burning of Çağlayan village on 6 May 1994 by soldiers. His only recollection of the claim that the Orhans had been apprehended by a military unit and disappeared was a rather vague memory of correspondence with the prosecutor's office in Kulp. The witness also confirmed that, if someone had been apprehended by a military unit on operation, it would be obliged to hand over the detainee to the gendarmes: such units do not have custody facilities or power to detain.

203. Persons apprehended and sent by Zeyrek station to the Kulp District Gendarme Command would not have come through his hands as the latter command would have passed on the detainee to the public prosecutor unless the suspect could only be brought the following day to the prosecutor, in which case the central gendarme station would detain the suspect in its custody room until the following day.

204. Having initially confirmed that the custody record would not indicate whether it had been the gendarme or the military who initially apprehended an individual, in cross-examination he confirmed that the latter information could be gleaned from the custody records in the “reasons for arrest” section. He then reverted to his initial position, adding that what is important is the reason for apprehension and not who apprehended the person. Therefore he agreed that some of the persons listed in his custody

records could have been handed over to him by military units from outside the region without the custody record showing that. He also agreed that this meant that the custody record would not provide any documentary proof to an individual who later alleged that the arresting forces had ill-treated him before handing him over the gendarmes. While he suggested that a further investigation would allow the identification of the unit who had initially apprehended a person, the witness could not refer to any specific records which would assist any such investigation.

205. Having confirmed that he was required to fill in all the columns in a custody record, the witness accepted, when shown the records from his station for the relevant time, that no date of release had been entered for 6 detainees. He accepted that it was not possible therefore to say with certainty from the custody records when those 6 persons had been released. It could be possible to verify if someone had been sent to the public prosecutor by checking the investigation report completed by the gendarme, sent with an individual to the public prosecutor and retained in the public prosecutor's records and, if someone had been released, by checking the hospital records as a detainee is medically examined on release.

9. Şahap Yaralı

206. The witness was Lice District Gendarme Commander from 1993 to 1995, a station situated on the outskirts of town near Lice Boarding School. Attached to his station was a central gendarme station (which was in the same building and commanded by Hasan Çakır) and four outlying stations. There was one set of custody facilities which was shared between the district and central stations and located in the central station.

207. He did not recall any allegations that soldiers were responsible for the burning of Çağlayan or of the disappearance of the Orhans. He did not know Çağlayan. He did not remember ever being involved in any way in the investigation into the Orhans' alleged disappearance or any correspondence to or from Lice District Gendarme Command about any such investigation.

208. He confirmed that large-scale military operations were conducted, *inter alia*, by the Bolu regiment in the Lice, Kulp and Şırnak districts many times in the course of the two years he served there. He could not recall any specific operation.

209. His command would be informed of the co-ordinates of a planned operation a day or half a day before its execution by the Provincial Gendarme Headquarters. They would be advised not to enter the operation area. If the operation had been planned in advance, that information would have been passed on in writing on a pre-printed form called a preliminary report form (whereas an emergency operation was notified orally only). A preliminary report form was not given to privates for confidentiality purposes: it would have been received by the person in charge of the

information centre and brought to the witness. If alerting subordinate units was required, he would have done so by telephone.

210. He also confirmed that military units from outside the region were billeted at Lice Boarding School and that he knew the school. The students, teachers, military units and other employees were housed in the same buildings inside the grounds of the school. There was a security check on entering the grounds of the regional boarding school. There were three separate but almost identical buildings each with three floors. The first building contained classrooms, the second had student dormitories, bathroom facilities and a refectory (*yemekhane*).

211. The third building had been built with classrooms. He initially said that that building had been unused before the military units began to be billeted there. However, he later gave evidence that the third building had not been empty before it housed troops as its ground floor was used by school administrative staff and by students, with the second and third floor classrooms being used as dormitories by the military (a battalion of 700-800 people maximum). The third building was therefore jointly used by the military, students and teachers.

212. He initially testified that the sketch of the school submitted by the Government in the above-cited *Çiçek* case represented either of the first two buildings used by the students. He was subsequently unsure about that and then confirmed that those plans appeared to represent the shared third building.

213. The soldiers had higher ranks so it would have been professional discourtesy to pry into what was going on in Lice Boarding School. However, "judicial duties" were an exception to that rule. Accordingly, if a person was apprehended during an operation by a military unit (if that unit encountered someone already suspected of an offence or someone caught committing a crime), that person had to be handed over to the gendarmes. A delivery record was prepared and placed on the investigation file compiled by the gendarmes and transferred to the public prosecutor. That record would include a note of where and when the detainee was originally apprehended.

214. It was not possible to determine from the Lice Central Gendarme Station Command custody records whether a person noted therein had been originally detained by the military or by the gendarmes unless – and it was not obligatory - a note was entered to that effect in the column entitled "Comments". Therefore, the identity of the gendarme or military unit which has originally apprehended an individual could not be gleaned from the custody records as was the case, for example, for entry No. 43 (Ramazan Ayçiçek).

215. In 1994 the capacity of the Lice Central Gendarme Station custody room was 7-8 persons. Any detainees in excess of this number would be put in a suitable place in the central building, a guard would be posted with

them and they would be entered in the custody record if they were to be detained. However, certain persons who were not free to leave (as they were being retained pending questioning) would not necessarily be entered in the custody record unless and until a decision had been made to detain them.

10. Hasan Çakır

216. The witness was born in 1962. He was Lice Central Gendarme Station Commander between August 1992 and July 1994. His station was attached to, and in the same building as, Lice District Gendarme Command and Şahap Yaralı was therefore his superior. The witness did not know Çağlayan: it was not attached to his station.

217. He knew Lice Boarding School as he had been there on several occasions. When reminded that his evidence in the above-mentioned *Çiçek* case suggested that there was only one building, he confirmed that there were, in fact, 3 large buildings.

218. However his evidence as to the layout of each building changed many times throughout his evidence, the last version being as follows.

219. The first building contained the refectory (*yemekhane)*, the library and administration offices together with classrooms on the first and second floors. The second building contained only dormitories for the students.

220. The third had also been built as a teaching building with classrooms. He could not remember whether there was a library but confirmed that there was a refectory (*yemekhane*) on the ground floor from which soldiers could get hot meals. Students could use the canteen (*kantin*) (or a cafeteria - *kafeterya*) on the ground floor where they could buy things. Some administration offices from which teachers would work were also on the ground floor. The second and third floor classrooms were occasionally used as dormitories by the military, and could house a battalion of 700-800 soldiers. He did not agree that it was impractical to have soldiers and students in the same house: some measures were taken but the students and soldiers were on good terms.

221. He was shown the sketch of the school which had been submitted by the Government in the *Çiçek* case. He initially said that those plans related to the first building, he then said he was not sure and later confirmed that, in any event, it was not the third building.

222. He had no authority over, or any function concerning, the military in the boarding school. No gendarmes were based there and no gendarme controls were carried out while the military were there. He agreed that it was possible that a military unit could detain someone in Lice Boarding School without the gendarme knowing.

223. He confirmed that military units from outside the region (including the Bolu regiment) were on operation in his area. All gendarme officers at his level would know when an operation was taking place. They would not know all details, but would know generally from where the unit had come

and where they would go on operation. Prior to such operations, military units were given a list of suspects and if suspects were apprehended during an operation, those persons could be held by the unit until it returned from operation when they would be handed over to the gendarmes.

224. The witness was clear in his evidence that it was not possible to determine from the custody record alone whether the detainee had been initially apprehended by gendarmes or by the military.

225. The witness was reminded that in the *Çiçek* case he was asked to explain why the names of certain persons, who had been noted in the Diyarbakır custody records as having been transferred from the Lice Central Gendarme Station, did not appear in that station's custody records. The explanation given by him in that case was that sometimes the detention room was "humid", the detainees would be kept under supervision outside the detention room and, in such circumstances, they would not be entered in the custody record. He added that persons detained for further investigation or those detained on military charges could be detained outside of the custody room without being entered in the custody records for a few hours, while the relevant procedures were completed, before being handed over to the relevant prosecutor. This meant that the names of certain persons who were not free to leave the station may not have been in the custody record.

11. Aziz Yıldız

226. The witness was born in 1967. He succeeded Hasan Çakır as Lice Central Gendarme Station Commander in mid-July 1994, a post he held for 2 years.

227. Prior to giving evidence, the witness had never heard of allegations about the burning of Çağlayan or the disappearance of the Orhans. He felt it was wrong to discuss such allegations as the armed forces were there for the people and it was inconceivable that any such thing could happen.

228. The witness confirmed that, while he was at Lice, military units from outside the region frequently carried out operations in his area. The Lice District Gendarme Commander (Şahap Yaralı) would inform him orally that operations would be conducted in certain areas, giving him the map co-ordinates of those areas, only sometimes identifying the units. Many units came on operation and sometimes the unit was from Bolu.

229. While he could not remember a specific incident, units were not authorised to detain persons and were required to bring persons apprehended from the operation area to their unit and from there to a gendarme station.

230. He identified his own signature on the Lice Central Gendarme Station custody records from in July 1994. He agreed that the custody records would not indicate who (the military or gendarmes) had initially detained an individual but other gendarme records containing this information would be on the prosecutor's file. If a person was not sent to the

public prosecutor, those additional records were retained in the gendarme station.

231. He also confirmed that persons could be at the gendarme station, not free to go and yet not be formally "taken into custody" and entered in the custody record (when, for example, the investigation documentation could be completed in the space of hours).

232. He further stated that military units were frequently based at Lice Boarding School in vacant rooms. Since it was a period of intense PKK activity in the region, the school was rarely empty of military personnel. Once the military were there, the school was under their jurisdiction and control.

233. The witness had visited the boarding school and said he could therefore guess its approximate structure.

234. When asked why he would therefore visit the school, he initially said that the military occasionally called his district commander when they had apprehended someone during an operation and he would be asked to go to the school for that purpose. On being asked to clarify whether a military unit would therefore take a detainee to the school first before handing them over to the gendarmes, the witness said that he would meet the military on their way to the school and he later added that the military would generally come almost as far as his station to hand over detainees.

235. Indeed it was "impossible" for a military unit to detain persons at the school. When he was informed that his predecessor in Lice Central Gendarme Station (Hasan Çakır) had said that it was possible, the witness responded that there was no point in taking detainees to the school and he had no idea what Hasan Çakır was talking about.

236. The witness remembered three main buildings together with several small staff living quarters. One of the buildings contained classrooms, the second contained the students' refectory (*yemekhane*) and dormitories. The military were billeted in the third building, probably in the rooms originally designed as classrooms. Some of the school's teachers used administrative offices on the ground floor. There was also a place in the basement where teachers, students and soldiers would play table tennis together. The library was also situated in the third building, and there was probably a further refectory (*yemekhane*) for the military in that building. He later confirmed that it was a canteen (*kantin*) that was in the third building where food and even clothes could be sold to both the students and the military.

237. He could not say to which building the sketch of the school submitted by the Government in the *Çiçek* case related.

12. Mustafa Atagün

238. The witness, born in 1949, was a public prosecutor in the office of the Diyarbakır Chief Public Prosecutor.

239. The only recollection he had of, and only involvement in, the allegations of the burning of Çağlayan and of the Orhans' disappearance was a statement he took from the applicant on 2 May 1995 in Diyarbakır and a follow-up letter dated 3 May 1995 to the Kulp Chief Public Prosecutor.

240. Given the location of Çağlayan, the judicial investigation would have been carried out by the Kulp Chief Public Prosecutor. He was not part of that investigation. He took the applicant's statement because of the letter from the Ministry of Justice of 20 April 1995. He was therefore a channel through which the Ministry would direct its requests to the subordinate and competent district prosecutors' offices (in this case, Kulp). The reason he had interviewed the applicant personally was because he had been requested by the Ministry to establish the applicant's wishes and whether the form of authority signed in favour of British lawyers was genuine, and, having done so, to determine what action had been taken in connection with his application. From the interview the prosecutor learned the district to which the complaint related, the scope and kind of complaint in question and what kind of documents were to be requested and from which district. Hence his letter of 3 May 1995 to the Kulp Chief Public Prosecutor.

241. The applicant's statement was taken with a clerk in a busy secretariat room at the Diyarbakır courthouse and not in a separate interview room. The witness followed the standard procedure for such matters: the witness put questions, the applicant answered, the witness listened and dictated to the clerk, who recorded the applicant's evidence as the applicant listened. The witness showed the applicant the form of authority and asked the applicant whether it was his signature, and whether or not he knew what it meant. The clerk typed the applicant's answers dictated in a loud voice by the witness; the witness made sure that the applicant had nothing to add, read the statement to the applicant and all three persons present signed it. The applicant told his story frankly, sincerely and without compulsion and it was accurately recorded in his statement. The witness could not understand why the applicant had later changed his mind.

242. The witness denied having been angry and pointed out that, had he wished to protect the State, he would have left out the applicant's remarks which were critical of the State.

13. Mehmet Yönder

243. The witness, born in 1969, was one of the two prosecutors at the Kulp Chief Public Prosecutor's office (January 1995 – October 1996).

244. The two prosecutors in Kulp divided the work between them. When the prosecutor dealing with the applicant's complaint was on holiday, he reviewed the file and considered two letters to be necessary: that of 6 April 1995 (to the Lice Chief Public Prosecutor) because no response had been received to his office's letter of 11 July 1994 and that of 16 May 1995 (to the Diyarbakır Chief Public Prosecutor).

245. The witness had reviewed the Kulp Chief Public Prosecutor's file prior to giving evidence and was asked some general questions about the investigation.

246. He initially confirmed that a very detailed investigation had been carried out by both the military and civilian authorities. However, it was then pointed out to him that the report dated 15 May 1997 noted several allegations that the Orhans had been detained by the Bolu regiment and that there was no evidence of any enquiry of that regiment on the file and he was asked whether this was a satisfactory state of affairs. He responded that there was "clearly a deficiency in the investigation". As to why there were two investigation reports on file (one dated 15 May 1997 signed by Kamil Gündüz and one dated 6 July 1999 signed by Yunus Güneş), the witness pointed out that the President of the District Administrative Council may have chosen, in his discretion, to re-launch the investigation with a second investigator if he found the first investigation inadequate.

247. He also confirmed that a visit to Ramazan Ayçiçek in Lice prison by someone not a relative would have required the competent public prosecutor's permission.

248. Finally, the witness confirmed that it was a matter of discretion as to how much guidance a prosecutor would give to the gendarmes asked to conduct an investigation. Sometimes no guidance was given. He also confirmed that, as a matter of general practice, it would be normal to communicate to the complainant the prosecutor's decision on lack of jurisdiction.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. State of emergency

249. 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. By 1996 the violence had claimed the lives of 4,036 civilians and 3,884 members of the security forces. Since 1987 ten of the eleven provinces of south-eastern Turkey have been the subject of emergency rule.

250. 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). Decree no. 285 (of 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 public security forces and the Gendarmerie Public Peace Command are at the

disposal of the regional governor. Decree no. 430 (of 16 December 1990) reinforced the powers of the regional governor.

B. Criminal law and procedure

251. The Turkish Criminal Code makes it a criminal offence, *inter alia*:
– to deprive someone unlawfully of his or her liberty (Article 179 generally, Article 181 in respect of civil servants);
– to subject someone to torture and ill-treatment (Articles 243 and 245);
– to commit unintentional homicide (Articles 452,459), intentional homicide (Article 448) and murder (Article 450);
– to commit arson (Articles 369, 370, 371, 372), or aggravated arson if human life is endangered (Article 382);
– to commit arson unintentionally by carelessness, negligence or inexperience (Article 383); and
– to damage another's property intentionally (Articles 526 et seq.).

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

If there is evidence to suggest that a death is not due to natural causes, members of the security forces who have been informed of that fact are required to advise the public prosecutor or a criminal court judge (Article 152). By Article 235 of the Criminal Code, any public official who fails to report to the police or a public prosecutor's office an offence of which he has become aware in the exercise of his duty is liable to imprisonment. A public prosecutor who is informed by any means whatsoever of a situation that gives rise to the suspicion that an offence has been committed is obliged to investigate the facts in order to decide whether or not there should be a prosecution (Article 153 of the Code of Criminal Procedure). A complainant may appeal against the decision of the public prosecutor not to institute criminal proceedings.

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

254. If the suspected offender is a civil servant and if the offence was committed during the performance of his duties, the preliminary investigation of the case is governed by the Law of 1914 on the prosecution of civil servants, which restricts the public prosecutor's jurisdiction *ratione personae* at that stage of the proceedings. 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 relevant local administrative council (for the district or province, depending on the suspect's status). That council will appoint an Adjudicator to conduct the preliminary investigation, on the basis of which the council will decide whether to prosecute. These councils are made up of civil servants, chaired by the governor. If a decision to prosecute has been taken, it is for the public prosecutor to investigate the case. A decision not to prosecute is subject to an automatic appeal to the Supreme Administrative Court.

255. By virtue of Article 4, paragraph (i), of Legislative Decree no. 285, the 1914 Law on the prosecution of civil servants also applies to members of the security forces who come under the governor's authority.

256. If the suspect is a member of the armed forces, the applicable law is determined by the nature of the offence. Thus, if it is a "military offence" under the Military Criminal Code (Law no. 1632), the criminal proceedings are in principle conducted in accordance with Law no. 353 on the establishment of courts martial and their rules of procedure. Where a member of the armed forces has been accused of an ordinary offence, it is normally the provisions of the Code of Criminal Procedure which apply (see Article 145 § 1 of the Constitution and sections 9 to 14 of Law no. 353).

C. Civil and administrative liability arising from criminal offences

257. Pursuant to section 13 of Law no. 2577 on administrative procedure, anyone who sustains damage because of an act of the authorities may, within one year after the alleged act was committed, claim compensation. If the claim is rejected in whole or in part or if no reply is received within sixty days, the victim may bring administrative proceedings.

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

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

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

260. However, Article 8 of Legislative Decree no. 430 (of 16 December 1990) provides:

> "No criminal, financial or legal liability may be asserted against ... the governor of a state of emergency region or by provincial governors in that region in respect of decisions taken, or acts performed, by them in the exercise of the powers conferred on

them by this legislative decree, and no application shall be made to any judicial authority to that end. This is without prejudice to the rights of individuals to claim reparation from the State for damage which they have been caused without justification."

261. Under the Code of Obligations, anyone who suffers damage as a result of an illegal or tortious act may bring an action for damages (Articles 41 to 46) and non-pecuniary loss (Article 47). The civil courts are not bound by either the findings or the verdict of the criminal court on the issue of the defendant's guilt (Article 53).

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

THE LAW

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

263. The applicant argued that he has proven that Deveboyu was burned and evacuated, that the Orhans were apprehended and subsequently detained incommunicado by the security forces, that the Orhans have died in detention and that no adequate investigation had been carried out by the authorities. Both the "balance of probabilities" and "beyond all reasonable doubt" burdens of proof have been discharged, although he submitted that the former should apply. The Government maintained that the applicant has not proven his allegations beyond all reasonable doubt, the applicable standard of proof. Indeed given the significant PKK activity in the region at the time, it cannot be excluded that the PKK were responsible for any disappearance of the Orhans or that the Orhans are alive and with the PKK.

A. General Principles

264. The Court recalls its recent jurisprudence confirming the standard of proof "beyond reasonable doubt" in its assessment of evidence (*Avşar v. Turkey*, no. 25657/94, § 282, ECHR 2001). Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. In this context, the conduct of the parties when evidence is being obtained has to be taken into account (Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 65, § 161).

265. The Court is sensitive to the subsidiary nature of its role and recognises that it must be cautious in taking on the role of a first instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case (see, for example, *McKerr v. the United Kingdom* (dec.), no. 28883/95, 4 April 2000). Nonetheless, where allegations are made under Articles 2 and 3 of the Convention the Court must apply a particularly thorough scrutiny (see, *mutatis mutandis*, the Ribitsch v. Austria judgment of 4 December 1995, Series A no. 336, § 32, and *Avşar v. Turkey*, cited above, § 283) even if certain domestic proceedings and investigations have already taken place.

B. Article 38 § 1(a) and consequent inferences drawn by the Court

266. It is important to note that Convention proceedings, such as the present application, do not in all cases lend themselves to a rigorous application of the principle *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 (*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 Government have access to information capable of corroborating or refuting these allegations. A failure on a Government's part to submit such information which is in their hands without a satisfactory explanation may not only give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations, but may also reflect negatively on the level of compliance by a respondent State with its obligations under Article 38 § 1 (a) of the Convention (*Timurtaş v. Turkey*, no. 23531/94 §§ 66 and 70, ECHR 2000-VI). The same applies to delays by the State in submitting information which prejudices the establishment of facts in a case.

267. In this respect, the Court has noted with some concern three matters concerning the Government's response to the Convention organs' requests for documents, information and witnesses.

268. In the first place, having failed to comment on the applicant's request in January 1998 for military operations' records concerning May 1994 for the region, the Government were requested to furnish the documents by letter dated 13 September 1999. Before the Delegates, the Government initially stated that they did not have the operations' records to hand, that they were confidential and therefore difficult to obtain. On the final day of evidence, the Delegates recalled their request for these records. The Government was then reminded of the outstanding records by letters of 28 October 1999 and 13 March 2000. Since the Government's observations of June 2000 made no reference to the outstanding records, the Court sent further written reminders on 14 June and on 4 and 19 July 2000. A single page document was received with the Government's letter of 2 August 2000 citing "clerical errors and communication problems" as the reason for the delay.

269. The Court considers that the communication in February 1995 by the former Commission of the applicant's detailed allegations meant that, from that date, the operations' records became fundamental to the Government's position on the facts of this case. Consequently, the additional delay after these specific requests for the records has not been convincingly explained by the Government's brief reference to clerical errors and communication problems. In addition, the document is rather summary, amounting as it does to a table of one page to describe 30 military operations in the Diyarbakır province between 2 and 31 May 1994. Apart from abbreviated references to the units involved, no details are given as to how many troops were involved, where they were billeted or about the purpose or result of the operations. Moreover, given the Court's findings in the above-cited *Çiçek v. Turkey* case (§ 132) that on 10 May 1994 military units had carried out an operation in Dernek village, Lice District and the fact that the records submitted make no reference to this operation, the Court finds it difficult to avoid the conclusion that the operations records are not complete.

270. Secondly, the Commission requested, in its letter of 10 May 1999, the identity and attendance before its Delegates, of the commander of military operations in the region, allegedly by the Bolu regiment. The Government's response of 9 August 1999 made no reference to the matter. The Commission reminded the Government in letters of 9 August and 13 September 1999. While on the first day of the taking of evidence by the Delegates (October 1999) the Government indicated that it had no information, on the following day they confirmed that "the responsible officer who carried out the operation in the area is General Yavuz Ertürk". The Government added, during the oral hearing before the Court in

May 2001, that General Ertürk was the commander of the Bolu regiment and that he had not been called before the Delegates because he had already given evidence to Delegates in another case (*Akdeniz and Others v. Turkey*, no. 23954/94, judgment of 31 May 2000, unpublished) and had no further information so that there was no point in his repeating before the Delegates, in this case, his previous statements.

271. The Court considers that General Ertürk's identity and evidence would also have been central to the establishment of the Government's position on the facts of this case which, as noted above, were communicated to them in February 1995. However, no explanation has been given as to why this officer could not be identified until October 1999 during the taking of evidence, which delay frustrated any possibility of hearing his evidence. Finally, it was for the Commission, as it is for this Court, to decide whether and to what extent a witness is relevant for its assessment of facts. In this latter respect, the Court notes that the case of *Akdeniz* concerned a military operation at a time (October 1993) and place (Alaca village) different to the operation at issue in the present case.

272. Thirdly, and of even greater importance, on 10 May 1999 the Commission also requested, amongst other items, the identity and attendance before the Delegates of the officer in charge at Lice Boarding School. Since the Government's response of the 9 August 1999 omitted this information, further written reminders were sent by the Commission in August and September 1999. Having indicated to the Delegates in October 1999 that it had no information, the Government was reminded of this outstanding matter in the Commission's and Court's letters of 28 October 1999 and 13 March 2000. The Government's observations of June 2000 made no reference to the matter leading to three further written reminders from the Court in June and July 2000. The Government's letter of 2 August 2000 submitted certain other outstanding information without reference to this matter, leading to further written reminders from the Court in August, September and November 2000. The question remaining unanswered, the Court requested the Government during the oral hearing to explain their failure to submit this information. The Government did not respond to the question.

273. The Court notes that, apart from the brief response to the Delegates, the Government failed to acknowledge, let alone respond to, early and numerous, oral and written requests for the identity of the officer in charge of the military establishment at Lice Boarding School. Clearly this frustrated his attendance before the Delegates. The relevance of his testimony is evident, given the applicant's consistent submissions from the outset that he had been told that the Orhans had been detained in that school.

274. The Court concludes that the Government have not advanced any, or any convincing, explanation for its delays and omissions in response to

the Commission and Court's requests for relevant documents, information and witnesses. Accordingly, it finds that it can draw inferences from the Government's conduct in this respect. Furthermore, and referring to the importance of a respondent Government's co-operation in Convention proceedings (see paragraph 266 above) and mindful of the difficulties inevitably arising from an evidence-taking exercise of this nature (the above-cited *Timurtas* case, at § 70), the Court finds that the Government fell short of their obligations under Article 38 § 1(a) (formerly Article 28 § 1(a)) of the Convention to furnish all necessary facilities to the Commission and Court in its task of establishing the facts.

275. The applicant's complaint also made under Article 38 about being summoned before Mr Mustafa Atagün of the Diyarbakır Chief Public Prosecutor's office has been considered by the Court under Article 34 of the Convention (see paragraphs 403-411 below).

C. The Court's evaluation of the facts in the present case

276. It is not disputed that in April and May 1994 PKK activity was intense in the province of Diyarbakır or that, consequently, large numbers of military units took part in counter insurgency operations in that province.

1. The arrival of troops in April 1994, the burning of Deveboyu on 6 May 1994, the detention of the Orhans on 24 May 1994 and their presence in Gümüşsuyu also on 24 May 1994

(a) the Court's assessment of the parties' submissions and of the evidence

277. The Court considers that the applicant's oral testimony (paragraphs 126-146 above) was convincing in its detail and in its consistency with the many statements he had made over the years (3 November 1994 to the HRA, 2 May 1995 to Mustafa Atagün and 23 June 1999 to the Adjudicator, at paragraphs 25-31, 65-72 and 106-111 above) and with his shorter statements and petitions which related to the Orhans' apprehension (statement and petition of 8 June 1994 to the Kulp Chief Public Prosecutor together with his petitions of 16 June and 6 July 1994 to the Chief Public Prosecutor of the State Security Court and to the Emergency Regional Governor, respectively, at paragraphs 32-33 and 48-49 above).

278. The Court finds persuasive his direct and detailed evidence on the initial arrival of the troops on 20 April 1994 near Deveboyu and on the burning of the hamlet on 6 May 1994. Although his earlier statements varied somewhat on the question of whether he had seen, from a field where he was working, the Orhans being brought up the hill towards Gümüşsuyu by soldiers on 24 May 1994, his oral testimony that he had witnessed this was clear and credible in its detail and it was to some extent backed up by

Adnan Orhan. Again, while his earlier statements varied as to the precise persons with whom he spoke in Gümüşsuyu on the evening of 24 May 1994, his oral evidence as to the information he received on that date in Gümüşsuyu about the Orhans passing through with the soldiers was entirely consistent with the later oral and direct evidence of Mehmet Emre.

279. Finally, the applicant's oral evidence clarified somewhat his earlier statements as to who had gone to Zeyrek and Kulp gendarme stations after the apprehension of the three Orhans and his evidence was again entirely consistent with that of Mehmet Emre.

280. Adnan Orhan also gave testimony noteworthy for its detail and clarity (paragraphs 147-155 above). In addition, he gave direct evidence on a number of important matters of fact: he was on sick leave from Lice Boarding School and in Deveboyu when the soldiers initially set up base near Çağlayan; he was in his father's house when the soldiers began burning the village; he saw his own house (that of Selim Orhan) being burned by soldiers and saw those of the applicant and of Hasan Orhan burning; he saw the soldiers initially detain the Orhans; he heard the radio conversation of the soldiers including their commander's request for instructions as to whether the Orhans should be taken; he saw the Orhans being taken by the soldiers on foot up the hill in the direction of Gümüşsuyu; and he saw the women and children of the hamlet follow the convoy pleading for the release of the Orhans.

281. Mehmet Emre's oral testimony (paragraphs 168-173 above) was also clear, detailed and compelling. Importantly, he provided direct evidence on four key issues. In the first place, he described the arrival of a large number of soldiers near Çağlayan prior to the burning of the hamlets of Deveboyu and Gümüşsuyu. Secondly, he saw smoke coming from Deveboyu the day before Gümüşsuyu was also burned. Thirdly, he lived in Gümüşsuyu and spoke to the Orhans when the convoy stopped in Gümüşsuyu: he described how he gave them water and cigarettes, how the Orhans asked for help, how Hacı Mehmet had pleaded for their release but had been threatened with detention himself and how the convoy left in the direction of Zeyrek after about a half an hour. Fourthly, he also gave direct evidence on his visit the next day with Hacı Mehmet to Zeyrek gendarme station where Ahmet Potaş said that the Orhans had been taken to Kulp.

282. Most of Mehmet Can's evidence (paragraphs 156-167 above) about the first and second visit of the soldiers to the village was hearsay as he was not there at the relevant times. Nevertheless, he did arrive 2-3 days after each operation. He spoke to a large number of persons in the village and his indirect evidence was completely consistent with the direct evidence heard from the applicant, Adnan Orhan and Mehmet Emre. He was also the only witness capable of identifying the type of soldiers (infantry and commando units) who were still in the area (on the road between Çağlayan and Zeyrek) when he first arrived in Çağlayan in early May and he gave a detailed

description of the relevant uniforms. His evidence as to the burning of the village can be considered direct since smoke was still rising from some houses when he arrived in early May. He did not, however, indicate in evidence that he had gone to Kulp District Gendarme Command with the applicant after the apprehension of the Orhans, whereas the applicant's statement of 23 June 1999 appears to indicate that he did.

283. In contrast, the Court considers that the motivation of Ahmet Potaş (paragraphs 174-181 above) and his superior, Ali Ergülmez (paragraphs 182-192 above), while giving evidence, was transparently exculpatory. Although Ahmet Potaş professed to remember little of the events in question, the Court finds it difficult to believe that he could recall absolutely nothing of relevance. On the one hand, he confirmed that he was the commander in a local gendarme station (Zeyrek) to which Çağlayan village was attached, that he knew Çağlayan village well, that he got on well with the villagers and that he knew the *muhtar* of each village personally. On the other hand, he said that he could not remember significant events or matters: whether there had been a PKK problem in Çağlayan, whether Çağlayan had been burnt down by the security forces, whether complaints had been made about its burning, whether complaints had been made directly to him by the *muhtar* about three villagers having been detained by the security forces or whether he had gone to Çağlayan after it had been burned down. Indeed, he could not even remember if any villages had been burnt down in his area during his time as commander of that station.

284. Similarly Ali Ergülmez appeared set on denying any recollection of the matters put to him. He went so far as to deny recognition of the name of the person who was his deputy in Kulp District Gendarme Command when the name was put to him (Ümit Şenocak) and any recollection of an investigation into the Orhans' disappearance despite the Kulp Chief Public Prosecutor's contact with Kulp District Gendarme Command in 1994 and 1995, despite his having personally signed a letter about the matter on 23 September 1994 and despite his having been appointed as Adjudicator in the second investigation by the District Administrative Council. Indeed, he simply would not countenance any suggestion of security force involvement as alleged, putting at less than 1000 to 1 the chances of village destruction being carried out by security forces and at even less than 1,000 to 1 the chances of such forces abducting villagers: he agreed that he considered such allegations likely to be PKK propaganda. Moreover, he said that he did not recall any major operations in April-May 1994 in his area, whereas the military operations' records now submitted indicate 30 operations in the province in May 1994 including two in Kulp.

285. In such circumstances, the Court does not find these officers' alleged inability to recollect the events of which the applicant complains constitutes any, let alone sufficient, rebuttal of the applicant's allegations.

286. Moreover, only two brief statements were taken from the villagers of Çağlayan by the authorities (from Hasan Sumer and the *muhtar* of Çağlayan at paragraphs 56, 81 and 98). However, their direct evidence is entirely consistent with the applicant's testimony about the Orhans' initial apprehension and about the subsequent visit to Zeyrek gendarme station.

287. Furthermore, the Government's denial that there was any military operation in Çağlayan is weakened by the inferences drawn by the Court from their delays in identifying both the commander of military operations and the military units so operating and in disclosing operations' records for that period and region, records the Court has found to be summary and incomplete.

288. The Court therefore finds that it has no reason to doubt the testimony of the applicant, Adnan Orhan, Mehmet Emre and Mehmet Can whose accounts were clear, credible and consistent.

(b) The Court's consequent findings of fact

289. The applicant and his brothers (Hasan and Selim Orhan, both born in 1954) had houses and land in Deveboyu. Cezayir Orhan (born in 1977 and son of Selim) was a builder and plasterer, working, at the relevant time, at Malatya İnönü University. His father's house remained, nevertheless, his home in Deveboyu where he was on holiday at the relevant time.

290. On 20 April 1994 a large military convoy established itself close to the village of Çağlayan. It is likely that they were infantry and commando units. It was not possible to identify these soldiers as coming from the Bolu regiment as alleged, but that regiment conducted operations around that time in the region.

291. The soldiers left “up the hills” towards the Bingöl Muş border on operation. On their return on 6 May 1994, they gathered the villagers in front of the mosque, giving them one hour to clear their houses. Beginning with the mosque, the soldiers began burning the houses in the village almost immediately including the houses of the applicant, Hasan Orhan and Selim Orhan which were located in Deveboyu hamlet. The applicant managed to remove only some of his possessions before his house burned. The soldiers ordered the evacuation of the village in three days and left.

292. On 7 May 1994 the soldiers burned the hamlet of Gümüşsuyu. On the same day the applicant, Kamil Ataklı (the village *muhtar*) and Selim Orhan went to see Ahmet Potaş the commander of Zeyrek gendarme station and they informed him of the destruction of the village, asking if they could stay to harvest the crops. Ahmet Potaş sent them to Kulp where they spoke to Ali Ergülmez (Kulp District Gendarme Commander) on the same day. He gave the villagers permission to stay at the village until the harvest.

293. On 24 May 1994 the soldiers came back to the village. The majority of the remaining men were either in the fields or went there on sight of the soldiers, but the Orhans were in Deveboyu repairing their

houses. The soldiers told the Orhans that their commander wanted them and that, in any event, the soldiers needed them to act as guides. The Orhans objected, as did many women and children from the village including Adnan Orhan who followed the convoy as it left, but the Orhans were obliged to accompany the soldiers. The applicant saw, from the field where he was, the convoy leave up the hills in the direction of Gümüşsuyu.

294. That evening, the soldiers arrived with the Orhans in Gümüşsuyu where they stopped for about 30 minutes. Many villagers saw the convoy and some of the villagers (including Mehmet Emre and Hacı Mehmet) gave water and cigarettes to the Orhans and spoke to them. The Orhans asked for help. The convoy moved off in the direction of Zeyrek.

295. The applicant went to Gümüşsuyu the same evening and spoke to a number of villagers there including Hacı Havina, Mehmet Emre and Hacı Mehmet who confirmed the sighting of the Orhans with the soldiers.

296. On 25 May 1994 Mehmet Emre and Hacı Mehmet went to Zeyrek gendarme station to complain to Ahmet Potaş about the apprehension and the latter told them that the Orhans had been taken to Kulp. They passed this information on to the applicant whom they met on their way back from Zeyrek station. The applicant and the village *muhtar* went on the same day to Zeyrek Gendarme station where Ahmet Potaş gave them the same information. The applicant then went to Kulp District Gendarme Command, along with other villagers from Deveboyu including Hasan Sumer, Suleyman Nergiz and Huseyin Can, and complained about the apprehension of the Orhans to Ali Ergülmez. The latter said that he had no information about the incident. The applicant returned to Kulp to repeat his request for information on a number of occasions, but to no avail.

297. The applicant stayed to harvest his crops, but he was then obliged to leave the village in late 1994.

298. In conclusion, the Court finds it established that the houses and certain of the possessions of the applicant, Selim Orhan and of Hasan Orhan were deliberately destroyed by security forces on 6 May 1994 and that their village had to be subsequently evacuated. It is also found to be established that the Orhans were last seen alive in Gümüşsuyu hamlet on the evening of 24 May 1994 while in the hands of the State's security forces.

2. The detention of the Orhans thereafter

299. The applicant maintained that that he was told by Ramazan Ayçiçek and by "Esref from Inkaya District" that the Orhans had been subsequently detained in a Kulp gendarme station overnight and then in a Lice gendarme station for a number of days before being detained in Lice Boarding School. The Government denied that the Orhans had been detained.

(a) the Court's assessment of the parties' submissions and of the evidence

300. The applicant immediately and constantly maintained (statements of 22 August 1994, 3 November 1994, 2 May 1995 and 23 June 1999) that the Orhans had been taken to Kulp and that in or around a month after the Orhans had been apprehended Ramazan Ayçiçek, then in Lice Prison, told the applicant that he had been detained with the Orhans in Lice Boarding School. In contrast, the first indication of the applicant's claim about Esref is in his statement to Yunus Günes in June 1999.

301. Having boarded for six months in Lice Boarding School prior to May 1994, Adnan Orhan provided important direct evidence as to the layout of the school complex which he sketched for the Delegates. He confirmed the presence of three buildings including a separate army barracks, that detained persons were brought there from time to time and that the plans of the school submitted by the Government in the above-cited *Çiçek* case did not, in fact, relate to the military building.

302. None of the gendarme custody records submitted contained any entry relating to the Orhans. However, Ramazan Ayçiçek's investigation file shows that he claimed (his interrogation of 10 June 1994) that he also had been apprehended by the security forces at the end of May 1994 and the relevant gendarme custody records do not mention him until 7 June 1994. This would not be inconsistent with his being detained in Lice Boarding School by the security forces before being handed over to the gendarmes on 7 June 1994.

303. The Court finds the testimony of the relevant gendarmes strikingly evasive and demonstrative of significant sensitivity about, in particular, military activities in Lice Boarding School. In addition, their evidence reinforced this Court's previous findings concerning the inaccuracy of gendarme custody records (see, for example, the above-cited *Çiçek* case, at §§ 136-137).

304. Kamil Taşcı had, for example, some difficulty in explaining certain gaps in the Kulp Central Gendarme Station custody records, for which only he and his two assistants were responsible. In agreeing in cross-examination that one could not tell from his custody records by which unit (military or gendarme) a detainee had been originally apprehended or by which date six detainees had been released, he clearly contradicted his earlier and clear evidence to the contrary. His evidence that he was not aware that military units (namely, at least a battalion of 700-800 men) were billeted in Lice Boarding School was difficult to believe and unconvincing.

305. Ümit Şenocak's avoided answering specific questions by saying that he was mostly out on operations while he was in Kulp. However, that position is difficult to reconcile with his later declaration that he could not recall ever encountering a single military unit from outside the region on operation in the area, even though the operations' records now submitted list 30 operations in the Diyarbakır province alone in May 1994, including two

in the district of Kulp. He went on to distance himself completely from the investigation and conclusions described in his own letter of 22 July 1994 to the Kulp Chief Public Prosecutor. It was, he claimed, simply not possible that the security forces acted as the applicant alleged: those allegations were PKK propaganda, a view he based on his own experience of two attacks on villages.

306. Şahap Yaralı confirmed that there were military operations in the region at the relevant time and that such units would be based in Lice Boarding School complex. Although he stated that there were three buildings in that complex, his evidence was clearly reluctant, confused and contradictory as to the layout of the complex. He initially confirmed that the plans of the school submitted in the above-cited *Çiçek* case were not of the military building, he was then unsure and he then testified that maybe they did refer to the military building. He unconvincingly insisted that the third military building was also shared with school personnel.

307. The evidence of Hasan Çakır as to the layout of Lice Boarding School appeared just as vague, imprecise and unpersuasive as that of Şahap Yaralı. At best his detailed evidence in the present case as to the layout of the school complex rendered his evidence on the same point in the *Çiçek* case economical to the point of being misleading, given that the allegations of detention in the school were similar in both cases. While his last description, during his oral evidence in the present case, of the layout of each building in the complex was relatively comprehensive, at the same time he claimed to be unsure to which building the plans submitted by the Government in the *Çiçek* case related; after initially confirming that they related to one of the school buildings and then being uncertain, he finally accepted that the plans did not, in fact, refer to the military building. He did accept, consistently with his evidence in the *Çiçek* case, that if the military wanted to detain someone in Lice Boarding School, the gendarmes would not necessarily know about it.

308. Aziz Yıldız began his evidence by stating that Lice Boarding School was "available for detention of individuals because there was lots of room" and that he would go to the school from time to time to pick up detainees from the security forces. On further questioning, he unpersuasively changed this evidence to say that he would pick up those persons from the security forces 'on their way to the school' or the military would bring them to his station. He attested to knowing the school complex well, although he could not give precise evidence as to the layout of the military building. He was not even sure whether the plans submitted by the Government in the *Çiçek* case related to the military building or not. Contrary to other witnesses, his evidence left the impression that the taking of detainees by the security forces was not unusual. He was entirely dismissive of the suggestion that the security forces could be responsible for destroying villages.

309. Finally some consensus could be gleaned from the gendarmes' testimony concerning certain relevant matters. Ahmet Potaş, Ümit Şenocak, Kamil Taşcı, Hasan Çakır and Aziz Yıldız all agreed that it was not possible to tell from gendarme custody records whether a detainee had been initially detained by the military or not. Although Ali Ergülmez disagreed, Şahap Yaralı and Hasan Çakır confirmed (consistently with their evidence in the *Çiçek* case) that, for various reasons, it was possible that an individual could be held in a gendarme station, not being free to go, without being entered in the custody record. Aziz Yıldız also confirmed this in evidence. These latter three gendarme officers also indicated that they were aware that the Bolu regiment was operating in the area.

(b) the Court's consequent findings of fact

310. In the Court's opinion, it is not possible to establish to the requisite standard of proof where the Orahns were detained after they were seen in Gümüşsuyu in the hands of the security forces.

311. There is some evidence to suggest that the Orhans were detained in Kulp or Lice gendarme stations.

312. The Court has found that Ahmet Potaş said that the Orhans had been taken to Kulp and the applicant claimed that Esrep had been detained with the Orhans in Kulp. The Court has also found the relevant gendarmes' evidence evasive and unconvincing (see paragraphs 283 and 303 above).

313. The Court further considers that the deficiencies established as regards the completion of gendarme custody records means that the absence of the Orhans' names therefrom is not conclusive proof that they did not pass through those stations. In the first place, the Court has, in previous cases, recorded deficiencies mainly relating to the "unsatisfactory and arbitrary distinction" drawn by gendarmes between being taken into custody, in which case an entry is made in the custody records, and being detained for observation and/or questioning, in which case there will not necessarily be a custody record entry (*Çakıcı v. Turkey* [GC], no. 23657/94, § 105, ECHR 1999-IV, and the above-cited *Çiçek* case, at §§ 137-138). This practice was confirmed by the evidence of three gendarme officers in the present case. The reliability of custody records is further undermined by the fact that those records will not show whether one was initially apprehended by military forces or not (paragraphs 204 and 309 above). Their accuracy is also reduced by the failure observed in the present case to note in the custody records the date on which a number of detainees were released from gendarme custody (see paragraph 304 above).

314. There is further strong evidence to suggest that at some stage the Orhans were detained at Lice Boarding School.

315. It seems probable that, despite the denials of the gendarme witnesses and the absence of any custody record relating to the school, persons taken into detention by military units were, on occasion, detained at

the school before being transferred to Lice Central Gendarme Station. This was established by the Court in the *Çiçek* case by direct evidence of villagers who had been detained there. Support for this view came also from the evidence of Adnan Orhan in the present case (paragraphs 38, 150 and 301 above). Ramazan Ayçiçek's statement during interrogation is not inconsistent with his being detained with the Orhans in the school.

In addition, the evasiveness and contradictions in the evidence of the gendarme witnesses on the subject of the school is, in the Court's opinion, demonstrative of considerable sensitivity about the use of the school by the military. Indeed, Aziz Yıldız initially said, before he changed his evidence, that he would go to the school to pick up detainees and Hasan Çakır agreed that the military could detain persons there without the gendarmes necessarily knowing about it. Consistently, the gendarme witnesses were clear that they exercised no control whatsoever over the activities of the military at the school or elsewhere. The Court's impression from the evidence is that the military was largely unaccountable for what occurred in the school. Importantly, the Court must draw a negative inference from the unexplained failure by the Government to provide, pursuant to the numerous requests of the Commission and Court, the name of the officer in charge of the military establishment at Lice Boarding School.

316. Nevertheless, the fact remains that the only evidence that the Orhans were in fact detained in Kulp or Lice Gendarme stations or at Lice Boarding School is hearsay. No further information about Esref was provided to the Court and neither he nor Ramazan Ayçiçek appeared as a witness before the Delegates. This indirect evidence is, despite the strong suspicions to which the evidence gives rise, insufficient to enable the Court to conclude beyond all reasonable doubt that the Orhans were detained in the above-noted gendarme or military establishments. The fact that those investigating authorities did not take Ramazan Ayçiçek's statement when he was still traceable (namely, in a State prison) is considered below under Article 2 of the Convention in the context of the adequacy of the investigations carried out.

317. Accordingly, while the Court finds that the Orhans were last seen in the hands of soldiers in Gümüşsuyu, it cannot conclude beyond all reasonable doubt as to the precise location of their detention thereafter, whether in Lice or Kulp gendarme stations or in Lice Boarding School.

3. The ill-treatment of the Orhans in detention

318. The Court encounters the same evidential difficulties in establishing the ill-treatment of the Orhans implied by the applicant's earlier accounts of Ramazan Ayçiçek's conversation with him. Indeed, the position is even less clear, the applicant contradicting that earlier evidence in his oral evidence to the Delegates when he confirmed that Ramazan Ayçiçek had not said anything about the Orhans' condition.

319. Accordingly, the Court cannot establish, to the requisite degree of certainty, the treatment to which the Orhans were subjected after they were seen in Gümüşsuyu.

4. The complaints made by the applicant to the authorities

(a) about the destruction of Deveboyu

320. The Court has found that the applicant (and other villagers) complained orally about the burning of the village on 7 May 1994 to Ahmet Potaş and to Ali Ergülmez. The Government submitted that, in June 1995, these complaints, including an administrative application for the grant of a house "for those [who are] the subject of terrorist attacks", were under investigation by the relevant authorities.

321. The Court notes that, in addition to the oral complaints, the applicant indicated in his statement of 2 May 1995 that he had applied to the Regional Governor for a new home. However, since the Government have not further elaborated their brief submissions in these respects or produced any evidence of the continuing investigations to which they refer, the Court does not find it established that any specific investigation into the burning of Deveboyu by security forces took place or that, in applying for a new house, the applicant had claimed that his home had been destroyed by terrorists, as the Government alleged.

(b) about the Orhans' disappearance

322. The applicant complained orally about the Orhans' apprehension on 25 May 1994 to Ahmet Potaş and subsequently on a number of occasions to Ali Ergülmez. He also lodged a written petition with the Kulp Chief Public Prosecutor (dated 8 June 1994), with the Chief Public Prosecutor of the Diyarbakır State Security Court (dated 16 June 1994) and with the State of Emergency Regional Governor, Diyarbakır (dated 6 July 1994).

323. Although the Government submitted that the security forces were asked and responded that no one was detained, this early submission was without further elaboration, was not repeated in their subsequent oral or written submissions and, importantly, is not supported by any documentary evidence. The Court finds this alleged request of the security forces to be unsubstantiated.

II. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION IN RESPECT OF THE ORHANS

324. Article 2 provides as follows:

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

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

(a) in defence of any person from unlawful violence;

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

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

A. General considerations

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

326. In the light of the importance of the protection afforded by Article 2, the Court must subject deprivations of life to the most careful scrutiny, taking into consideration not only the actions of State agents but also all the surrounding circumstances. Detained persons are in a vulnerable position and the authorities are under a duty to protect them. Consequently, where an individual is taken into police custody in good health and is found to be injured on release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused (see, amongst other authorities, *Avşar v. Turkey*, cited above, § 391). The obligation on the authorities to account for the treatment of a detained individual is particularly stringent where that individual dies or disappears thereafter.

327. Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their

control in detention, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (*Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII; *Çakıcı v. Turkey* [GC], no. 23657/94, § 85, ECHR 1999-IV; *Ertak v. Turkey,* no. 20764/92, § 32, ECHR 2000-V, and *Timurtaş v. Turkey,* no. 23531/94, § 82, ECHR 2000-VI).

B. Whether the Orhans can be presumed dead

328. The applicant complains under Article 2 of the Convention that, after the Orhans' apprehension by the security forces, they disappeared and must have died in detention. The Government denied these allegations.

329. In the above-cited Timurtaş v. Turkey judgment, the Court stated as follows (at §§ 82-83):

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

330. The Court considers that there are a number of elements distinguishing the present case from cases such as Kurt v. Turkey (judgment of 25 May 1998, *Reports of Judgments and Decisions* 1998-III, § 108), in which the Court held that there were insufficient persuasive indications that the applicant's son had met his death in detention. Üzeyir Kurt was last seen surrounded by soldiers in his own village, whereas the Orhans were last seen being taken away to an unidentified place of detention by authorities for whom the State is responsible. There were, in addition, few elements

identifying Üzeyir Kurt as a person under suspicion by the authorities: in the present case, there is some direct evidence (from Adnan Orhan, see paragraphs 41 and 154 above) that the Orhans were wanted by the authorities. In the general context of the situation in south-east Turkey in 1994, it can by no means be excluded that an unacknowledged detention of such persons would be life-threatening (*Timurtaş v. Turkey,* cited above, § 85 and the *Çiçek v. Turkey*, cited above, § 146). It is to be recalled that the Court has held in earlier judgments that defects undermining the effectiveness of criminal law protection in the south-east during the period relevant also to this case, permitted or fostered a lack of accountability of members of the security forces for their actions (*Cemil Kılıç v. Turkey*, no. 22492/93, § 75, ECHR 2000, and *Mahmut Kaya v. Turkey*, no. 22535/93, § 98, ECHR 2000). This lack of accountability is particularly marked in the present context, the evidence being that the gendarmes knew little of the detail of the military's activities on operation and that they exercised no control over the military and their operational activities.

331. For the above reasons, and taking into account that no information has come to light concerning the whereabouts of the Orhans for almost 8 years, the Court is satisfied that the Orhans must be presumed dead following an unacknowledged detention by the security forces. Consequently, the responsibility of the respondent State for their death is engaged. Noting that the authorities have not provided any explanation as to what occurred following the Orhans' 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 their death is attributable to the respondent Government (*Timurtas*, § 86, and *Çiçek*, at § 147, both judgments cited above).

332. Accordingly, there has been a violation of Article 2 on that account in respect of the Orhans.

C. The alleged inadequacy of the investigation

333. The applicant further contended that the investigations undertaken were inadequate rendering ineffective any remedy available in theory. The Government submitted that the investigations were thorough and sufficient: all relevant custody records were requested, all relevant witnesses were interviewed and the relevant authorities were asked whether operations had been carried out in that area. If the resulting responses did not provide any information about a taking into custody and detention of the Orhans by Government forces or agents, that was because they had not been so apprehended or detained.

334. The Court recalls that the obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to “secure to everyone

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

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

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

ECHR 2001-III and *Avşar v. Turkey*, cited above, §§ 390-395). The need for promptness is especially important when allegations are made of a disappearance in detention.

337. The Court finds that the applicant's complaints (see paragraphs 322-323 above) constituted early, detailed, and serious allegations concerning detention of three men by the security forces and their subsequent disappearance. Those allegations were summarised and communicated to the State by the Commission in February 1995.

338. Three investigations were carried out into these allegations.

339. As regards the first, the Kulp Chief Public Prosecutor investigations did not go beyond the confirmations received by him that the Orhans did not appear in the custody records or wanted lists of the Kulp District Gendarme Command, the Diyarbakır State Security Court, the Diyarbakır Public Order Branch Directorate or the Lice District Gendarme Command.

340. The response from the latter is demonstrative of the lack of depth or vigour in this investigation: the specific allegation about the Orhans being detained in Lice Boarding School was raised with the Lice Chief Public Prosecutor in July 1994. No reply was received. No reply was forthcoming to a reminder in April 1995, nine months later. When the Lice Boarding School query was redirected in May 1995 to the Lice District Gendarme Command, the latter simply responded that there was no reference to the Orhans in the *gendarme* custody records. The gathering of this information, together with the taking of the briefest of statements of the applicant (8 June 1994, 22 August 1994 and 23 September 1994), of the *muhtar* and of Hasan Sumer, took over one year. Even if the role of this investigation was limited to establishing whether the matter concerned the gendarmes or the military forces on "administrative duty", the investigation was clearly cursory and was not pursued with the necessary rapidity.

341. Importantly, no attempt was made during this investigation to take Ramazan Ayçiçek's statement when he would have been easily traceable. The Lice Boarding School allegation had clearly been made as early as July 1994 and the State was notified of his identity and allegations at least as early as the Commission's communication of the application in February 1995. It is now accepted that he was detained at least as early as June 1994 and the Government's letter of 6 October 1999 to the Commission confirmed that he had been in Şanliurfa prison until 17 August 1995.

342. The second investigation was pursued by the Kulp District Administrative Council, the purpose being too establish the role of the security forces in the matter. However, the Court has already found that this body cannot be regarded as independent as it is made up of civil servants hierarchically dependent on the governor, an executive officer linked to the very security forces under investigation (Güleç v. Turkey judgment, cited above, §§ 77-82, and *Oğur v. Turkey*, cited above, §§ 85-93). That Council's appointment of Ali Ergülmez as Adjudicator (at the earliest in 1995 when

the Kulp Chief Public Prosecutor transferred the matter), was even more inappropriate given that the applicant's allegation was to the effect that the Orhans had been detained in the Kulp District or Central gendarme stations which were under Ali Ergülmez's command. Moreover, even if any investigation had been commenced by him (and there is no evidence that it was), it simply stopped when he was transferred. The investigation was not revived until May 1997 when the Diyarbakır Provincial Governor's office requested a progress report.

343. This request led to the appointment of a new Adjudicator on 15 May 1997 and his report was completed within a week. Given the serious nature of the allegations, the length of the investigation of the new Adjudicator was disturbingly short. Moreover, his conclusions reveal a cursory examination of the case: he assumed that Çağlayan village had been deserted due to PKK activity, the Adjudicator took his enquiries no further than the applicant, who was not at home in Diyarbakır when called upon, and the Kulp District Gendarme Command custody records. No statements were taken from the many villagers from Deveboyu or Gümüşsuyu hamlets who directly witnessed the events alleged by the applicant. Indeed the Government's observations of September 1997 pointed out that no one had seen the Orhans being taken away by the soldiers. No evidence was taken from Ahmet Potaş or from Ali Ergülmez, to whom the applicant complained directly after the events. No attempt was made to obtain any photographs of the Orhans.

344. Incomprehensibly, given the purpose of this investigation, there is no evidence of any request to the security forces for information concerning those forces' operations at the relevant time in the region or about those forces activities at Lice Boarding School. This omission is sufficient, of itself, to warrant describing this investigation as seriously deficient. When this omission was put to Mehmet Yönder by the Delegates, he responded that there had been “an evident lack” in this investigation.

345. A third investigation was initiated by the letter of 4 June 1999 from the Diyarbakır Provincial Governor to the Kulp District Administrative Council. This was five years after the events in question. At that stage, for example, the Kulp District Gendarme custody records for 1994 had been archived and, as the Adjudicator discovered, Ramazan Ayçiçek could not be traced. As during the second investigation, no gendarmes were interviewed, no photographs of the Orhans were requested, no villagers who witnessed the destruction of Deveboyu or the initial detention of the Orhans were interviewed except for the applicant and the *muhtar* who had already made clear and detailed statements covering the same ground. Indeed, additional eye witnesses were identified to this Adjudicator by the applicant (those who had accompanied him to Kulp District Gendarme Command on 25 May 1994 and Esref) but no attempt was made to take their statements. Despite this, the decision of 7 July 1999 indicated simply that there were no

eye-witnesses. Military operations' records were not requested, the Adjudicator simply noting that there were no documents in Kulp District Gendarme Command concerning operations in April-July 1994.

346. Moreover, the applicant was never informed of the progress of, or decisions taken in, the investigations, although Mehmet Yönder considered that this would have been normal.

347. Finally, the Court observes that certain investigations which had been commenced were left in abeyance and unfinished. By way of illustration, the Court notes that Kulp District Gendarme Station was a crucial starting point in any investigation into the applicant's complaints about the Orhans' disappearance. Ümit Şenocak, the deputy commander in Kulp District Gendarme Command, signed a letter dated 22 July 1994 confirming that the Orhans had not been detained by his command and promising that the search for the Orhans would continue. He confirmed in his oral evidence that he probably did not complete the investigation to which his letter referred but that it was likely his subordinates did so and that they drafted the letter on his behalf. He did not recall having further investigated. It is not surprising therefore that, when Ümit Şenocak moved on from Kulp in November 1994, Kulp District Gendarme station did not continue the investigation as undertaken in his letter of July 1994. Indeed the next involvement of this gendarme station was the appointment, it appears in 1995, of Ali Ergülmez as Adjudicator who was subsequently transferred elsewhere leaving the entire investigation file in abeyance until 1997 when the newly appointed Adjudicator took up the matter.

348. For the reasons outlined above, the Court finds that the investigations carried out into the disappearance of the Orhans were seriously deficient and 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 in respect of the Orhans on this account also.

D. Additional complaints under Article 2

349. The applicant further submitted that the planning of the military operations in the Çağlayan area in April and May 1994 was inadequate and that the recording of detentions during such operations was deficient. The Court considers that it is not necessary, given its conclusions above, to consider the former complaint and has considered the latter complaint under Article 5 of the Convention below.

III. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

A. General principles

350. Article 3 reads as follows:

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

351. The Court recalls, that Article 3 enshrines one of the fundamental values of a democratic society. Even in the most difficult of circumstances, such as the fight against terrorism, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment. No provision is made, as in other substantive clauses of the Convention and its Protocols, for exceptions and no derogation from it is possible under Article 15 (Akşoy v. Turkey judgment of 18 December 1996, *Reports* 1996-VI, § 62, *Dulaş v. Turkey*, no. 25801/94, § 52, ECHR 2001, and Selçuk and Asker v. Turkey judgment of 24 April 1998, *Reports* 1998-II, § 75).

352. The Court further recalls that, having regard to the strict standards applied in the interpretation of Article 3 of the Convention, ill-treatment must attain a minimum level of severity before it will be considered to fall within the provision's scope. The assessment of this minimum is relative and depends on all of the circumstances of the case including the duration of its treatment, the physical or mental effects and, in some cases, the age, sex and health of the individual. The practice of the Convention organs requires compliance with a standard of proof "beyond reasonable doubt" that ill-treatment of such severity occurred (as cited above, Ireland v. the United Kingdom judgment, §§ 161-162, *Dulaş v. Turkey* judgment, § 53, and *Çiçek v. Turkey* judgment, § 154).

B. In respect of the Orhans

353. Relying on the arguments used to support the complaints under Article 2, the applicant maintained that the respondent State is in breach of Article 3 because the Orhans' detention incommunicado for a significant period of time in a manner devoid of the most basic judicial safeguards leads to an irresistible inference of suffering in the nature of acute psychological torture. In addition, the evidence was that they were ill-treated in detention. The Government maintained their denial of the factual basis of the applicant's allegations.

354. The Court recalls that, where an apparent forced disappearance is characterised by a total lack of information, the question of the impact of this on the detainee can only be a matter of speculation (the above-cited *Çiçek v. Turkey* judgment, § 154). In addition, the Court has found that

when the applicants were last seen in the hands of the security forces on 24 May 1994 in Gümüşsuyu they appeared in good health and it could not be found to the requisite degree of certainty that the Orhans were subsequently subjected to ill-treatment. Moreover, the Court recalls that the acute anxiety which must be attributed to persons apparently held incommunicado without official record and excluded from the requisite judicial guarantees, is an added and aggravated aspect of the issues arising under Article 5, and has been considered below in this context (Kurt v. Turkey judgment, cited above, § 115).

355. It concludes that there has not been a violation of Article 3 of the Convention in respect of the Orhans' detention.

C. In respect of the applicant

356. The applicant also complained that the disappearance of his eldest son and only two brothers caused him suffering in breach of Article 3 of the Convention. The Government maintained that there was no credible evidence that the Orhans had been detained as alleged or at all.

357. The Court observes that in the above-cited Kurt case which concerned the disappearance of the applicant's son during unacknowledged detention, it found that the applicant mother had, in the circumstances, suffered a breach of Article 3. It referred, in particular, to the fact that she was the mother of a victim of a serious human rights violation and herself the victim of the authorities' complacency in the face of anguish and distress (at §§ 130-134). The Kurt case does not, however, establish any general principle that a family member of a "disappeared person" is thereby the victim of treatment contrary to Article 3.

358. Whether a family member is such a victim will depend on the existence of special factors which give the suffering of the applicant a dimension and character distinct from emotional distress which may be regarded as inevitably caused to relatives of a victim of serious human rights' violations. 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 members in the attempts to obtain information about the disappeared person and the way in which the authorities responded to those enquiries. The Court would further emphasise that the essence of such a violation does not so much lie in the fact of the disappearance of the family member but rather concerns the authorities reactions and attitudes when the situation is brought to their attention. It is especially in respect of the latter that a relative may claim to be a direct victim of the authorities' conduct (*Çakıcı v. Turkey*, cited above, § 98).

359. In the present case, the Court has found that the applicant's eldest son and only brothers disappeared almost 8 years ago. Like in the Kurt case, the applicant was present and witnessed the Orhans leave the village and go up the hill towards Gümüşsuyu with soldiers. Unlike in the above-cited *Akdeniz* case (see § 102), and apart from his initial oral complaints when he was accompanied by other villagers, the applicant bore the weight of the pursuit of the numerous enquiries and petitions listed above (paragraphs 322-323). Indeed, it notes its conclusions below as to the impact on the applicant of being summoned before the authorities to, *inter alia*, confirm his appointment of British lawyers for his application under the Convention (paragraphs 408-409 below). Moreover, he has never received any information or explanation from the authorities as to what has become of the Orhans and, indeed, the evidence is that he was not even informed of the outcome of the investigations pursued. The Court also considers that the above-noted matters would have had an added impact on any individual who had just lost the security of his home and village as the applicant had.

360. The Court finds that the uncertainty and apprehension suffered by the applicant over a prolonged and continuing period, and to which he attested in his oral testimony, has clearly caused him severe mental distress and anguish constituting inhuman treatment contrary to Article 3. It concludes that the applicant has, therefore, suffered treatment in violation of Article 3 of the Convention in this respect.

D. In respect of the applicant and the Orhans

361. The applicant further argued that the destruction of their homes, village and community amounted, of itself, to treatment of the Orhans and of himself contrary to Article 3. Moreover the absence of any adequate investigation into these complaints constitutes a separate breach of that provision.

362. The Court has found that the applicant witnessed the burning by the soldiers of his home, his village and much of his possessions and the order to evacuate the village. However, even assuming that the Orhans also witnessed these events, the Court does not consider that the particular circumstances are such as would establish, to the required standard of proof, that either the applicant or the Orhans suffered treatment contrary to Article 3 of the Convention in respect of such destruction. In particular, it does not find in the present case distinctive elements concerning the age or health of the applicant or the Orhans or specific conduct of the soldiers vis-à-vis either of those persons which could lead to a conclusion that they had suffered treatment contrary to Article 3 of the Convention (the above-cited judgments of *Dulaş v. Turkey*, § 53-54, and Selçuk and Asker v. Turkey, § 75).

363. Accordingly, the Court does not find that the circumstances of the present case are demonstrative of a violation of Article 3 concerning the destruction of Deveboyu (Akdivar and Others v. Turkey judgment of 16 September 1996, *Reports* 1996-IV, § 91, and Menteş and Others v. Turkey judgment of 28 November 1997, *Reports* 1997-VIII, § 77).

364. As to the complaint about the adequacy of the remedies in these respects, the Court does not consider it necessary to consider this complaint under Article 3, given its examination of the adequacy of the investigations into the presumed death in detention of the Orhans and about the destruction of Deveboyu under Articles 2, 5 and 13 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION IN RESPECT OF THE ORHANS

365. The applicant also submitted that the unlawful and unacknowledged detention incommunicado of the Orhans after their initial detention by the security forces and the inadequate investigations thereafter gave rise to multiple violations of Article 5 of the Convention. The Government reiterated their denial of the applicant's factual allegations.

366. Article 5, to the extent relevant, provides as follows:

> "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."

367. The Court stated in the above-cited Kurt judgment (§ 122) as follows (see also the above-cited Çakıcı, Timurtaş and Çiçek judgments, at §§ 104, 103 and 162, respectively):

"... the fundamental importance of the guarantees contained in Article 5 for securing the right of individuals in a democracy to be free from arbitrary detention at the hands of the authorities. It is precisely for that reason that the Court has repeatedly stressed in its case-law that any deprivation of liberty must not only have been effected in conformity with the substantive and procedural rules of national law but must equally be in keeping with the very purpose of Article 5, namely to protect the individual from arbitrariness (...). This insistence on the protection of the individual against any abuse of power is illustrated by the fact that Article 5 § 1 circumscribes the circumstances in which individuals may be lawfully deprived of their liberty, it being stressed that these circumstances must be given a narrow interpretation having regard to the fact that they constitute exceptions to a most basic guarantee of individual freedom (...)".

368. The Court went on to emphasise in the Kurt judgment (at § 123):

"... that the authors of the Convention reinforced the individual's protection against arbitrary deprivation of his or her liberty by guaranteeing a corpus of substantive rights which are intended to minimise the risks of arbitrariness by allowing the act of deprivation of liberty to be amenable to independent judicial scrutiny and by securing the accountability of the authorities for that act. The requirements of Article 5 §§ 3 and 4 with their emphasis on promptitude and judicial control assume particular importance in this context. Prompt judicial intervention may lead to the detection and prevention of life-threatening measures or serious ill-treatment which violate the fundamental guarantees contained in Articles 2 and 3 of the Convention (...). What is at stake is both the protection of the physical liberty of individuals as well as their personal security in a context which, in the absence of safeguards, could result in a subversion of the rule of law and place detainees beyond the reach of the most rudimentary forms of legal protection."

369. The Court stresses in this respect that the unacknowledged detention of an individual is a complete negation of these guarantees and a most grave violation of Article 5. Having assumed control over that individual, it is incumbent on the authorities to account for his or her whereabouts. For this reason, Article 5 must be seen as requiring the authorities to take effective measures to safeguard against the risk of disappearance and to conduct a prompt effective investigation into an arguable claim that a person has been detained and has not been seen since (the above cited judgments of *Timurtaş*, § 103, and *Çiçek*, at § 164).

370. The Court has found that the Orhans were detained by security forces on 24 May 1994 in Deveboyu and were last seen in the hands of those forces in the hamlet of Gümüşsuyu.

371. In the first place, the Orhans' detention was not logged in the relevant custody records from Zeyrek, Lice or Kulp gendarme stations. No other custody records (for example, from military units) have been produced, or indeed are alleged to exist. Indeed there exists no official trace of their subsequent whereabouts or fate. This fact in itself must be considered a most serious failing since it enables those responsible for the act of deprivation of liberty to conceal their involvement in a crime, to cover their tracks and to escape accountability for the fate of the detainee. In the view of the Court, the absence of data recording such matters as the date, time and location of detention, the name of the detainee as well as the reasons for the detention and the name of the person effecting it, must be seen as incompatible with the very purpose of Article 5 of the Convention (above-cited judgments of *Timurtaş*, § 105, *Çakıcı,* § 105, and *Çiçek*, § 165).

372. Further, certain serious deficiencies have been noted in the practice of recording custody in gendarme stations (see paragraphs 313 above). The first established deficiency is not allowed by domestic law namely, the gendarme practice of detaining persons for various reasons in their stations without being entered in the custody records. The second and third failing further underline the unreliability of custody records as those records will not show whether one is apprehended by military forces and may not show the date of release from the gendarme station. These three deficiencies attest to the absence of effective measures to safeguard against the risk of disappearance of individuals in detention.

373. The Court notes, in addition, its conclusions at paragraph 348 above concerning the inadequacy of the investigations of the applicant's early, consistent and serious assertions about the apprehension and detention of the Orhans by the security forces and their subsequent disappearance (the *Çiçek* judgment, § 167).

374. For all of these reasons, the Court concludes that the Orhans have been held in unacknowledged detention in the complete absence of the most fundamental of safeguards required by Article 5 of the Convention (the *Çiçek* judgment, at § 168).

375. It, accordingly, concludes that there has been a violation of the Orhans' right to liberty and security of person guaranteed under Article 5.

V. ALLEGED VIOLATION OF ARTICLE 8 AND ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION IN RESPECT OF THE APPLICANT AND THE ORHANS

376. The applicant further complained under Article 8 and Article 1 of Protocol No. 1 that the destruction of his and the Orhans' home, property and possessions represented a serious violation of their right to respect for their private and family lives and their homes and of their right to peaceful

enjoyment of their possessions. He also argued that his expulsion from his home, village and community represented a separate and serious violation of his rights under these provisions. The Government disputed that there was any such military operation in Deveboyu as alleged or at all.

377. Article 8 reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

378. Article 1 of Protocol No. 1 reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

379. The Court has found it established that the homes and certain possessions of the applicant and of the Orhans were deliberately destroyed by the security forces. The applicant's house continued to be Cezayir Orhan's home in Deveboyu. In addition, the village had to be evacuated after the harvest. There is no doubt that these acts constituted particularly grave and unjustified interferences with the applicant's and the Orhans' right to respect for their private and family lives and homes. Such acts also amounted to serious and unjustified interferences with the peaceful enjoyment by the applicant, by Hasan Orhan and by Selim Orhan of their property and possessions. No evidence has been offered as regards the property or possessions of Cezayir Orhan in Deveboyu (the above-cited jusgments of Akdivar and Others, § 88, Menteş and Others, § 73, D*ulaş*, § 60, and Selçuk and Asker, § 86). The Court does not find it necessary to consider whether the forced evacuation of the village is sufficient, of itself, to constitute a violation of these Articles.

380. Accordingly, the Court finds a violation of Article 8 and of Article 1 of Protocol No. 1 in respect of the applicant, Selim Orhan and Hasan Orhan and of Article 8 only in respect of Cezayir Orhan.

VI. ALLEGED VIOLATION OF ARTICLE 13 IN CONJUNCTION WITH ARTICLES 2, 3, 5, 8 OF THE CONVENTION AND ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION IN RESPECT OF THE APPLICANT AND THE ORHANS

A. The parties' submissions

381. The applicant complained under Article 13 that neither he nor the Orhans had an effective domestic remedy in respect of the Orhans' disappearance or in relation to the destruction of Deveboyu. The Government referred to the investigations conducted into the applicant's allegations. They also suggested that the applicant could have taken administrative or civil proceedings seeking damages or made a criminal complaint to the public prosecutor, which constituted effective remedies within the meaning of Article 13 of the Convention.

382. Article 13 provides as follows:

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

B. The general principles

383. The Court recalls that Article 13 guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or the omissions of the authorities of the respondent State (Aksoy v. Turkey judgment of 18 December 1996, *Reports* 1996-VI, § 95, and Aydın v. Turkey judgment of 25 September 1997, *Reports* 1997-VI, § 103, and the above-cited Kaya judgment, § 89).

384. In addition, where the relatives of a person have an arguable claim that the latter has disappeared at the hands of the authorities, the notion of an effective remedy for the purposes of Article 13 entails, in addition to the payment of compensation where appropriate, a thorough and effective

investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure (*mutatis mutandis,* the above-mentioned Aksoy, Aydin and Kaya judgments at § 98, § 103 and §§ 106-107, respectively). The Court further recalls that, the requirements of Article 13 are broader than a Contracting State's obligation under Article 2 to conduct an effective investigation into the disappearance of a person at the hands of the authorities (*Kiliç v. Turkey*, no 22492/93, § 93, ECHR 2000-III).

385. The same applies where an individual has an arguable claim that his home and premises have been purposely destroyed by agents of the State (Mentes and Others v. Turkey judgment, cited above, § 89).

C. The Court's assessment

386. As regards the Orhans' disappearance, the Court has found that the applicant's son and two brothers were detained by the security forces, that no record of their subsequent detention has been produced by the authorities and that they can be presumed to be dead (see paragraphs 330-331 above). The Court has also found that the impact on the applicant of the Orhans' disappearance and of his search for them thereafter constituted inhuman treatment. The complaints under Articles 2, 3 and 5 in these respects are therefore clearly "arguable" for the purposes of Article 13 (Boyle and Rice v. the United Kingdom judgment of 27 April 1988, Series A no. 131, § 52, together with the above-cited Kaya and Yaşa judgments, § 107 and § 113, respectively).

387. The authorities thus had an obligation to carry out an effective investigation into the disappearance of the Orhans. For the reasons set out above in the context of Article 2 (see paragraph 348), an effective criminal investigation was not conducted in accordance with Article 13, the requirements of which are broader than the investigation obligations imposed by Article 2 (the above-cited Kaya judgment, § 107 and *Çakıcı* judgment, §§ 108 and 114).

388. As to the destruction of Deveboyu, the Court has found that this disclosed a violation of Article 8 of the Convention and of Article 1 of Protocol No. 1 in respect of the applicant, Selim Orhan and Hasan Orhan and constituted a violation of Article 8 in respect of Cezayir Orhan. These complaints are therefore also "arguable" for the purposes of Article 13 (the above cited judgments of Boyle and Rice, at § 52; Kaya v. Turkey, at § 107, Yaşa v. Turkey, at § 113, and *Dulaş v. Turkey*, at § 67).

389. The Court finds that it has not been established with sufficient certainty that the remedies referred to by the Government (see paragraph 381 above) provided, in the circumstances of this case, any effective prospect of obtaining redress in respect of the destruction of Deveboyu.

390. In the first place, the applicant complained orally about the burning of the village on 7 May 1994 to Ahmet Potaş and to Ali Ergülmez. While, the latter agreed in evidence that any village burning complaint would be serious, there is no evidence that either of these officers instituted any investigation in relation to this complaint (paragraph 320 above).

391. While the Court accepts that it was the Orhans' disappearance rather than the burning of his village which was initially a priority for the applicant, in any event, by February 1995 his application including detailed allegations concerning the burning of Deveboyu had been communicated to the Government. There followed instructions from the Ministry of Justice to the Mustafa Atagün (of the office of Diyarbakır Chief Public Prosecutor) who summoned the applicant (see paragraphs 65-72 above) and took his statement in which the applicant maintained his claim that the village had been destroyed by the security forces. Although Mustafa Atagün sent the statement to the Kulp Chief Public Prosecutor, that was the extent of his involvement and the response of the Kulp Chief Public Prosecutor (letter of 16 May 1995) referred to investigations concerning the Orhans' disappearance only. By July 1995 the Kulp Chief Public Prosecutor had relinquished jurisdiction to the District Administrative Council and there is no evidence that any investigations thereafter dealt with the destruction of Deveboyu by the security forces.

392. Regard must also be had to the situation which existed in south-east Turkey at the time of the events complained of by the applicant, which was characterised by violent confrontations between the security forces and members of the PKK (Mentes and Others judgment, cited above, § 58). In such a situation, as the Court has recognised in previous cases, there may be obstacles to the proper functioning of the system of the administration of justice (the above-cited judgments in Akdivar and Others v. Turkey, § 70, in *Cemil Kılıç v. Turkey*, §§ 71-75, and in *Mahmut Kaya v. Turkey*, §§ 94-98).

393. The Court further recalls that, despite the extent of the problem of village destruction, there appears to be no example of compensation being awarded in respect of allegations that property had purposely been destroyed by members of the security forces or of prosecutions having been brought against them in respect of such allegations (the above-cited judgments of Menteş and Others, § 59, and Selçuk and Asker, § 68).

394. Moreover, the Court has consistently found a general reluctance on the part of the authorities to admit that this type of practice by members of the security forces had occurred (Selçuk and Asker judgment, at § 68) and the gendarme evidence in the present case does not permit a different conclusion. On the contrary, the oral evidence of the gendarmes in the present case only serves to affirm that reluctance: during his oral evidence before the Delegates, Ali Ergülmez put at 1,000 to 1 the chances that the security forces could destroy a village; Ümit Şenocak would not even accept those odds, as he considered that it was not possible that the security forces

would do such a thing and Aziz Yıldız went so far as to suggest that it was wrong even to discuss such an inconceivable allegation.

395. Accordingly, the Court finds that it has not been demonstrated by the Government with sufficient certainty that effective and accessible domestic remedies existed for complaints concerning the destruction of Deveboyu. Having regard to the circumstances in which his, the Orhans' and other villagers' homes were destroyed in Deveboyu, the Court considers it understandable if the applicant and the Orhans would have considered it pointless to attempt to secure satisfaction through national legal channels. The insecurity and vulnerability of villagers following the destruction of their home and village is also of some relevance in this context (Selçuk and Asker judgment, cited above, §§ 70-71).

396. Accordingly, the Court finds that there was no available effective remedy in respect of the presumed death of the Orhans in detention and the destruction of Deveboyu. The Court concludes therefore that there has been a breach of Article 13 in conjunction with Articles 2, 3, 5 and 8 of the Convention and with Article 1 of Protocol No. 1 in respect of the applicant and the Orhans.

VII. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION IN RESPECT OF THE APPLICANT AND THE ORHANS

397. Relying on its submissions concerning the failure by the Government to provide the necessary and relevant information, documents and witnesses in this application, the applicant submitted that he was deprived of the opportunity to prove the true motives of the security forces in destroying Deveboyu and in detaining the Orhans which were discriminatory given his and the Orhans' Kurdish origin. He considered that sufficient evidence, including a significant amount of published material on the position of the Kurds in south-east Turkey, is before the Court in the present and in previous cases to conclude that the motives, or at least the impact of the impugned actions, is clearly discriminatory. The Government maintained their denial of the factual basis of the substantive complaints.

398. Article 14 of the Convention provides:

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

399. The Court notes its findings of a violation of Articles 2, 3, 5, 8, 13 and of Article 1 of Protocol No. 1 in relation to the applicant's complaints about the Orhans' presumed death while in detention and about the destruction of Deveboyu and does not consider that it is necessary also to consider these complaints in conjunction with Article 14 of the Convention.

VIII. ALLEGED VIOLATION OF ARTICLES 18 AND 34 OF THE CONVENTION

400. Article 18 reads as follows:

> "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."

401. Article 34 reads, in so far as relevant, as follows:

> "The Court may receive applications from any person, ... 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."

402. In the first place, the applicant complained that the Government failed to provide necessary and relevant witnesses, information and documents to the Convention organs. The Court has already made certain findings in these respects in the context of Article 38 of the Convention (see paragraph 274 above) and does not consider it necessary also to examine these matters under either Articles 18 or 34 of the Convention.

403. Secondly, the applicant complained under Article 34 about his being summoned to appear before Mr Atagün of the Diyarbakır Chief Public Prosecutor's office, arguing that that constituted a serious interference with the exercise of his right of individual petition guaranteed by Article 34 of the Convention.

404. He submitted that the purpose of the meeting was to question him about his complaint to the Commission and the statement drawn up by Mr Atagün was not an accurate record of what had been said. He explained that Mr Atagün was angry with him, that he was upset and broke down, that Mr Atagün did not re-read his statement to him and that that was why his statement of 2 May 1995 contained the phrases it did concerning his application to the Commission.

405. The Government submitted that the purpose of the applicant's summons to Mr Atagün's office was to question him on his recollection of the Orhans' apprehension and to verify the authenticity of the power of attorney he had signed in favour of English lawyers. As Mr Atagün had explained to the Commission's delegates, this latter step had been necessitated by the fact that in various other cases brought before the Convention organs, statements from applicants and witnesses had been shown to have been forged. They also submitted that there is no evidence that the procedure before, and attitude of, the relevant prosecutor was as alleged by applicant.

406. The Court reiterates that it is of the utmost importance for the effective operation of the system of individual petition instituted by Article 34 that applicants or potential applicants should be able to communicate freely with the Convention organs without being subjected to

any form of pressure from the authorities to withdraw or modify their complaints (the above-cited judgments of Akdivar and Others, § 105; Aksoy, § 105; Kurt, § 159; *Tanrıkulu*, § 130, together with Ergi v. Turkey judgment of 28 July 1998, *Reports* 1998-IV, § 105). In this context, "pressure" includes not only direct coercion and flagrant acts of intimidation but also other improper indirect acts or contacts designed to dissuade or discourage applicants from pursuing a Convention remedy (the Kurt judgment, cited above, § 159). The fact that the individual actually managed to pursue his application does not prevent an issue arising under Article 34: should the Government's action make it more difficult for the individual to exercise is right of petition, this amounts to "hindering" his rights under Article 34 (the above-cited Akidivar and Others judgment, §§ 105 and 254).

407. Furthermore, whether or not contacts between the authorities and an applicant are tantamount to unacceptable practices from the standpoint of former Article 34 must be determined in the light of the particular circumstances of the case. In this respect, regard must be had to the vulnerability of the complainant and his or her susceptibility to influence exerted by the authorities. In previous cases, the Court had regard to the vulnerable position of applicant villagers and the reality that in south-east Turkey complaints against the authorities might well give rise to a legitimate fear of reprisals, and it has found that the questioning of applicants about their applications to the Commission amounted to a form of illicit and unacceptable pressure, which hindered the exercise of the right of individual petition in breach of former Article 25 of the Convention (Akdivar and Others and Kurt judgments, cited above, at § 105 and § 160, respectively).

408. In the instant case, it is not necessary to resolve the dispute as to the precise tone and conduct adopted by Mustafa Atagün when he took the applicant's statement, given the undisputed relevant facts: the police called to the applicant's home in Diyarbakır to summon him before the Diyarbakır Chief Public Prosecutor; he therefore attended in the offices of Mustafa Atagün who took his statement; he was shown a copy of his signed form of authority in favour of his British legal representatives in respect of his application to the former Commission and he was asked to confirm whether he had signed that document or not. Recalling the factors noted in the preceding paragraph, the applicant could, as he testified, have been intimidated and unstabilised by the experience.

409. The Court would emphasise that it is inappropriate for the authorities of a respondent State to enter into direct contact with an applicant even on the pretext of verifying whether an applicant had, in fact, signed a form of authority in favour of legal representatives before the former Commission or this Court. Even if a Government has reason to believe that in a particular case the right of individual petition is being abused, the appropriate course for that Government is to alert the Court and

inform it of their misgivings (*Tanrıkulu* judgment, cited above, § 131). To proceed as the Government did in the present case was, the Court finds, reasonably interpreted by the applicant as an attempt to intimidate him.

410. In addition, the Court finds that an attempt was made by the authorities to cast doubt on the validity of the present application and thereby on the credibility of the applicant. These actions cannot but be interpreted as a bid to try to frustrate the applicant's successful pursuance of his claims, which also constitutes a negation of the very essence of the right of individual petition (*Tanrıkulu* judgment, cited above, § 132).

411. Accordingly, the Court finds that the respondent State has failed to comply with its obligations under Article 34 of the Convention.

IX. APPLICATION OF ARTICLE 41 OF THE CONVENTION

412. 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."

413. The applicant claimed 150,516 pounds sterling (GBP) on his own behalf (should his house not be reconstructed) together with an "uplift"of 50% as exemplary damages. GBP 299,323 each was claimed on behalf of Selim and Hasan Orhan and GBP 279,522 on behalf of Cezayir Orhan together with an added 50% as exemplary damages in each case. Finally, reimbursement of legal costs and expenses in the sum GBP 40,800.52 was also requested.

414. The claims in pounds sterling were based on conversion rates applicable in August 2000 when the just satisfaction claim was first made and interest at 8% was requested from that date. Any damages awards were to be made in pounds sterling (due to the fluctuating value of the Turkish lira – "TRL") and paid to a sterling account to be identified by him, any awards in respect of the Orhans' estates to be held on trust by him. He further requested that any legal costs and expenses' award be paid to the account of the KHRP in London.

415. The Government disputed the applicant's allegations of fact and contended that, since there had been no violation of the Convention, no just satisfaction was payable. Alternatively, they took issue with the matters and persons in respect of which compensation was claimed, as with the applicant's calculations and the substantiation of his claims. They requested that any just satisfaction be paid to the applicant in Turkey and in Turkish Lira. In any event, the Government submit that the families of the Orhans have no standing before the Court.

416. The Court observes, as was confirmed by the applicant's representative during the oral hearing before the Court, that the applicant

introduced this application on his own behalf and on behalf of his son (Cezayir Orhan) and his brothers (Selim and Hasan Orhan). In these circumstances, the Court may, if it considers appropriate, make awards in respect of violations of the Convention of which the Orhans have been victims, such awards to be held by the applicant in trust for the Orhans' estates (Kurt judgment, cited above, § 174, and *Çakıcı v. Turkey,* cited above, § 125).

417. As to the currency in which any awards should be made and to where they will be paid, the Court notes that the applicant's British representatives before this Court engaged the assistance of additional British and Turkish persons and organisations, and that it is those British representatives' responsibility to discharge the costs of those engaged to assist them. Consequently, any award of costs and expenses can be paid to the sterling account nominated by the applicant. However, Court considers that no reason has been advanced as to why any award of damages cannot be made in sterling to be converted into Turkish lira at the date of settlement, as this conversion addresses the only relevant concern voiced by the applicant namely, the fluctuation of the value of the Turkish lira.

A. Pecuniary damage

418. The applicant claimed compensation for the material damage suffered by him and the Orhans. Although those claims exceeded previous awards, he considered the claims to have been well documented, substantiated and fair. The Government pleaded that pecuniary awards were only to be made in the rarest of cases and only then on an equitable basis, within reasonable limits and avoiding speculation.

1. Houses, land and other property

419. On his own behalf, the applicant claimed GBP 3,191.40 in compensation for pecuniary loss arising from the loss of his house (a 2 storey stone house of 280 square metres), his harvested crops (2 tons of wheat and 500 kilogrammes of lentils), numerous household items (including a bed, refrigerator, television, oven, kitchen cupboard and utensils, a carpet, rugs, sofa, chairs, table, stove, curtains, clothes, a glass cabinet, two full “trousseau” chests) and his livestock (10 cows and 25 goats).

420. GBP 3,372 each was claimed in pecuniary damages on behalf of each of the Orhans. As to Selim Orhan, reference is made to the destruction and loss of his house, possessions and livestock (35 sheep and 5 cows). A detailed schedule submitted in respect of Hasan Orhan valued his house (2 storey stone house of 260 square metres), destroyed household items (similar to those listed by the applicant) and his livestock (5 cows and

20 goats). No information has been provided as to any possessions or property of Cezayir Orhan which were destroyed.

421. In support of these claims, the applicant submitted a statement of the Chamber of Engineers and Architects of Turkey which cited published figures of the Ministry of Housing and Public Works concerning reconstruction costs and house values. Statements from the applicant, Adnan Orhan (son of Selim) and Ahmet Orhan (son of Hasan) attest to the amount of land and livestock which their father owned.

422. The Government considered the material submitted by the applicant to be unrealistic and partial. The statement from the Chamber of Engineers and Architects and the other schedules concerning the cost of, and income from, farm land and animals, were not backed up by any documentary evidence or by site visits.

423. On the one hand, the Court has found that the applicant's, Selim Orhan's and Hasan Orhan's houses were destroyed. Given its findings as to the time allowed to remove their belongings, the Court accepts that a significant portion of the contents of those three houses was also destroyed. It is therefore necessary to make some compensatory award. On the other hand, no decisive (for example, independent) proof of the size and nature of the houses, property and possessions destroyed and lost has been provided. No evidence was presented as to what happened to the livestock of the applicant, Selim Orhan and of Hasan Orhan. It is, nevertheless, noted that the Government, while contesting the applicant's submissions as to the property owned and emphasising the failure by the applicant to produce an on-site inspection report, have not themselves attempted to provide any such report as in the *Bilgin v. Turkey* case (no. 23819/94, § 142, 16 November 2000, unpublished, and the above-cited *Dulaş* judgment, § 90).

424. In such circumstances, the Court's assessment of the necessary awards must, by necessity, be speculative and based on principles of equity (Akdivar and Others v. Turkey (*Article 50*) judgment of 1 April 1998, *Reports* 1998-II, § 18 and the above-cited Selçuk and Asker judgment, §§ 106, 108 and 110).

425. The Court awards GBP 2,500 each to the applicant, to Selim Orhan and to Hasan Orhan. However, and since Cezayir Orhan did not have a house in Deveboyu and no indication has been given as to any of his possessions which were allegedly destroyed, the Court rejects the claim made under this heading on behalf of Cezayir Orhan.

2. Loss of past income and future income

426. The applicant claimed GBP 42,566 on his own behalf and GBP 31,730 each on behalf of Selim and Hasan Orhan in respect of loss of past earnings from farming. It was submitted that all three owned 10 acres of irrigated land (for vegetables) and 15 acres of dry land (for grain crops), the applicant also referring to his groves, gardens and forestry land. In

support of these claims, a statement from the Turkish Union of Agricultural Workers (giving the annual income per "decare" and from livestock) and detailed schedules calculating the incomes of the applicant and of Selim and Hasan Orhan were submitted. GBP 10,318 was also claimed on behalf of Cezayir Orhan, a figure based on past earnings of GBP 8.60 per day, a working year of 200 days and a Ministry of Public Works table of earnings for the building industry.

427. The claim as to the loss of the Orhans' future earnings was based on the Ogden actuarial tables and their working until they would have been 65 years of age. GBP 37,018 each is therefore claimed on behalf of Hasan and Selim Orhan and GBP 39,560 on behalf of Cezayir Orhan in respect of future earnings.

428. The Government submitted that the actuarial calculations were speculative and highly susceptible to abuse by those seeking unjust enrichment. In addition, the Government pointed out that no document was submitted substantiating the applicants' actual and relevant earnings, meaning that any assessment based on their fictitious figures would be speculative. They also claimed that the amounts claimed were excessive.

429. The Court clarifies that there is no evidence that ownership of the applicant's, Selim Orhan's and Hasan Orhan's land has, in fact, been removed and it has considered the claims about the loss of land as a claim about the loss of income (past and future) from that land.

430. The Court recalls that there must be a clear causal connection between the damage claimed by the applicant and the violation of the Convention and that this may, in the appropriate case, include compensation in respect of loss of earnings (Barberà, Messegué and Jabardo v. Spain judgment of 13 June 1994 (*Article 50*), Series A no. 285-C, §§ 16-20, and the above-cited judgments in the *Cakıcı* case, § 127, and the Selçuk and Asker case, § 112).

431. In addition, it is recalled that a precise calculation of the sums necessary to make complete reparation *(restitutio in integrum*) in respect of the pecuniary losses suffered by an applicant may be prevented by the inherently uncertain character of the damage flowing from the violation (Young, James and Webster v. the United Kingdom judgment (former Article 50) of 18 October 1982, Series A no. 55, § 11). An award may still be made notwithstanding the large number of imponderables involved in the assessment of future losses, though the greater the lapse of time involved the more uncertain the link between the breach and the damage becomes. The question to be decided in such cases is the level of just satisfaction, in respect of either past and future pecuniary loss, which it is necessary to award to an applicant, the matter to be determined by the Court at its discretion, having regard to what is equitable (Sunday Times v. the United Kingdom judgment (former Article 50) of 6 November 1989, Series A

no. 38, p. 9, § 15; *Lustig-Prean and Beckett v. the United Kingdom* (just satisfaction), nos. 31417/96 and 32377/96, §§ 22-23, ECHR 2000).

432. The Court has found that the Orhans can be presumed dead in violation of Article 2 of the Convention, that the houses of the applicant, Selim Orhan and Hasan Orhan were destroyed in violation of Articles 8 and Article 1 of Protocol No. 1 and that their families were obliged to evacuate Devenboyu. In such circumstances, there was a causal link between these violations of the Convention and the cessation of the Orhans' earnings, earnings which the Court accepts were put to the use of Selim's and Hasan's spouses and children, and of the family of Cezayir Orhan (the applicant's). There is, further, a causal link between these violations of the Convention and a reduction in the applicant's earnings.

433. The Court has had regard therefore to, on the one hand, the applicant's detailed actuarial submissions and calculations as to the capital sum representing the claims of lost past and future incomes (*Tanli v. Turkey*, no. 26129/95, § 183, ECHR 2001 and the above-cited judgment of *Çakıcı v. Turkey*, § 127) and, on the other hand, the absence of any independent evidence concerning the size of the landholdings, the number of livestock and the income therefrom of the applicant, Selim Orhan and Hasan Orhan, or of Cezayir Orhan's actual earnings at the relevant time or of the applicant's current earnings.

434. Adopting equitable considerations (the above-cited *Çiçek* judgment, at § 201), the Court awards under this heading GBP 2,500 to the applicant, GBP 5,000 each to Selim and Hasan Orhan together with GBP 8,000 to Cezayir Orhan.

3. Rent and other added living costs

435. As regards past additional rental and other living costs, the applicant further claimed GBP 3,970 on his own behalf and on behalf of each of the Orhans' estates. It was explained that farm produce and fuel was available at no cost in Deveboyu and reference was also made to unspecified amounts for added costs of education, electricity, water and heating in Diyarbakır. The applicant's claim is based on the rent he has actually paid in Diyarbakır. The statements of the sons of Selim and Hasan Orhans indicated that their families paid rent of TRL 50,000,000 and TRL 40,000,000 per month, respectively in Diyarbakır.

436. As to future added expenses, the applicant also claimed, assuming that his house would not be re-constructed and based on the Ogden actuarial figures, GBP 12,900 in rental costs, referring also to added food and fuel costs in Diyarbakır.

437. The Court recalls that this application was lodged by the applicant on his own behalf and on behalf of the Orhans, now presumed dead. Accordingly, the only relevant causal link to be established is that between the alleged violations in respect of the Orhans and the consequent damage

suffered by *them*. Accordingly, and while they clearly no longer earned given their presumed death (and hence the award in respect of lost income), it would be inconsistent to accept that those presumed dead had subsequently incurred or would incur added rental and other living costs.

438. However, the Court has found that the applicant's house was destroyed and that he had to leave the village at the end of 1994 in violation of Article 8 and of Article 1 of Protocol No. 1. It is also accepted that he would have had and has certain household costs in Diyarbakır (for example, food and fuel) over and above the costs of rural living. It is therefore necessary to make some compensatory award to the applicant as regards these rental and other added expenses (the above-cited Selçuk and Asker judgment, §§ 113-114). However, no independent documentary evidence was submitted regarding the rent paid by the applicant in Diyarbakır or the alleged additional household expenses so that the Court's assessment of the necessary award must, of necessity, be speculative and based on principles of equity.

439. The applicant is therefore awarded GBP 2000 under this heading.

4. Pecuniary losses flowing from inadequate investigations

440. The applicant argued that adequate investigations would have allowed him to establish liability and obtain compensation in Turkey regarding the presumed death of the Orhans and the burning of Deveboyu and he claimed to have suffered a pecuniary loss in this respect. However, the Court considers that this amounts to a request for compensation twice in respect of the same matters, the Court having already made pecuniary (and non-pecuniary – see directly below) damages awards in respect of the violations of the Convention to which the Orhans' presumed death and the destruction of Deveboyu give rise.

B. Non-pecuniary damage

441. In the first place, and as regards the Orhans' presumed death, the applicant claimed GBP 40,000 on behalf of each of their estates and GBP 45,000 on his own behalf. Secondly, he requested GBP 20,000 on his own behalf and on behalf of each of the Orhans' estates, given the deliberate destruction of the community of Deveboyu and of a generations-old way of life. Thirdly, he claimed GBP 10,000, on his own behalf and on behalf of each of the Orhans' estates, in respect of the inadequacy of the domestic authorities' response to his complaints.

442. The Government maintained that these claims were not only excessive, but without any basis whatsoever. No such award should be made given the absence of a causal link between the alleged violations and any damage. The claims were exaggerated, did not take account of socio-economic conditions in Turkey and would lead to unjust enrichment.

443. The Court has found that the presumed death in detention of the Orhans gives rise to violations of Articles 2, 5, and 13, in respect of the Orhans. It considers that an award of compensation should be made in their favour having regard to the gravity of the breaches in question. Accordingly, it awards the sum of EUR 12,400 each in respect of Selim, Hasan and Cezayir Orhan. Moreover, the above presumed death and the authorities' reaction to the applicant's search for the Orhans has been found to constitute a breach of Articles 3 and 13 in respect of the applicant. The Court considers that an award of compensation in his favour is also clearly justified. It therefore awards the applicant the sum of EUR 6,200.

444. Finally, the Court has concluded that the destruction of Deveboyu constituted serious violations of Article 8 and of Article 1 of Protocol No. 1 alone and in conjunction with Article 13 in respect of the applicant, Selim Orhan and Hasan Orhan, and a grave violation of Article 8 both alone and in conjunction with Article 13 in respect of Cezayir Orhan.

445. EUR 6,200 is awarded to the applicant, EUR 4,400 each as regards Selim and Hasan Orhan together with EUR 2,500 as regards Cezayir Orhan.

C. Summary of pecuniary and non-pecuniary awards

446. Accordingly, the following amounts are awarded by way of just satisfaction for pecuniary and non-pecuniary loss suffered, all sums to be converted to Turkish lira on the date of settlement:

1. to the applicant: GBP 7,000 (pecuniary loss) and EUR 12,400 (non-pecuniary loss);
2. as regards Selim Orhan, to be held in trust for his estate by the applicant: GBP 7,500 (pecuniary loss) and EUR 16,800 (non-pecuniary loss);
3. as regards Hasan Orhan, to be held in trust for his estate by the applicant: GBP 7,500 (pecuniary loss) and EUR 16,800 (non-pecuniary loss); and
4. as regards Cezayir Orhan, to be held in trust for his estate by the applicant: GBP 8,000 (pecuniary loss) and EUR 14,900 (non-pecuniary loss).

D. Exemplary damages and increased damages

447. The applicant further claimed, on his own behalf and on behalf of the Orhans' estate, that a violation of Article 14, 18, 34 and 38 and the bad faith that that implies, means that his damages award should be “uplifted” by 50%. Such an award would express disapproval for and punish the State's particularly blameworthy conduct. While he recognised that the Court has previously refused to do so, he argued that the Court gave no reasons, that there was international precedent and that such an award would

be the only way to achieve the purposes of the Convention. The Government disputed this proposition.

448. The Court notes that it has rejected on a number of occasions, recently and in Grand Chamber, requests by applicants for exemplary and punitive damages *(Cable and Others v. the United Kingdom* [GC] nos. 24436/94 *et seq*., 18 February 1999, § 30, the above-cited Selçuk and Asker judgment, § 119, and *Lustig-Prean and Beckett,* cited above*,* §§ 22-23).

449. The Court therefore rejects this claim.

E. Obligation to reconstruct Deveboyu and to investigate the Orhans' presumed death

450. The applicant also argued that the Court should oblige the State to reconstruct the houses and the village of Çağlayan in the same way in which it has ordered States to return the relevant property in other cases (Papamichalopoulos and Others v. Greece judgment *(Article 50)* of 31 October 1995, Series A no. 330-B, and *Brumărescu v. Romania* [GC] (just satisfaction), no. 28342/95, ECHR 2001). Associated with this submission, he invited the Court to rule, for the benefit of the Committee of Ministers, that there is no evidence to suggest that it would be impossible for the village to be re-built and for the applicant and his surviving relatives to return to their homes. He also requested the Court to request a serious investigation to be held into the fate of the Orhans.

451. The Court recalls that a judgment in which it finds a breach imposes on the respondent State a legal obligation to put an end to that breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (*restitutio in integrum*). However, if *restitutio in integrum* is in practice impossible the respondent States are free to choose the means whereby they will comply with a judgment in which the Court has found a breach, and the Court will not make consequential orders or declaratory statements in this regard. It falls to the Committee of Ministers acting under Article 54 of the Convention to supervise compliance in this respect (see above-cited judgments of Papamichalopoulos and Others, § 34 and Akdivar and Others (Article 50), § 47, and, as regards consequential orders, Tolstoy Miloslavsky v. the United Kingdom judgment of 13 July 1995, Series A no. 316-B, §§ 69–72).

F. Costs and expenses

452. Finally, the applicant claimed, referring to schedules and invoices, GBP 40,800.52 in legal costs and expenses (this being exclusive of value-

added tax ("VAT") in respect of the British legal costs) and broken down as follows:

– GBP14,500 for the barrister's legal work (approximately 140 hours);

– GBP 13,630.52 for the KHRP which included GBP 9,116 for legal work (approximately 90 hours), GBP 415 for administrative costs, GBP 1,529 for translation costs, GBP 916.68 for the costs of attending before the Delegates and GBP 933.84 in costs for attending the hearing in Strasbourg; and

– GBP 12,940 for the Turkish lawyers including GBP 12,030 in legal costs (approximately 200 hours).

453. He submitted that the hourly rates are reasonable, that he was entitled to have foreign lawyers and to have Turkish lawyers to support them, that the inadequate domestic investigation rendered the legal work more complex and lengthy, that the division of labour between the lawyers was efficient and that the participation of the KHRP was necessary, *inter alia*, to facilitate consultation between the British and Turkish representatives, for the translation of documents, for contacts with the applicant and for logistical and administrative support during the taking of evidence in Ankara in October 1999.

454. The Government submitted that, while only costs and expenses actually incurred can be reimbursed, no acceptable receipt, document or invoice with a taxation number has been submitted. In addition, the costs and expenses were inflated and not all were necessarily incurred. In particular, the Government objected to any reimbursement in respect of the costs and expenses claimed in respect of the KHRP.

455. The Court observes that only legal costs and expenses necessarily and actually incurred can be reimbursed pursuant to Article 41 of the Convention. It notes that this case involved complex issues of fact and law requiring detailed examination, the taking of evidence from witnesses in Ankara and an oral hearing before this Court. However, it considers excessive the total number of hours of legal work (over 430) for which the applicant claims in respect of his British and Turkish lawyers and considers that it has not been demonstrated that all those legal costs were necessarily and reasonably incurred.

The Court further accepts as necessary and reasonable the expenses of the applicant's British and Turkish lawyers in respect of translation and administration; the attendance before the Delegates (of one British and one Turkish lawyer); and the attendance before the Court for the oral hearing (of two British lawyers).

456. It accordingly awards the sum of GBP 29,000 exclusive of any value-added tax that may be chargeable but less EUR 2,455.29 having been received in legal aid from the Council of Europe, the net award to be paid in

pounds sterling into the bank account in the United Kingdom requested and identified by the applicant.

G. Default interest

457. The Court considers it appropriate that default interest should be payable at the rate of 7.25% per annum with regard to the sums awarded in euros and 7.5% per annum with respect to the sums awarded in pounds sterling.

FOR THESE REASONS, THE COURT

1. *Holds* by six votes to one that there has been a violation of Article 2 of the Convention in respect of Selim, Hasan and Cezayir Orhan;

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

3. *Holds* unanimously that there has been a violation of Article 5 of the Convention in respect of Selim, Hasan and Cezayir Orhan;

4. *Holds* unanimously that there has been a violation of Article 8 and of Article 1 of Protocol No. 1 to the Convention in respect of the applicant, Selim Orhan and Hasan Orhan;

5. *Holds* unanimously that there has been a violation of Article 8 of the Convention in respect of Cezayir Orhan;

6. *Holds* by six votes to one that there has been a violation of Article 13 of the Convention in conjunction with Articles 2, 3, 5 and 8 of the Convention together with Article 1 of Protocol No. 1 to the Convention in respect of the applicant, Selim Orhan, Hasan Orhan and Cezayir Orhan;

7. *Holds* unanimously that it is not necessary to consider the complaints under Article 14 of the Convention;

8. *Holds* unanimously that it is not necessary to consider the complaints under Article 18 of the Convention;

9. *Holds* by six votes to one that there has been a failure to comply with Article 34 of the Convention;

10. *Holds* by six votes to one
that the respondent State is to pay, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts, to be converted into Turkish lira at the rate applicable on the date of settlement:
(a) GBP 7,000 (seven thousand pounds sterling) for pecuniary damage and EUR 12,400 (twelve thousand four hundred euros) for non-pecuniary damage in respect of the applicant;
(b) GBP 7,500 (seven thousand five hundred pounds sterling) each in respect of Selim Orhan and Hasan Orhan for pecuniary damage and EUR 16,800 (sixteen thousand eight hundred euros) each in respect of Selim Orhan and Hasan Orhan for non-pecuniary damage, which sums are to be held in trust for each of their estates by the applicant;
(c) GBP 8,000 (eight thousand pounds sterling) for pecuniary damage and EUR 14,900 (fourteen thousand nine hundred euros) for non-pecuniary damage in respect of Cezayir Orhan, which sums are to be held in trust for his estate by the applicant;
(d) that simple interest at the annual rates indicated at paragraph 457 above shall be payable from the expiry of the above-mentioned three months until settlement;

11. *Holds* by six votes to one
(a) that the respondent State is to pay the applicant, within the above-mentioned three months and into the bank account in the United Kingdom identified by him, in respect of costs and expenses, GBP 29,000 (twenty-nine thousand pounds sterling) exclusive of any value-added tax that may be chargeable, and less EUR 2,455.29 (two thousand four hundred and fifty-five euros and twenty-nine cents, to be converted to pounds sterling on the date of settlement) the latter amount having been received in legal aid from the Council of Europe; and
(b) that simple interest at the annual rates indicated at paragraph 457 above shall be payable 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 18 June 2002, 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 dissenting opinion of Mr Gölcüklü is annexed to this judgment.

E.P.
M.O.B.

DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

(Translation)

To my great regret I cannot agree with certain of the majority's conclusions which directly concern the essential substance of the case.

I. Establishment of the facts and procedural steps

1. In paragraphs 266 et seq. of the judgment the majority criticise – in terms not usually employed by the Court, I regret to say – the attitude and conduct of the respondent Government at the time when the Convention institutions were taking evidence, and go on to draw legal inferences on that basis concerning the merits of the case. According to the majority, the respondent Government did not reply as they should have done – that is to say in due form and in accordance with the wishes of the Convention institutions – to the repeated requests of those institutions for documents, information, the summoning of witnesses, etc. The Government had, for example, failed to produce a complete, detailed file on the military operations in issue for the purposes of the adversarial examination of the case. In the majority's view, such an attitude was tantamount to an "admission of guilt" and constituted at the same time the foundations of the applicant's allegations.

2. Firstly, this case concerned the need to counter a sharp and widespread upsurge of terrorism (as the majority noted themselves), and in most cases of this type very few things are prepared in advance. Almost everything is improvised at the last minute according to the requirements of the situation at the time and military imperatives, usually involving "security matters" or "military secrets". So this case is not an ordinary, banal one. There was no "pitched battle" conducted according to a plan fixed in advance "with documentary evidence for everything".

At the public hearing in the case the Agent clearly stated that his Government had submitted in good faith for the examination of the Convention institutions all the evidence in their possession and that if anything was missing this was in all probability the result of the difficulties inherent in this type of case and the long period of time that had elapsed since the events in issue.

That being so, are the majority sure that the respondent Government concealed certain facts detrimental to their case and thus obstructed the elucidation of the truth?

Consequently, I cannot agree with the majority's opinion concerning the establishment of the facts, their interpretation and the conclusions they drew therefrom.

II. Application of Article 2

3. In paragraph 310 of the judgment the majority reached the following conclusion on the fate of the Orhans after they were seen in Gümüşsuyu: "In the Court's opinion, it is not possible to establish to the requisite standard of proof where the Orhans were detained after they were seen in Gümüşsuyu in the hands of the security forces." That is speculation and unfounded supposition on the majority's part. If the preceding paragraphs on the facts of the case are studied with the attention they deserve, nothing can be found there to support that assertion. When the majority say: "[I]t is not possible to establish ... where the Orhans were detained after they were seen in Gümüşsuyu in the hands of the security forces" (my emphasis), they gratuitously presuppose that they continued to be detained thereafter. The real question to be answered is not where they were detained, but whether they continued to be detained after they were seen in the charge of the security forces in Gümüşsuyu.

4. The contradiction between "the Court's assessment of the parties' submissions and of the evidence" and the conclusion reached in the above-mentioned paragraph 310 is manifest. What is true is that "it is not possible to establish to the requisite standard of proof what happened to the Orhans after they were seen in Gümüşsuyu". Indeed that is evidenced by the majority's own admission in paragraph 316 of the judgment that "the fact remains that the only evidence that the Orhans were in fact detained in Kulp or Lice gendarme stations or at Lice Boarding School is hearsay. No further information about [Eşref] was provided to the Court. ... This indirect evidence is, despite the strong suspicions to which the evidence gives rise, insufficient to enable the Court to conclude beyond all reasonable doubt that the Orhans were detained in the above-noted gendarme or military establishments..." (my emphasis).

5. If it has not been established that the Orhans were detained by gendarmes after they were seen for the last time with soldiers, how can one claim – as the majority did – that it must be presumed that they died as the result of unacknowledged detention by the security forces, and thus conclude that there has been a violation of Article 2. Reasoning of that kind defies all elementary logic, in my opinion, and is therefore unacceptable to me.

6. In short, this case concerns nothing more than an unacknowledged disappearance, to which the only applicable provision is Article 5 of the Convention according to the Kurt judgment of 25 May 1998, but not Article 2, as the majority considered. In the Timurtaş v. Turkey judgment of 13 June 2000 the Court mistakenly applied Article 2 on the basis of a series of alleged differences between that case and the Kurt case (so as not to be accused of reversing the precedent firmly established by the Kurt judgment)

and by introducing a purported "presumption of death". The Orhan case is identical to the Kurt case just as the Timurtaş and Akdeniz cases were. Although the people and places have changed, the substance of the case has not. For the purposes of applying Article 2, a presumption which amounts to no more than speculation is not sufficient. For as long as the death of the person in question has not been proved beyond a reasonable doubt, as in the present case, Article 5 takes precedence. In that connection, I refer to my detailed dissenting opinion in the above-mentioned Timurtaş case and would confine myself here to citing once more paragraphs 108 and 109 of the Kurt judgment:

> "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...
>
> 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."

III. Alleged violation of Article 3 of the Convention in respect of the applicant

7. In the Kurt case the Court held that in cases of unacknowledged disappearances the indifference to an applicant's complaints shown by the national authorities charged with conducting an effective inquiry might, in specific circumstances (see also the Çakıcı judgment of 7 July 1999), constitute a breach of Article 3 in respect of the applicant – but without laying down a general principle on the question. However, in the more recent case of Akdeniz v. Turkey, which is almost identical to the Orhan case (see the judgment of 31 May 2001, § 102), the Court, having found no specific circumstances, held that there had been no violation of Article 3 in respect of the applicants. Similarly, in the present case, the national authorities responsible for investigating the case were not so complacent about the applicant's complaints that it is possible to find a violation of Article 3 in his respect.

IV. With regard to a violation of Article 13

8. I consider that where the Court finds a violation of Article 2 in its procedural aspect, as the majority did in the instant case, no separate issue arises under Article 13, since the finding of a violation of Article 2 takes

account of the fact that there has been neither an effective inquiry nor a satisfactory procedure after the incident. For more details on that subject, I refer to my dissenting opinion in the Ergi v. Turkey, Akkoç v. Turkey and Taş v. Turkey judgments. The same reasoning should apply as to alleged violation of Article 13 in conjunction with Articles 3, 5 and 8 of the Convention and Article 1 of Protocol No. 1, besides the question of exhaustion of domestic remedies.

V. Application of Article 41

9. The above considerations dispense me from examining the application of Article 41 under its different aspects. However, I should point out that this part of the judgment is far from being clear and convincing and is in contradiction with legal logic. Some people, and the applicant is one, are awarded sums under a number of different heads for the same facts in respect of their unmarried sons "presumed dead".

10. I further contest any payment to the Kurdish Human Rights Project, an association based in London, in respect of costs and expenses for their assistance in this case.

Apart from translation fees, the Court has to date always refused these constantly repeated claims (see the following judgments: Kurt v. Turkey, 25 May 1998, § 180; Salman v. Turkey, 27 June 2000, § 143; İlhan v. Turkey, 27 June 2000, § 116; Çiçek v. Turkey, 27 February 2001, § 209; Berktay v. Turkey, 1 March 2001, § 219; Şarlı v. Turkey, 21 May 2001, § 93; Taş v. Turkey, 14 November 2000, § 106; Akkoç v. Turkey, 10 October 2000, § 109; Avşar v. Turkey, 10 July 2001, § 448). In stating its reasons for refusing, the Court confined itself to saying either that it had been provided with no details of "the precise extent of that organisation's involvement in the preparation of the case" (see the above-mentioned Kurt judgment) or that it was not persuaded that "the fees claimed in respect of the KHRP [had been] necessarily incurred" (see the above-mentioned Salman case). The scraps of explanation given on the matter were indeed very evasive. The Court was all the more demanding on the point because it was aware that an association working to protect human rights should have provided its assistance free of charge. Except for the translation fees, the costs incurred in respect of that organisation should not have been added to the general legal costs, thus presenting the KHRP as a party to the proceedings. The Court must therefore openly and unequivocally reject any claim for the reimbursement of fees in respect of the KHRP.