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

SECOND SECTION

CASE OF TOĞCU v. TURKEY

(Application no. 27601/95)

JUDGMENT

STRASBOURG

31 May 2005

FINAL

31/08/2005

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

In the case of Toğcu v. Turkey,

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

Mr J.-P. COSTA, *President*,
Mr A.B. BAKA,
Mr K. JUNGWIERT,
Mr M. UGREKHELIDZE,
Mrs A. MULARONI,
Mrs E. FURA-SANDSTRÖM, *judges*,
Mr F. GÖLCÜKLÜ, ad hoc *judge*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 10 May 2005,

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

PROCEDURE

1. The case originated in an application (no. 27601/95) against the Republic of Turkey lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Mr Hüseyin Toğcu ("the applicant"), on 25 May 1995.

2. The applicant, who had been granted legal aid, was represented by Dr Anke Stock, a lawyer practising in London. The Turkish Government ("the Government") did not appoint an agent for the purposes of the Convention proceedings.

3. The applicant alleged, in particular, that his son Ender Toğcu had been taken into the custody of the security forces in the city of Diyarbakır on 29 November 1994 and that nothing had been heard from him since that date. The applicant invoked Articles 2, 3, 5, 13, 14 and 18 of the Convention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

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

6. By a decision of 14 September 1999, the Court declared the application admissible.

7. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*), the parties were invited to submit final written observations, of which possibility the applicant availed himself. The parties further considered the possibility of a friendly settlement, but no settlement was reached.

8. By letter of 9 October 2001, the Government requested the Court to strike the case out of its list and enclosed the text of a declaration with a view to resolving the issues raised by the applicant. The applicant filed written observations on the Government's request on 17 December 2001, in which he asked the Court to reject that request.

9. On 12 March 2002 the Chamber rejected the applicant' request for the Chamber to relinquish jurisdiction in favour of the Grand Chamber (Rule 72 § 1).

10. On 9 April 2002 the Court, in the light of the declaration submitted by the Government, considered that it was no longer justified to continue the examination of the application and decided to strike the application out of the list in accordance with Article 37 § 1 (c) of the Convention (see *Toğcu v. Turkey* (striking out), no. 27601/95, 9 April 2002).

11. On 8 July 2002 the applicant requested the Court either to restore the application to the list of cases or, in the alternative, to seek referral of the case to the Grand Chamber.

12. On 21 May 2003 the Panel of the Grand Chamber (“the Panel”) decided to send the present application back to the Second Section for it to take a decision, under Article 37 § 2 of the Convention and in the light of the Grand Chamber's judgment in the case of *Tahsin Acar v. Turkey* ((preliminary objection) [GC], no. 26307/95, ECHR 2003-VI), as to whether to restore the application to the Court's list of cases.

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

14. On 1 March 2005 the Second Section of the Court decided, pursuant to Article 37 § 2 of the Convention, to restore the application to the Court's list of cases.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

15. The applicant, a Turkish citizen of Kurdish origin, was born in 1944 and lives in the town of Silvan within the administrative jurisdiction of the province of Diyarbakır, in south-east Turkey.

A. Introduction

16. The facts of the case, particularly concerning events which took place on or about 21 April 1992 and on or about 30 June 1992, are disputed between the parties.

17. The facts as presented by the applicant are set out in Section B below (paragraphs 18-32). The Government's submissions concerning the facts are summarised in Section C below (paragraphs 33-36). Documentary evidence submitted by the Government and by the applicant are summarised in Sections D (paragraphs 37-61) and E (62-67) respectively.

B. The applicant's submissions on the facts

18. The applicant's son Ender Toğcu[1] was the manager of the Sento hotel and the Arzu club in Diyarbakır. He had no relations with the Kurdistan Workers' Party (the PKK) or any other similar organisations.

19. On an unspecified date, Ender's maternal cousin Mehmet Kartal was taken into custody in relation to a criminal case and when Ender's photograph was found on him, he apparently made a statement to the effect that he and Ender were partners in the alleged crime. The cousin was subsequently released without charge.

20. The applicant stated in the application form submitted to the Commission that, on 29 November 1994, Ender Toğcu's wife Güler was in Diyarbakır Hospital, giving birth. The applicant's wife was with her. At about 3 p.m. Ender Toğcu left his older brother Ali Toğcu to go to the hospital. However, Ender never arrived at the hospital and had not been seen since.

21. In reply to a query from the Court into details of the hospital records showing the date of birth, the applicant replied on 31 January 2000 with the correction that the woman who had been in hospital giving birth on the day of Ender's disappearance was not Ender's wife but the wife of his brother

1. In a number of documents drawn up by domestic authorities, as well as in the parties' observations, "Ender Toğcu" was sometimes referred to as "Önder Toğcu". For consistency, he will be referred to as "Ender Toğcu" throughout this judgment.

Ali. On the day in question Ender and Ali had had a meal together at a restaurant near their house before Ender had left for the hospital to visit Ali's wife. Although the applicant submitted that he would obtain hospital records and send them to the Court, he failed to do so.

22. In his memorial of 16 October 2001, the applicant submitted that on the day of his disappearance, his son Ender had been with his wife Güler, who was pregnant and had been taken to the maternity ward of the hospital as she was feeling unwell. Ender never returned from the hospital. The applicant also informed the Court that Ender had one child, born on 12 March 1993.

23. At about 10.30 p.m. on 29 November 1994, seven or eight plain-clothes police officers came to the applicant's home in Diyarbakır and beat the applicant and his younger son. The police officers enquired about Ender's whereabouts. The applicant told them, although he knew that this was untrue, that Ender had left for Kayseri three days earlier. The police officers then told him that his son was in the hands of the police and that they would hand over his body in three days.

24. The police officers moved on to the house of Ali Toğcu, where they arrived at about midnight and conducted a search without finding anything. Ali told the police officers that he had not seen his brother Ender since 3 p.m. that day. The police officers took Ali to the applicant's house, where they told the applicant that there was a firearm in his house and ordered him to hand it over. Both the applicant and Ali denied the existence of any gun. After having conducted a conversation over the wireless, the police officers told the applicant and Ali that the firearm was in the woodshed of the applicant's house. The police officers told the applicant's wife that Ender had told them where he had hidden the gun. The police officers then found the firearm hidden in the woodshed, and left.

25. On 30 November 1994, Ali was apprehended by police in a café in Diyarbakır and taken to the Security Directorate. He was subsequently taken to the official detention centre of the Rapid Reaction Force2 where he was detained for four to five hours, during which he was interrogated and tortured intensely. He was questioned about Ender's whereabouts. When he told the police officers that he did not know where his brother was, he was told that Ender had been apprehended and that a price-list of walkie-talkies and batteries had been found on him. Ali was also asked where Ender's rifle was. During his interrogation, Ali, despite having been told by the police officers that his brother Ender had "gone to the mountains", could hear the screams of Ender. After having been interrogated and tortured for about four to five hours and believing that he was dead, the police officers left Ali on a dump in Ergani, about 50 kilometres from Diyarbakır.

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2 This particular detention facility was also referred to by the applicant in his observations as "Jail Forces", which, in fact, are the detention facilities of the Rapid Reaction Force (*Çevik Kuvvet* - literal translation: Agile Forces).

26. After his release, Ali Toğcu made inquiries about Ender at the Çarşı Police Station, where he was told that his brother was being held by the police and that he would be released after interrogation.

27. On an unspecified date, Ali Toğcu made further inquiries about Ender with the Chief Commissioner at the Homicide Department, taking with him a photograph of his brother, a photocopy of his brother's identity card and the applicant's home telephone number. These inquiries had not yielded any results.

28. On an unspecified date, the applicant and Ali Toğcu were apprehended and detained for six days. The police accused them of helping and meeting with Ender, whom they alleged was in the mountains. They were both released after six days without having been brought before a court.

29. On another occasion, Ali Toğcu was approached by police officers who asked him for money in exchange for which Ender would not be killed. One police officer asked Ali for one billion Turkish Lira to be given to a third person. In return, Ender would be released.

30. The applicant and his family filed many petitions with the State of Emergency Governor, the City Governor and other authorities. None of these petitions were accepted. On 6 April 1995, the applicant's wife filed a petition with the office of the Public Prosecutor at the Diyarbakır State Security Court (hereinafter "the Diyarbakır Court"). On 7 April 1995, she was informed by the authorities that the name of Ender Toğcu did not appear in their records.

31. The applicant was heard by the Prosecutor for the first time on 19 July 1996. On 6 November 1996 the Diyarbakır Prosecutor issued a decision not to prosecute anyone in relation to the disappearance (*Takipsizlik Kararı*).

32. The investigation was apparently reopened in October 1999. The applicant gave a second statement to the Diyarbakır Prosecutor and, for the first time, statements were taken from the spouses of the applicant and Ender. As the applicant and his wife did not speak any Turkish, their grandson Mehmet was present when their statements were taken. According to Mehmet, the official court interpreter distorted the statements given by the applicant and his wife. For example, although the applicant stated that he would recognise the police officers who came to the house, the interpreter translated this as "I don't know the people who took my son away". After he objected to this, Mehmet was removed from the Prosecutor's office and he was not allowed to read the recorded statements.

C. The Government's submissions on the facts

33. On 30 November 1994, at about 12.30 a.m., the homes of the applicant and his son Ali Toğcu were searched pursuant to a request made

on 29 November 1994 by the Commander of the Diyarbakır Gendarmerie to the Diyarbakır Security Directorate. The aim of the search was to find Ender Toğcu, who was suspected of involvement with the PKK. Police officers carrying out the search did not manage to find Ender Toğcu. However, a firearm and a charger with bullets were found in the applicant's house. As the applicant stated that it belonged to his nephew Mehmet Kartal, the police officers took the firearm and left the applicant's home without detaining anyone.

34. Neither Ali nor Ender Toğcu was taken into detention on 29 or 30 November 1994. The applicant and Ali were detained, however, on 4 July 1995 on suspicion of involvement in a terrorist organisation and released on 8 July 1995 on account of the lack of sufficient evidence. Ali Toğcu was arrested once again by police on 7 August 1997 and released on 8 August 1997, after having given a statement.

35. The applicant's wife submitted a petition to the Prosecutor's office at the Diyarbakır Court. No other petitions were submitted to any Prosecutor. An investigation into the disappearance of Ender Toğcu was carried out by the Diyarbakır Prosecutor who, in the course of his investigation, checked the custody records of the detention facilities in Diyarbakır and its districts. In the absence of any evidence implicating any State agent in the disappearance, the Prosecutor decided on 6 November 1996 not to prosecute anyone.

36. The Diyarbakır Prosecutor instigated a second investigation at a later stage. In the course of this investigation, statements were taken from the applicant and his wife and also from Ender's wife. The Prosecutor further made attempts to take statements from the police officers who had searched the applicant's house on 29 November 1994. This second investigation was ongoing.

D. Documentary evidence submitted by the Government

37. The following information appears from documents submitted by the Government.

38. On 29 November the deputy commander of the Diyarbakır Provincial Gendarmerie Headquarters (hereinafter "the Gendarmerie Headquarters") requested the Diyarbakır Police Headquarters to assist the personnel from the Gendarmerie Headquarters to apprehend "the persons who had been aiding and abetting the PKK in Diyarbakır".

39. According to a report of "house search and confiscation", a number of police and gendarme officers, acting on the above mentioned request, went to the applicant's house in Diyarbakır in the early hours of 30 November 1994. They were looking for the applicant's son Ender Toğcu whom they wanted to arrest. However, Ender was not at home. During the search conducted at the house, a 7.45 millimetre calibre pistol with its

bullets were found in the attic and confiscated by the officers. The applicant told the officers that the pistol belonged to his nephew, Mehmet Kartal.

40. It appears from another report, drawn up and signed by the same officers, that after having searched the applicant's house they had gone to Mrs Sabahat Toğcu's house and unsuccessfully looked for Ender there.

41. Custody records which, according to the Government, were from Diyarbakır's Çarşı Police Station and the Anti-Terror Branch of the Diyarbakır Police Headquarters, showed that neither Ender nor his brother Ali or their father Hüseyin – that is the applicant – were detained by the police on 28, 29 or 30 November 1994.

42. According to copies of the custody records of a number of police and gendarmerie stations in and around Diyarbakır, no member of the Toğcu family was arrested and detained in November 1994.

43. It appears from the custody records of the Silvan Central Gendarmerie Station that the applicant's nephew Mehmet Kartal was arrested on 22 November 1994 and released the next day (see paragraph 19 above). He was re-arrested on 8 December 1994 and an order for him to be remanded in custody was issued by the Diyarbakır Court on 21 December 1994.

44. On 4 July 1995 the applicant and his son Ali Toğcu were arrested at their homes by a number of police officers. As they could not be linked to any illegal organisation, they were released on the orders of the Prosecutor on 8 July 1995.

45. On 1 February 1996 Ramazan Sürücü, the chief of the Anti-Terror Branch of the Diyarbakır Police Headquarters, sent a reply to a letter which had apparently been sent to him from the Diyarbakır Police Headquarters on 30 January 1996. In his letter Mr Sürücü referred to another letter sent by his office on 24 January 1996. He informed the Headquarters that Ender Toğcu had not been detained at the Anti-Terror Branch on 29 October 1994. Hüseyin Toğcu and Ali Toğcu had been arrested on 4 July 1995 and then released on 8 July 1995.

46. On 8 February 1996 the Diyarbakır Prosecutor replied to a letter sent to him by the Ministry of Justice's International Law and Foreign Relations Directorate (hereinafter "the Directorate") on 22 January 1996, informing that Directorate that Hüseyin and Ali Toğcu had been detained on 4 July 1995 and released on 8 July 1995.

47. On 25 June 1996 the Diyarbakır Prosecutor asked the Prosecutor at the Diyarbakır Court whether an investigation into the applicant's allegations concerning Ender Toğcu was in progress.

48. On 27 June 1996 the Prosecutor at the Diyarbakır Court replied to the Diyarbakır Public Prosecutor that Ender Toğcu's name did not feature in the records of the Diyarbakır Court.

49. On 19 July 1996 a statement was taken from the applicant by the Diyarbakır Prosecutor. The applicant acknowledged that he had lodged an

application with the European Commission of Human Rights and confirmed the accuracy of the contents of the statement he had given at the Human Rights Association (see paragraph 63 below). He recounted that on 29 November 1994 he and his sons, Ender and Ali, had been arrested outside his house by plain-clothes members of the Anti-Terror Branch of the Police Headquarters. Prior to his arrest, Ender had just returned from the hospital, where his pregnant wife had been giving birth. The reason for Ender's arrest was his suspected involvement with the PKK. The police officers arresting Ender had told the applicant to go and collect Ender's body in Fiskaya in three days' time.

50. The applicant further stated that he had been kept in detention for a week before being released. Ali had been detained twice; on the first occasion he had been detained for a week and on the second he had been detained for three days. The firearm had been handed over to the police officers who had come to his house to search for it. Nothing had been heard from Ender since he had been detained on 29 November 1994, and the enquiries made by the applicant with the Prosecutor's office at the Diyarbakır Court and with the Anti-Terror Branch of the Police to obtain information about his son's fate had yielded no results. He told the Prosecutor that he wished to press charges against members of the Anti-Terror Branch of the Police.

51. On 2 September 1996 a Prosecutor (no. 34973) sent a reply to a letter sent from the Diyarbakır Prosecutor of 26 August 1996. He enclosed copies of the documents contained in investigation file no. 1996/4211.

52. On 6 November 1996 the Diyarbakır Prosecutor decided not to prosecute anyone in connection with the applicant's allegations concerning the detention of his son. The Prosecutor based this decision on a letter sent to him on 16 October 1996 by the Anti-Terror Branch in which, according to the decision, that Branch had denied taking Ender Toğcu into custody.

53. Ali Toğcu was once more arrested at his house on 7 August 1997.

54. On 14 October 1999 the Diyarbakır Prosecutor sent letters to the Diyarbakır Police Headquarters and the Gendarmerie Headquarters, asking them to submit to his office the custody records of 29 November 1994. He also instructed them to search for Ender.

55. On 20 October 1999 the Gendarmerie Headquarters informed the Prosecutor that Ender had not been detained by them. Copies of their custody records, in which Ender's name did not feature, were forwarded to the Prosecutor with this letter.

56. On 1 November 1999 the Diyarbakır Prosecutor took a statement from the applicant. The applicant recounted that his son Ender had been living with him prior to his disappearance. On the evening of 29 November 1994, seven or eight plain-clothes police officers had come to his house and told him that Ender, who was in their hands, had told them that there was a firearm in the house. The applicant had replied that he did not know

anything about a firearm. The officers had then found it in the attic of the house and left. He had not heard from Ender since that day. His other son Ali had been arrested and detained three to four days after the disappearance of Ender and had been ill-treated whilst in custody. Ali had also told him that he had heard a person's screams while he was in custody. Ali had thought it might be his brother Ender. Two months after the disappearance of Ender, the applicant and Ali had been arrested and detained once more, this time for a period of six days during which they had been questioned about the petition in which they had complained about police officers.

57. The applicant further submitted that his son Ender had not had any involvement with the PKK. The applicant had never been told by anyone to go and find the body of his son in Fiskaya (see paragraph 49 above). Finally, the applicant had asked the Prosecutor to find his son.

58. Also on 1 November 1999 the Diyarbakır Prosecutor took a statement from Güler Tuncel, the wife of Ender Toğcu. She stated that, while pregnant, she had become unwell on 29 November 1994 and her husband Ender had taken her to hospital. They had then returned home in the early afternoon and Ender had gone to his café at around 3 p.m. Ender would normally return home at 11 p.m. or midnight. At around midnight on 29 November 1994 seven or eight plain-clothes police officers had come to their house and had asked her and her father-in-law, the applicant, about a firearm. She knew that her husband owned a gun but she did not know where he kept it. The police officers then found it in the attic. She had not known that it was hidden there and, had they not been told by Ender where it was hidden, the police officers would not have been able to find it. She had not heard from Ender since that day.

59. Finally, on 1 November 1999 the Diyarbakır Prosecutor questioned Soliye Toğcu, the wife of the applicant. Mrs Toğcu stated that on 29 November 1994 she had gone to hospital together with her daughter-in-law Güler. Her son Ender had also been at the hospital for some time, but he was at home when she had returned. Ender had left at 3 p.m. to go to the café which he was running and had not returned. At around midnight the same day, seven or eight police officers had arrived at their house and asked for Ender. According to the officers, Ender had told them that there was a firearm in the house. The officers had found the gun and left. She had subsequently petitioned the Prosecutor about the disappearance of her son but had never been informed about his fate.

60. On 30 November 1999 the Diyarbakır Prosecutor reminded the Diyarbakır Police Headquarters and the Gendarmerie Headquarters of his requests of 14 October 1999 (see paragraph 54 above) and urged them to submit to his office copies of the custody ledgers and to search for Ender.

61. Also on 30 November 1999 the Diyarbakır Prosecutor sent a letter to the Anti-Terror Branch of the Police and summonsed the police officers who had gone to the applicant's house on 30 November 1994 (see paragraph

39 above) to his office. He also asked whether any action had been taken in relation to the firearm found in the applicant's house. The Prosecutor finally asked whether Ender, Ali and the applicant had been detained on 30 November 1994. He asked for copies of the custody records to be sent to his office.

E. Documentary evidence submitted by the applicant

62. On 6 April 1995 the applicant's wife submitted a petition to the Prosecutor's office at the Diyarbakır Court (see paragraphs 30 and 35 above). She informed the Prosecutor that her son Ender Toğcu had been taken into custody by members of the security forces in Diyarbakır on 29 November 1994. Plain-clothes police officers who had raided her house on the evening of 29 November 1994 had told her that her son was in their hands. She had not heard from her son since that date. She asked the Prosecutor to give her information about her son. A handwritten note on this petition reads "his name was not found in the examination of our records".

63. On 10 April 1995 the applicant made a written statement, addressed to a "Human Rights Project". He submitted that at around 3 p.m. on 29 November 1994, his son Ender had left his brother Ali to go to the hospital where Ender's wife was giving birth. The applicant's wife, who was staying at the hospital to look after her daughter-in-law, had told the applicant that their son Ender had never arrived at the hospital. Ali had been arrested the following day by police officers from the Çarşı Police Station and been questioned for three days. On the third day he had been released on the Ergani Road.

64. In a letter forwarded to the Court on 31 January 2000, the applicant's son Ali Toğcu submitted that on 30 November 1994 he had been arrested by police officers and been taken to the Security Directorate, from where he had been taken to the Rapid Reaction Force. While at the Rapid Reaction Force, Ali had been questioned about his brother Ender and been told by police officers that Ender had gone to the mountains to join the PKK. While in custody, Ali had heard the screams of his brother Ender. Ali had been severely tortured and, believing that he was dead, the police officers had left him at a dump near Ergani. Following that incident, he had been detained a total of five times and on each of these occasions he had been accused of meeting with his brother Ender, whom, the police officers insisted, had joined the PKK.

65. The applicant forwarded to the Court a letter which he had dictated on 14 September 2001. In this letter the applicant submitted that there were no eye-witnesses to the abduction of his son Ender. No one at Ender's workplace had witnessed his arrest. He himself had not witnessed it either. He had been arrested, together with his other son Ali, one day in the summer and detained for six days. He had been asked why he had

complained about the police officers and he had replied that his son had been detained by police officers and, for that reason, he had applied to the Prosecutor and to the Human Rights Association. He had then been told by police officers that his son had not been in their hands but that he had gone to the mountains.

66. In a letter, drawn up by Ali Toğcu's son Mehmet Toğcu on 18 September 2001, Mehmet Toğcu submitted that he had accompanied his grandparents – that is the applicant and his wife – and the wife of his uncle Ender (see paragraph 32 above) to the Prosecutor's office and had acted as the interpreter for his grandparents who did not speak any Turkish. His aunt Güler – Ender's wife – could speak Turkish. When he had begun translating word by word what his grandfather was saying, the Prosecutor had interrupted him and had asked another person working at the courthouse to take over the interpretation. However, this person had distorted his grandfather's words and, when Mehmet had objected, he had been removed from the office. He had later wanted to see the statements taken from his grandparents but his request had been refused by the Prosecutor.

67. In a letter dated 13 October 2001, Mrs Sabahat Toğcu (see paragraph 40 above) submitted that on the day of the incident she had gone to the hospital, where the wife of her brother-in-law was giving birth. Afterwards she had gone to the house of her brother-in-law Ali Toğcu. At 3 a.m. the following morning, a number of police officers had come to the house and told the people present that Ender had a large number of weapons in the house of a certain person named Yavuz. She and Ali had then accompanied the police officers to her house where, because she had forgotten the keys, the police officers had broken the door and had entered, and searched the house. Nothing had been found.

II. RELEVANT DOMESTIC LAW AND PRACTICE

68. The relevant domestic law and practice are set out in the judgment in the case of *Tahsin Acar v. Turkey* ([GC], no. 26307/95, §§ 186-197, ECHR 2004).

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

69. In their post-admissibility observations, the Government submitted that the investigation concerning the disappearance of Ender Toğcu was still

continuing and they asked the Court to dismiss the application under Article 35 §§ 1, 3 and 4 of the Convention.

70. The Court notes that, prior to the Court's decision on the admissibility of the present case, the Government had not argued that domestic remedies had not been exhausted (see the admissibility decision of 14 September 1999). They are therefore estopped from raising this objection to the admissibility of the application now (see *Hasan İlhan v. Turkey*, no. 22494/93, § 103, 9 November 2004).

71. It therefore dismisses the Government's preliminary objection.

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

A. Arguments of the parties

1. The applicant

72. The applicant submitted that the totality of the following evidence was sufficient for the Court to establish beyond reasonable doubt that his son Ender had been abducted by agents of the State or by persons acting with the acquiescence of the State:

(a) the authorities were determined to detain Ender on 29 November 1994;

(b) the police officers told Ender's mother that he had informed them about his firearm;

(c) Ender's brother Ali heard his screams while detained the following day; and, finally,

(d) the authorities failed to carry out an adequate investigation into the abduction and disappearance of Ender; they failed to act in response to specific information provided to them by the applicant and his family.

73. The applicant emphasised that, in order for him to obtain the requisite evidence to establish that his son had been abducted by police officers as he alleged, and that his son had been killed in custody as he feared, he and his family were entirely reliant upon the authorities to carry out an investigation into his son's disappearance.

74. The applicant finally submitted that, in the light of the evidence he had provided, the burden was now on the respondent Government to prove that their agents had not been involved in the alleged enforced disappearance given that the events in issue lay wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody.

2. The Government

75. The Government contended that the applicant's allegations were baseless; neither Ender Toğcu nor his brother Ali had been arrested on 29 or 30 November 1994. Had they been detained, there would have been records of their detention, just like the record of the detention of Ali Toğcu on 4 July 1995.

76. According to the Government, in most cases involving people who were alleged to have disappeared in the south-east, it had later turned out that these persons had joined the PKK terrorist organisation.

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

77. Before proceeding to assess the evidence, the Court would stress, as it has done previously, that it is of the utmost importance for the effective operation of the system of individual petition, instituted under Article 34 of the Convention, that States should furnish all necessary facilities to make possible a proper and effective examination of applications (see *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 (see *Timurtaş v. Turkey*, no. 23531/94, §§ 66 and 70, ECHR 2000-VI).

78. The applicant alleged that the Government had failed to provide the Court with copies of the detention records in respect of the Rapid Response Force where his son Ali had been detained and had heard the screams of his brother Ender.

79. The Court notes that on 25 June 1999 it invited the Government to submit to it copies of the custody ledgers of the detention centre at the Diyarbakır Security Directorate. In their reply of 12 July 1999, the Government sent to the Court – what they claimed to be – copies of the custody ledgers of the Çarşı Police Station and also of the Anti-Terror Branch of the Diyarbakır Security Directorate (see paragraph 41 above).

80. Furthermore, on 21 September 1999 the Court asked the Government to inform it about the number of detention facilities in Diyarbakır and immediate surroundings. The Government were further requested to confirm whether the custody records of all these detention facilities had been checked in order to ascertain whether Ender Toğcu or

Ali Toğcu had been detained there between 29 November 1994 and 3 December 1994, and, if so, by whom and on what dates. The Government were finally requested to submit to the Court copies of the custody records of all the detention facilities in Diyarbakır and in its districts as well as a copy of the documents in the investigation file which post-dated 6 November 1996.

81. On 12 January 2000 the Government replied to the Court's queries that there were 12 detention facilities of the Diyarbakır Security Directorate in Diyarbakır and another 12 in its districts. Furthermore, there were 45 detention facilities of the Gendarmerie in and around Diyarbakır. The custody records had been verified by the prosecutors who were dealing with the investigation. The Government also submitted to the Court copies of "the custody records which have been obtained" (see paragraph 42 above).

82. The Court observes at the outset that the custody records submitted by the Government on 12 July 1999 do not offer any information as to the detention facility where they were drawn up. Neither have the names nor ranks of the officers who effected the arrests of the persons featuring in those records been noted. Indeed, it is not even clear whether these records relate to detention facilities of the Gendarmerie or the Police.

83. Furthermore, the letter sent by the Diyarbakır Prosecutor to the Diyarbakır Police Headquarters on 14 October 1999 (see paragraph 54 above), in which he asked for copies of the custody records showing the names of those detained on 29 November 1994 and the subsequent reminder sent by him on 30 November 1999 (see paragraph 60 above), suggests that the records submitted by the Government did not cover all of the detention facilities of the Diyarbakır Police Headquarters. Although the applicant specifically claimed that his son Ali had been detained at the Rapid Reaction Force (see paragraph 25 above) where he had heard the screams of his brother Ender, and not at the Anti-Terror Branch whose custody records were submitted, the Government did not indicate which of the custody records related to the Rapid Reaction Force.

84. As regards the copies of the custody records submitted by the Government on 12 January 2000 (see paragraph 81 above), the Court notes that while it appears from some of these custody records that they were drawn up at the detention facilities of a number of Gendarmerie Headquarters in and around Diyarbakır (such as Lice, Kulp, Hazro and Silvan), a number of others do not indicate their provenance. The applicant claimed that he, with the assistance of his legal representatives in Turkey, had established that the custody records submitted by the Government pertained to 18 different detention facilities. However, custody records in respect of the Rapid Reaction Force were not among them. The Government have not disputed this (see paragraph 7 above).

85. The Court further notes with concern that the Government have failed to submit to it a number of documents pertaining to the investigation

into Ender Toğcu's disappearance. It is true that, in a letter to the Commission of 11 October 1996, the Government claimed that they were forwarding "the documents relating to the investigation file of the Diyarbakır Prosecutor". Similarly, in their response of 12 January 2000 to the Court's request to be provided with the investigation file (see paragraph 81 above), they again submitted, what they claimed to be, "a copy of the Diyarbakır Prosecutor's investigation file".

86. However, the Court observes that the documents submitted by the Government do not constitute the complete investigation files, the submission of which had been requested. In this connection, the Court notes that the documents submitted make references to a number of other, potentially important, documents which were not made available to the Court. These documents included the following:

(a) a letter sent by the Diyarbakır Police Headquarters to the Anti-Terror Branch on 30 January 1996 (see paragraph 45 above);

(b) a letter sent by the Anti-Terror Branch on 24 January 1996 (see paragraph 45 above);

(c) the Directorate's letter of 22 January 1996 sent to the Diyarbakır Prosecutor's office (see paragraph 46 above);

(d) a letter of 26 August 1996 from the Diyarbakır Prosecutor, and the documents referred to in that letter (see paragraph 51 above); and, finally,

(e) the Anti-Terror Branch's letter of 16 October 1996 referred to in the decision not to prosecute (see paragraph 52 above).

87. The Court, observing that the Government have not advanced any explanation for their failure to submit these documents, finds that it can draw inferences from the Government's conduct in this respect. Furthermore, the Court, referring to the importance of a respondent Government's co-operation in Convention proceedings (see paragraph 77 above), finds that the Government fell short of their obligations under Article 38 § 1 (a) of the Convention to furnish all necessary facilities to the Commission and to the Court in its task of establishing the facts.

C. The Court's evaluation of the facts

88. The applicant submitted that his son had been taken into custody by security forces on 29 November 1994. The Government denied any involvement of State agents in the disappearance of Ender Toğcu and submitted that most cases of alleged disappearance in the south-east actually concerned persons who had joined the PKK terrorist organisation.

89. The Court would stress at the outset that the Government have not submitted to the Court any examples of persons initially believed to have disappeared who had later been found to have joined the PKK. It therefore disregards the Government's submissions in this respect and, in the absence

of any information to the contrary, finds it established that the applicant's son Ender Toğcu did indeed disappear.

90. In support of his allegation that his son had been taken by the security forces, the applicant submitted, in particular, that his son Ali had heard the screams of his brother while in the custody of the Rapid Reaction Force (see paragraph 25 above). He also submitted that the police officers who came to his house on the evening of 29 November 1994 had told his wife that they had been informed about the firearm by Ender (see paragraph 24 above).

91. As regards the applicant's latter submission, the Court notes that it has not been disputed by the applicant that he had told the police officers that the firearm was owned by his nephew Mehmet Kartal (see paragraph 39 above). It also notes that Mehmet Kartal had been detained earlier by the Silvan Gendarmerie on 22 November 1994 and released on 23 November 1994 (see paragraph 43 above). The Court cannot exclude, therefore, that Mehmet Kartal had himself told the Gendarmerie where he had hidden his firearm.

92. As regards the applicant's submissions concerning the detention of Ender, the Court observes that the applicant and his family have provided the Commission and the Court with conflicting versions of the circumstances leading up to the disappearance of Ender Toğcu. In this connection the Court would particularly highlight the following:

(a) In his statement of 10 April 1995, addressed to a Human Rights Project, the applicant submitted that on 29 November 1994 Ender had left his brother Ali to go to the hospital where his (Ender's) wife was giving birth. The applicant's wife, who was staying at the hospital to look after her daughter-in-law, had later told the applicant, however, that Ender had never arrived at the hospital. Ali had been arrested the following day by police officers from the Çarşı Police Station and had been questioned for three days. He had been released on the third day on the Ergani Road (see paragraph 63 above).

(b) In his application form, the applicant submitted that on 29 November 1994 Ender had left his brother Ali in order to go to the hospital where his wife was giving birth (see paragraph 20 above).

(c) In his letter to the Court of 31 January 2000, the applicant corrected his previous statement in that the woman who was in hospital giving birth on the day of Ender's disappearance had been the wife of Ender's brother (see paragraph 21 above).

(d) In his statement of 19 July 1996, the applicant told the Diyarbakır Prosecutor that he had also been detained together with his son Ender on 29 November 1994. He had then been released after a week but Ender, who was not released, had been missing since (see paragraphs 49-50 above).

(e) In his letter of 14 September 2001 forwarded to the Court, the applicant stated that there were no eye-witnesses to the abduction of his son Ender. He himself had also not witnessed it (see paragraph 65 above).

(f) In his memorial submitted to the Court on 16 October 2001 the applicant submitted that, on the day of his disappearance, his son Ender had been with his wife Güler, who was pregnant and had been taken to the maternity ward of the hospital because she was feeling unwell. Ender had never returned from the hospital (see paragraph 22 above).

(g) According to the statement made by Güler Tuncel, her husband Ender had taken her to the hospital and she had returned together with Ender before he left to go to his café (see paragraph 58 above).

(h) The applicant's wife, however, submitted in her statement of 29 November 1994 that she had gone to hospital together with her daughter-in-law Güler. Her son Ender was at the hospital with them but he was at home when she returned. Ender had left at 3 p.m. to go to the café which he was running and had not returned (see paragraph 59 above).

(i) Finally, in his memorial submitted to the Court on 16 October 2001 the applicant submitted that his son Ali had been detained on 30 November for a period of four to five hours.

93. The Court notes that the applicant – who was legally represented in the present proceedings – has not provided any explanation for these serious discrepancies. It finds that they detract from the credibility of his account to the extent that, on the basis of his submissions, the Court is unable to draw a clear picture of the events of 29 November 1994 and it cannot, therefore, find it established that Ender was taken into custody by security forces.

94. The Court is thus faced with a situation where it is unable to establish what took place on 29 and 30 November 1994 and this inability emanates from, on the one hand, the contradictory information submitted by the applicant, and on the other hand, the incomplete investigation file submitted by the Government.

95. The Court has already noted the difficulties for an applicant to obtain the necessary evidence in support of his or her allegations which is in the hands of the respondent Government in cases where that Government fail to submit relevant documentation. It has previously held that, where it is the Government's non-disclosure of crucial documents in their exclusive possession which is preventing the Court from establishing the facts, it is for the Government either to argue conclusively why the documents in question cannot serve to corroborate the allegations made by the applicants, or to provide a satisfactory and convincing explanation of how the events in question occurred. Failing this, an issue under Article 2 and/or Article 3 of the Convention will arise (see *Akkum and Others v. Turkey*, no. 21894/93, § 211, 24 March 2005). However, to shift the burden of proof onto the

Government in such circumstances requires, by implication, that the applicant has already made out a prima facie case.

96. In the light of the contradictory versions of events put forward by the applicant in the present case, the Court cannot but conclude that he has failed to make out his case to the extent necessary for the burden to shift onto the Government to explain that the custody records withheld by them contained no relevant information concerning Ender.

97. In these circumstances, the Court is unable to make a finding as to who might have been responsible for the disappearance of Ender Toğcu.

98. The Court will now proceed to examine the applicant's complaints under the various Articles of the Convention.

III. ALLEGED VIOLATIONS OF ARTICLE 2 OF THE CONVENTION

99. Article 2 of the Convention 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. Alleged disappearance of Ender Toğcu while in the custody of State agents

100. The applicant alleged that his son had been abducted and detained by security forces and is now to be presumed dead, in violation of Article 2 of the Convention.

101. According to the Government, State agents were not involved in the disappearance of the applicant's son.

102. The Court has already found that it was unable to reach a conclusion as to who might have been responsible for the disappearance of Ender Toğcu (see paragraph 97 above). It follows, therefore, that there has been no violation of Article 2 of the Convention on that account.

B. Alleged failure to safeguard the right to life of Ender Toğcu

103. The applicant submitted that the failure of the authorities to take reasonable steps to investigate or to protect his son whose forced disappearance had been reported to them, disclosed a failure on the part of the Government to comply with their positive obligation under Article 2 of the Convention to take positive steps to protect the right to life.

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

105. The Court concludes, on the basis of its examination of the parties' submissions and of the evidence (see paragraphs 88-97 above), that it is unable to reach the conclusion proposed by the applicant. It finds it more appropriate, in the circumstances of this case, to examine the Government's alleged failure to investigate Ender Toğcu's disappearance in the context of their obligation to carry out effective investigations (see paragraphs 106-122 below).

C. Alleged inadequacy of the investigation

106. The applicant alleged that there had been a violation of Article 2 of the Convention on account of the State's failure to carry out an adequate and effective investigation into the disappearance of his son.

107. In support of his allegation the applicant highlighted the following shortcomings in the investigation:

(a) the authorities' failure to react diligently and/or expeditiously to the various petitions made orally and in writing by him and members of his family;

(b) the authorities' failure to reply substantively, or at all, to the various petitions made by him and his family;

(c) the authorities' failure to take statements from all potential eye-witnesses, including neighbours and other villagers;

(d) the failure to take statements from all police officers concerned in the search for Ender and the search of his and his son Ali's homes;

(e) the failure of the prosecutors to inspect personally the detention facilities in all gendarmerie and police establishments where his son might have been detained from November 1994 to date; and, finally,

(f) the failure of the prosecutors to interview senior and/or custody officers, or to check the relevant custody records of all detention facilities.

108. In their observations of 12 January 2000, the Government submitted that an investigation, which had been opened into the applicant's allegations following the submission by his wife of a petition to the Prosecutor's office at the Diyarbakır Court, had been concluded with a decision not to prosecute, taken by the Diyarbakır Prosecutor on

6 November 1996. Nevertheless, the Diyarbakır Prosecutor's office had commenced another investigation in 1999, in the course of which statements had been taken from the applicant, his wife and daughter-in-law. According to the information received from the office of the Prosecutor, statements from the police officers who had signed the search reports would also be taken (see paragraph 36 above). Although the Government submitted in their observations that those statements would be submitted to the Court as soon as they were obtained, they failed to do so.

109. The Court reiterates that the obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", 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, *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, Series A no. 324, p. 49, § 161, and *Kaya v. Turkey,* judgment of 19 February 1998, *Reports* of *Judgments and Decisions*, 1998-I, p. 329, § 105). In that connection, the Court points out that this obligation is not confined to cases where it is apparent that the killing was caused by an agent of the State (see *Salman v. Turkey* [GC], no. 21986/93, § 105, ECHR 2000-VII).

110. The investigation must also be effective in the sense that it is capable of leading to the identification and punishment of those responsible (see *Oğur v. Turkey* [GC], no. 21954/93, § 88, ECHR 1999-III). 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 (*Tanrıkulu*, 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.

111. There is also a requirement of promptness and reasonable expedition implicit in this context (see *Yaşa v. Turkey,* judgment of 2 September 1998, *Reports* 1998-IV, §§ 102-104; *Çakıcı v. Turkey* [GC], no. 23657/94, § 80, 87, 106, ECHR 1999-IV; *Tanrıkulu,* cited above, § 109).

112. The Court notes that there is no proof that Ender Toğcu has been killed. However, the Court considers that the above mentioned obligations also apply to cases where a person has disappeared in circumstances which may be regarded as life-threatening. In this respect, it has previously held that the disappearance and unacknowledged detention of a person suspected by the authorities of PKK involvement could be considered as life-threatening in the general context of the situation in south-east Turkey in 1993 (see *Timurtaş*, cited above, § 85). Having regard to the cases involving disappearances which it has been called upon to examine and

which occurred in 1994, the Court concludes that that general context still pertained in that year (see, for instance, *Çiçek v. Turkey*, no. 25704/94, 27 February 2001; *İrfan Bilgin v. Turkey*, no. 25659/94, ECHR 2001-VIII; *Orhan v. Turkey*, no. 25656/94, 18 June 2002; *İpek v. Turkey*, no. 25760/94, ECHR 2004 (extracts)). It further appears that the authorities indeed suspected Ender Toğcu of PKK involvement (see paragraphs 38-39 above). In these circumstances, the Court considers that the disappearance of Ender Toğcu could be regarded as life-threatening.

113. The Court observes at the outset that despite the fact – acknowledged by the Government – that the authorities were informed of the disappearance of Ender on 6 April 1995 when the applicant's wife submitted a petition to the Prosecutor at the Diyarbakır Court, no action seems to have been taken for several months until Ramazan Sürücü, the chief of the Anti-Terror Branch, stated in a letter of 1 February 1996 that Ender Toğcu had not been detained at the Anti-Terror Branch on 29 October 1994 (see paragraph 45 above).

114. Notwithstanding the fact that the date of Ender's disappearance was clearly stated in the petition as having occurred a month later, on 29 November 1994, none of the investigating authorities seemed to have checked this information provided by Mr Sürücü.

115. The Court finds that the only meaningful action that was taken between 1 February 1996 and 6 November 1996 – the date on which the Prosecutor took a decision not to prosecute (see paragraph 52 above) –, was the questioning of the applicant on 19 July 1996 by the Diyarbakır Prosecutor, well over a year after being informed of the disappearance (see paragraph 49 above).

116. It further appears from the text of the decision not to prosecute, that a letter, purportedly sent to the Diyarbakır Prosecutor on 16 October 1996 by the Anti-Terror Branch, in which the detention of Ender Toğcu by that Branch was denied (see paragraph 52 above), formed the sole basis for this decision.

117. As the applicant pointed out, the Court has not been provided with any information to show that the Diyarbakır Prosecutor checked the custody records or that he questioned any members of the security forces before reaching that decision.

118. The Court further notes that no action was taken at the domestic level between 6 November 1996 and 14 October 1999. On this latter date the Diyarbakır Prosecutor instructed the Gendarmerie and the Police to send to his office the relevant custody records and to search for Ender (see paragraph 54 above). The Prosecutor, due to the failure of the Police to reply and, presumably, the Gendarmerie's failure to submit the complete custody records (see paragraph 60 above), had to repeat his instructions on 30 November 1999 both to the Gendarmerie and to the Police.

119. On account of the Government's failure to submit any documents which were drawn up after 30 November 1999 – in particular any statements which the Diyarbakır Prosecutor was to take from the police officers who had searched the applicant's house on 30 November 1994 (see paragraph 61 above) – the Court is unable to assess the efficiency of the subsequent steps that might have been taken in the investigation.

120. In the light of the above, the Court concludes that the authorities have failed to carry out an effective investigation as required by Article 2 of the Convention into the disappearance of the applicant's son.

121. The Court finds, therefore, that there has been a violation of Article 2 of the Convention under its procedural limb.

IV. ALLEGED VIOLATIONS OF ARTICLE 3 OF THE CONVENTION

122. The applicant submitted that there had been a separate violation of Article 3 of the Convention for the following reasons:

(a) The abduction and disappearance of his son, coupled with the State's failure to carry out any form of adequate and effective investigation into the disappearance, undermined, and were inconsistent with, the protection against torture and inhuman or degrading treatment under Article 3 of the Convention.

(b) The applicant himself had suffered anguish and distress in the face of the authorities' complacency in relation to his son's disappearance.

123. Article 3 of the Convention provides as follows:

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

124. The Government did not specifically deal with this complaint.

125. The Court reiterates that it has been unable to make a finding as to who might have been responsible for the disappearance of Ender Toğcu (see paragraph 97 above).

126. It considers that the question whether the authorities' failure to conduct an effective investigation into the disappearance of the applicant's son amounted to treatment contrary to Article 3 of the Convention in respect of the applicant himself, is a separate complaint from the one brought under Article 2 of the Convention which relates to procedural requirements and not to ill-treatment in the sense of Article 3 (see *Tahsin Acar*, cited above, § 237).

127. The Court points out that whether a family member is a victim will depend on the existence of special factors giving his or her suffering a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation. Relevant elements will include the proximity of the family tie, the particular circumstances of the relationship, the extent to which the

family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person and the way in which the authorities responded to those enquiries. The essence of such a violation does not so much lie in the fact of the "disappearance" of the family member but rather concerns the authorities' reactions and attitudes to the situation when it is brought to their attention. It is especially in respect of the latter that a relative may claim directly to be a victim of the authorities' conduct (*ibid,* § 238).

128. Although the inadequacy of the investigation into the disappearance of his son may have caused the applicant feelings of anguish and mental suffering, the Court considers that, in so far as the applicant has substantiated this claim, it has not been established that there were special factors which would justify finding a violation of Article 3 of the Convention in relation to the applicant himself (*ibid*, § 239, and the cases cited therein).

129. It therefore finds no breach of Article 3 of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

130. Invoking Article 5 of the Convention, the applicant alleged that his son had been detained in complete disregard of the safeguards contained in paragraphs one to five of this provision, which guarantees the right to liberty and security.

131. Beyond denying that the applicant's son had been detained by the police, the Government did not specifically address this complaint.

132. The Court reiterates that it has been unable to make a finding as to who might have been responsible for the disappearance of the applicant's son (see paragraph 97 above). There is thus no factual basis to substantiate the applicant's allegation.

133. Consequently, the Court finds no violation of Article 5 of the Convention.

VI. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

134. The applicant submitted that he and his family had taken every reasonable step possible in order to ensure that the detention of his son was properly and thoroughly investigated by the national authorities. However, the response of the various authorities to their complaints and petitions had been utterly inadequate. The necessary remedies either did not exist or they were, in practice, useless.

Article 13 of the Convention 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."

135. The Government contended that the disappearance of the applicant's son had been adequately investigated.

136. The Court reiterates that Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention 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. Thus, its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State (see *Aksoy v. Turkey*, judgment of 18 December 1996, *Reports* 1996-VI, p. 2286, § 95; *Kaya*, cited above, § 106).

137. Given the fundamental importance of the right to the protection of life, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the death, including effective access for the complainant to the investigation procedure (see *Kaya*, cited above, § 107). The Court considers that this also applies in the case of a disappearance in life-threatening circumstances (see paragraph 112 above).

138. On the basis of the evidence adduced in the present case, the Court has not found it proved that agents of the State were involved in the disappearance of the applicant's son. As it has held in previous cases, however, that does not preclude the complaint in relation to Article 2 of the Convention from being an "arguable" one for the purposes of Article 13 (see *Akkoç v. Turkey*, nos. 22947/93 and 22948/93, ECHR 2000-X and the cases cited therein). In this connection, the Court observes that it has already found that the applicant's son was the victim of a disappearance (see paragraph 89 above), and the applicant may therefore be considered to have an "arguable claim".

139. The authorities thus had an obligation to carry out an effective investigation into the circumstances of his disappearance. For the reasons set out above (see paragraphs 106-121), no effective criminal investigation can be considered to have been conducted in accordance with Article 13, the requirements of which may be broader than the obligation to investigate imposed by Article 2 (see *Kaya*, cited above, § 107). The Court finds, therefore, that the applicant was denied an effective remedy in respect of the disappearance of his son, and was thereby denied access to any other available remedies at his disposal, including a claim for compensation.

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

VII. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION IN CONJUNCTION WITH ARTICLES 2, 3, 5, 13 and 18

141. The applicant argued that the circumstances of this case disclosed a violation of Article 14 of the Convention in conjunction with Articles 2, 3, 5, 13 and 18. He submitted that there was sufficient evidence to establish that the Kurds in south-east Turkey had been subjected to systematic unlawful treatment. His son had also suffered discrimination on the grounds of race. He finally submitted that there was sufficient evidence to disclose an administrative practice of violations of Article 14 taken together with the Articles referred to above.

Article 14 of the Convention provides as follows:

> "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."

142. The Government did not specifically deal with this complaint.

143. The Court observes its findings of violations of Articles 2 and 13 of the Convention, and does not consider that it is necessary to examine separately the applicant's complaints under Article 14 of the Convention.

VIII. ALLEGED VIOLATION OF ARTICLE 18 OF THE CONVENTION

144. The applicant alleged that the restrictions on the rights and freedoms afforded under the Convention imposed and/or practised by Turkey, in particular in relation to Article 5, were applied for purposes not permitted under the Convention. He invoked Article 18 of the Convention, which reads:

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

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

IX. ALLEGED VIOLATION OF ARTICLE 34 OF THE CONVENTION

146. The applicant submitted that on several occasions he had been questioned by the national authorities about his application to the Court. This had happened most recently in July or August 2001, when he was asked, *inter alia*, "You have brought proceedings against Turkey. Why did

you do that?". According to the applicant, such questioning amounted to a hindrance which rendered the application process more difficult.

Article 34 of the Convention provides as follows:

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

147. The Government did not comment on this complaint.

148. The Court does not agree that the question allegedly put to the applicant can be construed as a hindrance within the meaning of Article 34 of the Convention. In this context, the Court observes that the applicant was able to lodge his application to the Commission and submit to the Commission and subsequently to the Court a number of observations. He has also continued to correspond with the Convention institutions without any obstacles.

149. In the light of the foregoing, the Court does not find it established that the applicant has been hindered in the exercise of his right of individual petition. It follows that there has been no violation of Article 34.

X. APPLICATION OF ARTICLE 41 OF THE CONVENTION

150. Article 41 of the Convention provides:

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

A. Pecuniary damage

151. The applicant submitted that his son had been born in 1968 and was 26 years old at the time of his disappearance. He was married and had – contrary to what the applicant claimed in his memorial of 16 October 2001 (see paragraph 22 above) – two children.

152. Before he died, he earned his livelihood from running the Sento Hotel and the Arzu Club in Diyarbakır with his business partner. He was earning the equivalent of 22,626.90 pounds sterling (GBP) per year. Taking into account the average life expectancy in Turkey at that time and having regard to actuarial tables, the applicant claimed the sum of GBP 540,556.64 in respect of the estimated loss of earnings of Ender Toğcu.

153. The Government have not commented on the applicant's claim.

154. The Court's case-law has established that there must be a clear causal connection between the damage claimed by the applicant and the

violation of the Convention and that this may, in appropriate cases, include compensation in respect of loss of earnings (see, among other authorities, *Barberà, Messegué and Jabardo v. Spain* (Article 50), judgment of 13 June 1994, Series A no. 285-C, pp. 57-58, §§ 16-20, and *Çakıcı,* cited above, § 127).

155. However, the Court finds no causal link between the matters held to constitute violations of the Convention – the absence of an effective investigation and an effective remedy – and the pecuniary damage alleged by the applicant. Consequently, it dismisses the applicant's claim under this head.

B. Non-pecuniary damage

156. The applicant claimed the sum of GBP 50,000, to be held for the benefit of Ender Toğcu's widow, mother, two children, three sisters and two brothers, as well as himself and his wife. He also claimed the sum of GBP 15,000 for himself. He requested the Court to specify its awards in pounds sterling.

157. The Government have not made any comments on the applicant's claims.

158. The Court reiterates that that the authorities failed to carry out an effective investigation into the circumstances surrounding the disappearance of the applicant's son, contrary to the procedural obligation under Article 2 of the Convention. It also found that the applicant did not have an affective remedy, in violation of Article 13 of the Convention. Consequently, and having regard to the awards made in comparable cases, the Court, on an equitable basis, awards the applicant the sum of 10,000 euros (EUR) for non-pecuniary damage, to be held by him for the widow and children of Ender Toğcu. It also awards the applicant the sum of EUR 3,500 for non-pecuniary damage sustained by him in his personal capacity.

C. Costs and expenses

159. The applicant claimed a total of GBP 21,192.34 for the fees and costs incurred in bringing the application. His claim comprised:

(a) GBP 11,729.99 for the fees of his lawyers working for the Kurdish Human Rights Project (KHRP) in the United Kingdom;

(b) GBP 4,903.40 for the fees of his lawyers based in Turkey;

(c) GBP 2,268 for administrative costs, such as telephone, postage, photocopying and stationary, incurred by the United Kingdom-based lawyers; and, finally,

(d) GBP 2,290,95 for administrative costs, such as telephone, postage, photocopying and stationary, incurred by his lawyers based in Turkey;

160. In support of his claims for the fees of his lawyers, the applicant submitted a detailed schedule of costs.

161. The Government have not commented on these claims.

162. The Court notes that the applicant has only partly succeeded in making out his complaints under the Convention and reiterates that only legal costs and expenses necessarily and actually incurred can be reimbursed under Article 41 of the Convention. Making its own assessment based on the information available, the Court awards the applicant EUR 10,000 in respect of costs and expenses – exclusive of any value-added tax that may be chargeable –, less EUR 758 received by way of legal aid from the Council of Europe, the net award to be paid in pounds sterling into his representatives' bank account in the United Kingdom, to be identified by the applicant.

D. Default interest

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

FOR THESE REASONS, THE COURT

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

2. *Holds* unanimously that the respondent State has failed to fulfil its obligation under Article 38 of the Convention to furnish all necessary facilities to the Court in its task of establishing the facts;

3. *Holds* unanimously that there has been no violation of Article 2 of the Convention in respect of the disappearance of the applicant's son;

4. *Holds* unanimously that there has been no violation of Article 2 of the Convention in respect of the Government's alleged failure to protect the right to life of the applicant's son;

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

6. *Holds* unanimously that there has been no violation of Article 3 of the Convention;

7. *Holds* unanimously that there has been no violation of Article 5 of the Convention;

8. *Holds* unanimously that there has been a violation of Article 13 of the Convention;

9. *Holds* by six votes to one that it is unnecessary to examine separately the applicant's complaint under Article 14 of the Convention;

10. *Holds* unanimously that it is unnecessary to examine separately the applicant's complaint under Article 18 of the Convention;

11. *Holds* unanimously that there has been no violation of Article 34 of the Convention;

12. *Holds* unanimously
(a) that the respondent State is to pay to the applicant, to be held by him for the widow and children of his son Ender Toğcu, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 10,000 (ten thousand euros) and any tax that may be chargeable on this amount, in respect of non-pecuniary damage; this sum is to be converted into new Turkish liras at the rate applicable at the date of settlement and be paid into the bank account of the applicant;
(b) that the respondent State is to pay to the applicant, within the same three month period, EUR 3,500 (three thousand five hundred euros) and any tax that may be chargeable on this amount, in respect of non-pecuniary damage; this sum is to be converted into new Turkish liras at the rate applicable at the date of settlement and be paid into the bank account of the applicant;
(c) that the respondent State is to pay the applicant, within the same three month period, into the bank account, to be identified by him, of his representatives in the United Kingdom, EUR 10,000 (ten thousand euros) in respect of costs and expenses, together with any value-added tax that may be chargeable, less EUR 758 (seven hundred and fifty-eight euros) received by way of legal aid from the Council of Europe, to be converted into pounds sterling at the rate applicable at the date of settlement;
(d) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

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

S. DOLLÉ	J.-P. COSTA
Registrar	President

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

J.-P.C.
S.D.

PARTLY DISSENTING OPINION OF JUDGE MULARONI

Unlike the majority, I believe that it is necessary for the Court to examine separately the applicant's complaint under Article 14 of the Convention.

After examining tens and tens of similar applications, all lodged, without exception, by Turkish citizens of Kurdish origin, and very often concluding that there was a violation of Articles 2 and 3 of the Convention, the Court should, to my mind, at least consider that there could be a serious problem under Article 14 of the Convention as well.

This does not mean, of course, that in the end the Court will invariably find that there has been a violation of Article 14. However, I cannot agree with the majority approach, which to me is tantamount to considering that the prohibition on discrimination in this type of case is not an important issue.