CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

CASE OF KURT v. TURKEY

(15/1997/799/1002)

JUDGMENT

STRASBOURG

25 May 1998

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SUMMARY[1]

Judgment delivered by a Chamber

Turkey – failure of authorities to account for whereabouts or fate of applicant's son last seen surrounded by members of security forces

I. GOVERNMENT'S PRELIMINARY OBJECTIONS

A. Non-validity of application

Applicant testified before delegates – confirmed her wish to take part in proceedings before Court and was present at hearing in her case – cannot be maintained in circumstances that applicant was not seeking redress in respect of complaint against authorities.

Conclusion: objection dismissed (unanimously).

B. Non-exhaustion of domestic remedies

Government barred on procedural grounds from raising objection – in any event, objection would have been dismissed on merits given that applicant did everything that could be expected of her to exhaust domestic remedies.

Conclusion: objection dismissed (unanimously).

II. ARTICLES 2, 3 AND 5 OF THE CONVENTION IN RESPECT OF THE DISAPPEARANCE OF THE APPLICANT'S SON

A. Establishment of the facts

Commission meticulously examined inconsistencies in applicant's evidence as well as Government's alternative explanations for disappearance of her son – applicant questioned extensively by delegates of the Commission and Government lawyers at hearing – applicant found credible and consistent on central issue, namely she had seen her son surrounded by soldiers and village guards in village – no exceptional circumstances which would lead Court to depart from Commission's finding that applicant's son detained in village in circumstances alleged and has not been seen since.

B. Article 2

No concrete evidence adduced proving, beyond reasonable doubt, that applicant's son was killed by authorities – neither circumstances in which son detained nor materials relied on by applicant in support of allegation of practice of, *inter alia*, disappearances and

1. This summary by the registry does not bind the Court.

extra-judicial killing of detainees corroborate allegation of unlawful killing – in view of Court, applicant's assertion that authorities failed to protect son's life falls to be assessed under Article 5.

Conclusion: not necessary to decide on complaint (unanimously).

C. Article 3 in respect of the applicant's son

As with Article 2 complaint, no evidence adduced to substantiate allegation of ill-treatment of applicant's son in custody – complaint falls to be considered from angle of Article 5.

Conclusion: not necessary to decide on complaint (unanimously).

D. Article 5

Reiteration of Court's case-law on fundamental importance of Article 5 guarantees for protection of physical liberty and personal security of individuals.

Unacknowledged detention of an individual must be considered a negation of these guarantees – assumption by authorities of control over individual requires them to account for individual's whereabouts – Article 5 requires that authorities take effective measures to safeguard against risk of disappearance and to conduct prompt effective investigation into arguable claim that an individual has not been seen since being taken into custody.

In instant case, no record kept of son's detention in village – moreover, authorities failed to carry out any meaningful investigation into applicant's allegation – applicant never interviewed – authorities must be considered in circumstances to have failed to discharge their responsibility to account for whereabouts of applicant's son – can be concluded that son held in unacknowledged detention without protection of safeguards guaranteed by Article 5 – in view of Court, this gives rise to particularly grave violation of that Article.

Conclusion: violation (six votes to three).

III. ARTICLE 3 OF THE CONVENTION IN RESPECT OF THE APPLICANT HERSELF

No serious consideration given by authorities to applicant's complaint – applicant a victim of authorities' complacency in face of her anguish and distress – suffering endured over prolonged period of time and must in circumstances be considered ill-treatment within scope of Article 3.

Conclusion: violation (six votes to three).

IV. ARTICLE 13 OF THE CONVENTION

Reiteration of Court's case-law on nature of an effective remedy in cases of alleged serious violations of Convention rights.

In instant case, authorities confronted with an arguable claim that applicant's son detained by security forces in village – authorities obliged in circumstances to conduct, for benefit of relatives, thorough and effective investigation into disappearance – no such investigation conducted for reasons given for finding of violation of Article 5.

Conclusion: violation (seven votes to two).

V. ARTICLES 2, 3 AND 5 IN CONJUNCTION WITH ARTICLE 14 OF THE CONVENTION

Complaints not substantiated.

Conclusion: no violation (unanimously).

VI. ARTICLE 18 OF THE CONVENTION

Complaint not substantiated.

Conclusion: no violation (unanimously).

VII. ARTICLE 25 § 1 OF THE CONVENTION

Reaffirmation of Court's case-law on obligation of Contracting State to ensure that applicants are able to communicate freely with Commission without being subjected to any form of pressure to withdraw or modify their complaints – expression "any form of pressure" covers not only direct coercion and intimidation but also improper indirect acts intended to dissuade or discourage applicants or potential applicants, their families or legal representatives from pursuing a Convention remedy – in instant case, Court satisfied on facts that applicant subjected to indirect and improper pressure to make statements in respect of her application to Commission – furthermore, threat of criminal proceedings against applicant's lawyer, even if not followed up, to be considered an interference with exercise of right of individual petition – allegations against a respondent State, even if proved false, must be tested in accordance with Convention procedures and not by threat of criminal measures against applicant's lawyer.

Conclusion: violation (six votes to three).

VIII. ARTICLE 50 OF THE CONVENTION

A. Non-pecuniary damage

Separate sums awarded to applicant's son and to applicant herself – first sum to be held by applicant for her son and his heirs.

Conclusion: respondent State ordered to pay specified sums (eight votes to one).

B. Costs and expenses

Applicant's claim allowed in part.

Conclusion: respondent State ordered to pay specified sum (eight votes to one).

COURT'S CASE-LAW REFERRED TO

24.3.1988, Olsson v. Sweden (no. 1); 20.3.1991, Cruz Varas and Others v. Sweden; 27.8.1992, Tomasi v. France; 22.3.1995, Quinn v. France; 27.9.1995, McCann and Others v. the United Kingdom; 16.9.1996, Akdivar and Others v. Turkey; 15.11.1996, Chahal v. the United Kingdom; 18.12.1996, Aksoy v. Turkey; 25.9.1997, Aydın v. Turkey; 28.11.1997, Menteş and Others v. Turkey; 19.2.1998, Kaya v. Turkey

In the case of Kurt v. Turkey[1],

The European Court of Human Rights, sitting, in accordance with Article 43 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A[2], as a Chamber composed of the following judges:

Mr R. BERNHARDT, *President*,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr L.-E. PETTITI,
Mr I. FOIGHEL,
Mr J.M. MORENILLA,
Mr G. MIFSUD BONNICI,
Mr K. JUNGWIERT,
Mr U. LÕHMUS,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 3 February and 27 April 1998,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 22 January 1997, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in an application (no. 24276/94) against the Republic of Turkey lodged with the Commission under Article 25 by a Turkish national, Mrs Koçeri Kurt on 11 May 1994. The application was brought by the applicant on her own behalf and on behalf of her son.

The Commission's request referred to Articles 44 and 48 and to the declaration whereby Turkey recognised the compulsory jurisdiction of the Court (Article 46). The object of the request was to obtain a decision as to

Notes by the Registrar

1. The case is numbered 15/1997/799/1002. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. Rules of Court A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol. They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 2, 3, 5, 13, 14, 18 and 25 § 1 of the Convention.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of Rules of Court A, the applicant stated that she wished to take part in the proceedings and designated the lawyers who would represent her (Rule 30). On 18 March 1997 the President of the Chamber refused the applicant's request to provide for interpretation in an unofficial language at the public hearing having regard to the fact that two of her lawyers used one of the official languages (Rule 27).

3. The Chamber to be constituted included *ex officio* Mr F. Gölcüklü, the elected judge of Turkish nationality (Article 43 of the Convention), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 § 4 (b). On 21 February 1997, in the presence of the Registrar, the President of the Court, Mr R. Ryssdal, drew by lot the names of the other seven members, namely Mr F. Matscher, Mr L.-E. Pettiti, Mr I. Foighel, Mr J.M. Morenilla, Mr G. Mifsud Bonnici, Mr K. Jungwiert and Mr U. Lõhmus (Article 43 *in fine* of the Convention and Rule 21 § 5).

4. As President of the Chamber (Rule 21 § 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the Turkish Government ("the Government"), the applicant's lawyers and the Delegate of the Commission on the organisation of the proceedings (Rules 37 § 1 and 38). Pursuant to the order made in consequence on 17 April 1997, the Registrar received the applicant's memorial on 23 September 1997 and the Government's memorial on 3 November 1997, the Government having been granted by the President of the Chamber on 29 May 1997 an extension of the time-limit for the submission of their memorial.

5. On 24 September 1997 the President of the Chamber granted leave pursuant to Rule 37 § 2 to Amnesty International to submit written comments on the case subject to certain conditions. These comments were received at the registry on 7 November 1997 and communicated to the Agent of the Government, the applicant's lawyers and the Delegate of the Commission.

6. On 27 September 1997 the Commission produced a number of documents from the file on the proceedings before it, as requested by the Registrar on the President's instructions.

7. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 26 January 1998. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*
Mr M. ÖZMEN,
Ms D. AKÇAY, *co-Agents*,
Ms A. EMÜLER,
Mr F. POLAT,
Ms A. GÜNYAKTI,
Ms M. ANAYAROĞLU,
Mr A. KAYA,
Mr K. ALATAŞ, *Advisers*;

(b) *for the Commission*
Mr N. BRATZA, *Delegate*;

(c) *for the applicant*
Ms F. HAMPSON, Barrister-at-Law,
Ms A. REIDY, Barrister-at-Law, *Counsel*,
Mr O. BAYDEMIR,
Mr K. YILDIZ, *Advisers*.

The Court heard addresses by Mr Bratza, Ms Hampson and Ms Akçay.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

The applicant

8. The applicant, Mrs Koçeri Kurt, is a Turkish citizen who was born in 1927 and is at present living in Bismil in south-east Turkey. At the time of the events giving rise to her application to the Commission she was living in the nearby village of Ağıllı. Her application to the Commission was brought on her own behalf and on behalf of her son, Üzeyir Kurt, who, she alleges, has disappeared in circumstances engaging the responsibility of the respondent State.

The facts

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

10. The facts presented by the applicant in her final observations on the merits of her application in the proceedings before the Commission are contained in Section A below. This account of the facts also addresses her allegation that she and her lawyer have been subjected to intimidation by the authorities on account of her decision to lodge an application with the Commission. The applicant did not reconstitute her version of the circumstances surrounding the disappearance of her son in her memorial to the Court, relying rather on the facts as established by the Commission in its report (Article 31) adopted on 5 December 1996.

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

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

13. The Commission, with a view to establishing the facts in the light of the dispute over the circumstances surrounding the disappearance of the applicant's son, conducted its own investigation pursuant to Article 28 § 1 (a) of the Convention. To this end, the Commission examined a series of documents submitted by both the applicant and the Government in support of their respective assertions and appointed three delegates to take evidence of witnesses at a hearing conducted in Ankara on 8 and 9 February 1996. The Commission's evaluation of the evidence and its findings thereon are summarised in Section E.

A. Facts as presented by the applicant

1. Concerning the disappearance of the applicant's son

14. From 23 to 25 November 1993 security forces, made up of gendarmes and a number of village guards, carried out an operation in the village of Ağıllı. On 23 November 1993, following intelligence reports that three terrorists would visit the village, the security forces took up positions around the village. Two clashes followed. During the two days they spent in the village they conducted a search of each house. A number of houses, between ten and twelve, were burnt down during the operation, including those of the applicant and Mevlüde and Ali Kurt, Mevlüde being her son's aunt. Only three of the houses were near the clashes. Other houses were burnt down on a second occasion during the military operation. The

villagers were told that they had a week to evacuate the village. The villagers fled to Bismil, many as they were homeless, and those who were not being too scared to remain.

15. According to the applicant, around noon on 24 November 1993, when the villagers had been gathered by the soldiers in the schoolyard, the soldiers were looking for her son, Üzeyir, who was not in the schoolyard. He was hiding in the house of his aunt Mevlüde (see paragraph 14 above). When the soldiers asked Aynur Kurt, his daughter, where her father was, Aynur told them he was at his aunt's house. The soldiers went to Mevlüde's house with Davut Kurt, another of the applicant's sons, and took Üzeyir from the house. Üzeyir spent the night of 24–25 November 1993 with soldiers in the house of Hasan Kılıç.

On the morning of 25 November 1993, the applicant received a message from a child that Üzeyir wanted some cigarettes. The applicant took cigarettes and found Üzeyir in front of Hasan Kılıç's house surrounded by about ten soldiers and five to six village guards. She saw bruises and swelling on his face as though he had been beaten. Üzeyir told her that he was cold. She returned with his jacket and socks. The soldiers did not allow her to stay so she left. This was the last time she saw Üzeyir. The applicant maintains that there is no evidence that he was seen elsewhere after this time.

16. On 30 November 1993 the applicant applied to the Bismil public prosecutor, Ridvan Yıldırım, to find out information on the whereabouts of her son. On the same day, she received a response from Captain Izzet Cural at the provincial gendarmerie headquarters stating that it was supposed that Üzeyir had been kidnapped by the PKK (the Kurdish Workers' Party). Captain Cural, who had proposed the plan for the operation in the village, replied in identical terms on 4 December 1993. The district gendarmerie commander noted on the bottom of the applicant's petition of 30 November that Üzeyir had not been taken into custody and that he had been kidnapped by the PKK.

17. On 14 December 1993 the applicant applied to the National Security Court in Diyarbakır which replied that he was not in their custody records. On 15 December 1993 she contacted the Bismil public prosecutor again but was referred to the gendarmerie. Finally, on 24 December 1993 the applicant approached the Diyarbakır Human Rights Association for help and made a statement on the circumstances surrounding her son's disappearance.

18. On 28 February 1994 Davut Karakoç (Üzeyir's cousin), Arap Kurt (Üzeyir's uncle and *muhtar* of the village) and Mehmet Kurt (another of Üzeyir's cousins) were taken to the gendarmerie and questioned about what they knew of "Üzeyir Kurt who was abducted by representatives of the PKK terrorist organisation". On 21 March 1994 the Bismil public prosecutor issued a decision of non-jurisdiction on the grounds that a crime had been committed by the PKK.

2. Concerning alleged intimidation and interference with the exercise of the right of individual petition

(a) In respect of the applicant

19. The applicant maintains that since submitting her application to the Commission on 11 May 1994 she has been the target of an extraordinarily concerted campaign by the State authorities to make her withdraw her application.

20. On 19 November 1994 the applicant was called to give a statement to the Bismil public prosecutor on the instructions of the Diyarbakır Principal Public Prosecutor. In this statement she was questioned about the statement she made to the Diyarbakır Human Rights Association on 24 December 1993 (see paragraph 17 above) as well as about her application to the Commission. She denied in her statement to the public prosecutor that the villagers had been tortured by the security forces as had been alleged in the statement taken down by the Diyarbakır Human Rights Association and rejected the reference in the latter statement to the effect that her son had been tortured. She had simply told the Human Rights Association that her son's face looked like it was swollen.

21. On 9 December 1994 the applicant signed a statement addressed to the Diyarbakır Human Rights Association which said that her petitions were written by the PKK terrorist organisation and were being used for propaganda purposes. A similar statement was addressed the same day to the Foreign Ministry in Ankara.

22. On 6 January 1995 the applicant was called by the State authorities to go to a notary in Bismil and was accompanied there by a soldier. She did not pay the notary. The statement which was signed indicated that her only wish was to find her son and that it was for this reason that she had contacted the Diyarbakır Human Rights Association. She indicated that an ill-founded petition had been made in her name by the PKK accusing the security forces of her son's disappearance. She rejected the application made in her name to the Commission and did not wish to pursue it.

23. On 25 January 1995 a statement was taken by the Principal Public Prosecutor's office, as part of a file prepared by the authorities for the purpose of bringing a complaint against the applicant's lawyer, Mr Mahmut Şakar (see paragraph 25 below).

24. On 10 August 1995 the applicant made another statement before the notary in Bismil which purported to withdraw her application to the Commission. While she was not forced to say anything to the notary and she told him what she wanted to be written, the applicant maintained that the statements do not represent her wishes and she had no opportunity to verify the contents of the statements.

(b) Actions taken against the applicant's lawyer, Mr Şakar

25. The applicant states that the authorities have taken steps with a view to prosecuting her lawyer, Mr Mahmut Şakar, for his involvement in her application to the Commission. She refers to a request made in a document dated 12 January 1995 by Mr Özkarol of the Foreign Ministry's Human Rights Directorate that an investigation be opened against Mr Şakar who was suspected of exploiting the applicant and had made an application against Turkey.

B. Facts as presented by the Government

1. Concerning the disappearance of the applicant's son

26. Ağıllı is a thirty-six-household village. From this village and its surroundings, about fifteen men and women have joined the PKK, which is a high ratio for such a small village. These include Türkan Kurt, the daughter of Musa Kurt, one of the applicant's sons.

27. While an operation did take place in the village and clashes occurred between the security forces and suspected terrorists, Üzeyir Kurt was not taken into custody by the security forces. He had no history of previous detention or problems with the authorities and there was no reason for him to be taken into custody.

28. The Government submit that there are strong grounds for believing that Üzeyir Kurt has in fact joined or been kidnapped by the PKK. They refer to the fact that the family allege that his brother died in gendarme custody several years before; the fact that the applicant stated that he hid when the security forces arrived in the village; and the fact that his house was burnt down following the clash in the village. Further, some members of the family had already joined the PKK and several months after the operation in the village a shelter was found outside the village which it was said was used by Üzeyir Kurt in his contacts with the PKK. There is also a strong tradition of villagers escaping to the mountains at the onset of any military action. Villagers have also stated that they heard that he had been kidnapped by the PKK.

29. The Government submit that Üzeyir could have hidden in the village at the commencement of the operation and then, under cover of darkness and poor weather, slipped through the security forces' blockade. Mehmet Karabulut testified before the Commission's delegates at the hearing in Ankara that on the night following the first clash Üzeyir was in Mevlüde's home sleeping (see paragraph 15 above) but that when he woke in the morning Üzeyir was no longer there. The Government stress that Mehmet Karabulut testified that he had not seen or heard soldiers in Mevlüde's house, which would confirm that Üzeyir went off of his own accord.

30. The only person who claims to have seen Üzeyir after that is the applicant, whose accounts are inconsistent, contradictory and unsubstantiated. In particular, she affirmed to the delegates at the hearing in Ankara (see paragraph 13 above) that the villagers assembled in the schoolyard were blindfolded. She subsequently retracted this statement. Furthermore, her statements to the Diyarbakır Human Rights Association and to the Commission in her application refer to one visit to her son to give him cigarettes, whereas in her oral testimony before the delegates she referred to two visits; her descriptions of how she received a message from her son vary and she could not identify the child who allegedly delivered the message to her that her son wanted cigarettes (see paragraph 15 above). In addition, her account of making two visits passing through the village when the security forces stated they were keeping people in their houses for security reasons is implausible. The Government also maintain that it would have been impossible for the applicant to retrieve her son's jacket and socks from his house on 25 November (see paragraph15 above) since it was alleged by the applicant that it had been burnt down the previous day.

31. The Government place particular emphasis on the fact that Hasan Kılıç (see paragraph 15 above) in his statement to the gendarmes of 7 December 1994 affirmed that the applicant came to his house, talked to her son who had spent the night there and then left with him. The soldiers had not left with Üzeyir. Furthermore, Üzeyir had not asked for cigarettes to be brought to him at the house; nor did he see Üzeyir being detained in front of his house by soldiers and village guards, as alleged. In fact, as Captain Cural told the delegates at the hearing in Ankara, no village guards had entered the village to back up the military operation.

32. In further support of the inconsistencies and contradictions in the applicant's account of the events, the Government also point to the allegations originally made in the applicant's application to the Commission in which it was stated that the soldiers killed the livestock, pillaged goods and beat the villagers. The applicant acknowledged that these allegations were incorrect when giving evidence to the delegates.

2. Concerning the alleged intimidation and interference with the exercise of the right of individual petition

33. The Government submit that the applicant was not subjected to any pressure not to give evidence before the delegates as was strongly alleged by the applicant's representatives.

34. The Government submit that the applicant has clearly stated that she did not wish to make a complaint against the State. Her only concern was to find her son and it was for that purpose only that she went to the Diyarbakır Human Rights Association. She had never been subjected to pressure by the authorities to withdraw her application to the Commission.

She had freely made statements to a Bismil notary on 6 January and 10 August 1995 (see paragraphs 22 and 24 above) in which she rejected the application to the Commission which the Diyarbakır Human Rights Association had presented in her name. No soldiers were around her when she made these statements, there was an interpreter present and her statements were read out to her before she fingerprinted them.

35. According to the Government, the applicant has been manipulated by the representatives of the Diyarbakır Human Rights Association who distorted the information which she gave them about the disappearance of her son into unfounded allegations that the soldiers, *inter alia*, slaughtered and ate the villagers' livestock during the operation in the village, looted their goods and tortured the persons kept in the schoolyard (see paragraph 32 above). These and other serious allegations were later shown to be fabrications and the applicant has herself denied that she made them. She had never been put under pressure by the authorities not to attend the delegates' hearing in Ankara. In fact, she had been minded not to attend since she was anxious to discontinue the application. It was in fact her lawyers who put pressure on her to appear since they discovered that she in fact did not want to attend.

36. As to the prosecution of the applicant's lawyer, Mahmut Şakar, the Government state that he has been instrumental in the manipulation of the application to the Commission and has exploited the Convention system for propaganda purposes. The Government's decision to take proceedings against him was justified.

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

37. In the proceedings before the Commission the applicant and the Government submitted a number of statements which she had made between 24 December 1993 and 7 February 1996 to the Diyarbakır Human Rights Association, the Bismil public prosecutor, the gendarmes, the Principal Public Prosecutor's office at Diyarbakır and to the notary in Bismil. The applicant also submitted official documents concerning the inquiry into the conduct of her lawyer, Mahmut Şakar. These materials were studied by the Commission when assessing the merits of the applicant's allegations as regards both the disappearance of her son and the intimidation of both her and her lawyer.

38. Statements were taken by gendarmes from twelve villagers between 23 February and 7 December 1994. On 23 February 1994 Arap Kurt, the *muhtar* of Ağıllı village at the relevant time, Davut Karakoç and Mehmet Kurt (both cousins of Üzeyir Kurt) were interviewed by gendarmes and asked about "their knowledge and observations about the hostage Üzeyir Kurt who had been kidnapped by the PKK". Hasan Kılıç (see paragraph 15 above), Mevlüde Kurt (see paragraph 15 above) and other villagers present at the time of the military operation were questioned by

gendarmes on 7 December 1994. None of the villagers questioned saw Üzeyir Kurt being taken into custody. Hasan Kılıç affirmed in his statement that Üzeyir Kurt had arrived at his house on the morning of 24 November, spent the night there and left the following morning when his mother arrived. While there had been soldiers staying in the house overnight, Hasan Kılıç maintained that the applicant and her son left the house together and the soldiers definitely did not leave with Üzeyir Kurt.

All the above statements were studied by the Commission when assessing the evidence before it. The Government rely on these statements to support their contention that the applicant's son had not been detained in the village by the security forces as alleged and that there was a reasonable likelihood that he had either been kidnapped by the PKK or left to join the PKK.

The Government also produced in the proceedings before the Commission the incident report drawn up by security forces on 24 November 1993; a report dated 19 November 1994 from the Bismil public prosecutor to the Diyarbakır Principal Public Prosecutor's office suggesting that the evidence pointed to the applicant's son having been kidnapped by the PKK following the clash on 23 November 1993; and a report dated 8 December 1994 prepared by Colonel Eşref Hatipoğlu of the Gendarmerie General Command, Diyarbakır, on the conduct of the operation in Ağıllı village and confirming, *inter alia*, that the applicant's son had not been taken into custody.

D. Proceedings before the domestic authorities

39. On 30 November 1993 the applicant submitted a thumb-printed petition to the Bismil public prosecutor, Ridvan Yıldırım. It stated that her son had been taken into custody following a clash between the gendarmes and the PKK at her village and that she was concerned about his fate. She requested that she be informed of his fate. On the same date the public prosecutor passed the petition to the district gendarmerie command with a handwritten request for the information to be provided. The district gendarmerie command noted in handwriting on the petition the same day that it was not true that Üzeyir Kurt had been taken into custody and that it was supposed that he may have been kidnapped by the PKK.

40. By letter dated 30 November 1993 Captain Cural, under heading of the provincial gendarmerie command, informed the Bismil Principal Public Prosecutor's office in answer to their unnumbered letter that Üzeyir Kurt had not been taken into custody and it was thought that he had probably been kidnapped by terrorists.

41. By letter dated 4 December 1993 Captain Cural, district gendarmerie commander, under heading of the district gendarmerie command at Bismil, informed the Bismil Principal Public Prosecutor's office that Üzeyir Kurt had not been taken into custody and it was thought that he had probably been kidnapped by terrorists (identical terms to the letter of 30 November in the preceding paragraph).

42. On 14 December 1993 the applicant submitted a fingerprinted petition to the Principal Public Prosecutor at the National Security Court at Diyarbakır. She stated that her son Üzeyir had been taken into custody twenty days previously by gendarmes and since they had had no news, they were concerned for his life. She requested that information be given to her concerning his whereabouts. On the bottom of the petition, the Principal Public Prosecutor noted in handwriting the same day that the name Üzeyir Kurt was not in their custody records.

43. On 15 December 1993 the applicant submitted a second written petition to the Bismil public prosecutor which repeated the terms of her petition of 14 December. The public prosecutor wrote on the petition an instruction to the gendarmerie regional command to provide her with the information requested.

44. On 21 March 1994 the Bismil public prosecutor, Ridvan Yıldırım, issued a decision of dismissal. The document identifies the complainant as the applicant and the victim as Üzeyir Kurt. The crime was identified as membership of an outlawed organisation and kidnapping and the suspects as members of the PKK. The text of the decision stated that following a clash between the PKK and the security forces, PKK members escaped from the village, kidnapping the said victim. Since this crime fell within the jurisdiction of the National Security Courts, the case was dismissed and referred, with the file, to the Diyarbakır National Security Court.

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

1. The written and oral evidence

45. The Commission had regard to the documentary evidence submitted by the applicant and the Government in support of their respective assertions (see paragraphs 37 and 38 above). Furthermore, at a hearing held in Ankara from 8 to 9 February 1996 the Commission's delegates heard the oral testimony of the following witnesses: the applicant; Arap Kurt, the *muhtar* of Ağıllı village and brother-in-law of the applicant; Ridvan Yıldırım, the public prosecutor in Bismil who had been first approached by the applicant about her son's disappearance (see paragraph 16 above); Izzet Cural, commander of Bismil district gendarmerie, who had proposed the plan for the military operation in Ağıllı village (see paragraph 31 above); Muharram Küpeli, a commander of a commando unit which was deployed during the military operation in the

village; and Mehmet Karabulut, who had seen the applicant's son for the last time at Ali and Mevlüde Kurt's house when the military operation began (see paragraph 29 above).

While thirteen witnesses had been summoned to give evidence, only the above six witnesses actually appeared at the hearing and testified.

2. The approach to the evaluation of the evidence

46. The Commission approached its task in the absence of any findings of fact made by domestic courts and of any thorough judicial examination or other independent investigation of the events in question. In so proceeding, it assessed the evidence before it having regard, *inter alia*, to the conduct of the witnesses who were heard by the delegates at the hearing in Ankara and to the need to take into account when reaching its conclusions the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. The Commission also made due allowance for the difficulties attached to assessing evidence obtained at the delegates' hearing through interpreters and to the vulnerable position of villagers from south-east Turkey when giving evidence about incidents involving the PKK and the security forces.

3. The Commission's findings of fact

(a) The military operation in Ağıllı village

47. The Commission found that the written and oral evidence was largely consistent as regards the general course of events during the operation. It was established that the villagers were gathered in the schoolyard on the morning of 24 November and searches were then carried out of the villagers' houses. During the clashes between the security forces and the terrorists who had entered the village the previous evening a number of houses including those of the applicant and her son were burned down. The villagers were again assembled in the schoolyard on 25 November. Three terrorists and one member of the security forces were killed in the clashes which occurred during the operation. Twelve villagers were taken into custody on 24 November and were released on 26 November. The security forces left the village late on 25 November.

(b) The alleged taking into custody of the applicant's son Üzeyir Kurt

48. The Commission noted that it was established that Üzeyir Kurt was present in the village of Ağıllı on the evening of 23 November 1993 and that the evidence pointed to his having stayed the night at the house of his uncle and aunt, Ali and Mevlüde Kurt, because of the clash between the PKK and the security forces.

49. It was also established that when the villagers were gathered in the schoolyard by the security forces on the morning of 24 November 1993, Üzeyir Kurt was not among them.

50. While Hasan Kılıç maintained that Üzeyir Kurt had left with his mother on the morning of 25 November having spent the night at his house, the applicant had however consistently stated that her son was with the soldiers after the villagers had been gathered during the day in the schoolyard. The last time she saw him was when she brought him cigarettes and clothing at Hasan Kılıç's house where he was being held by the security forces. Her account was largely consistent with her original statement of 24 December 1993 taken by the Diyarbakır Human Rights Association and with her statements and evidence thereafter. While the statement to the Diyarbakır Human Rights Association needed to be treated with caution, having regard to previous criticism which the Commission had made of the accuracy of the statements taken by that association from applicants in other cases, the Commission nonetheless considered that it had evidential value in so far as it was corroborated by the applicant's detailed account to the delegates. While the statement of Hasan Kılıç appeared to contradict the applicant's account that her son was detained as alleged, the Commission found that it did contain inaccuracies and was open to differing interpretations. The Commission regretted that Hasan Kılıç did not respond to the summons to attend the hearing and give evidence. Where his written statement appeared to conflict with the account of the applicant who did give oral evidence before the delegates, the Commission preferred the evidence of the applicant, who was found by the delegates to be credible and convincing.

51. The Commission did not consider that the Government's criticism of the applicant's account sufficed to undermine her credibility (see paragraphs 30–32 above). As regards her initial allegation that the villagers were blindfolded, it was possible that this was a reference to the twelve persons who were removed from the schoolyard and taken into custody for questioning in Bismil (see paragraph 47 above). As to the applicant's account of finding cigarettes and a jacket, the Commission saw no particular significance in her omission to specify where she obtained the jacket: the question was never directly put to her. Further, there was nothing in the gendarmes' testimony to indicate that villagers were not able, if they wished, to move freely from house to house in the period in the early morning before they were gathered for the day in the schoolyard.

52. It had been maintained that the village guards had all been positioned outside the village to mind the military's vehicles and their members could not therefore have been outside Hasan Kılıç's house as alleged by the applicant. However, the Commission did not find it excluded

on the evidence that village guards were in the village at some time during the operation, contrary to the apparent operational practice whereby the role of village guards should be restricted to areas outside villages other than their own.

53. The Commission found that it was the applicant's genuine and honestly held belief that her son was taken into custody by the security forces after which he "disappeared" and that there was no basis for inferring that the applicant's testimony was influenced by a reluctance to accord blame to the PKK or to acknowledge their involvement. Having regard to the assessment of the evidence before it, the Commission accepted her evidence that she saw him surrounded by soldiers and village guards outside Hasan Kılıç's house on the morning of 25 November 1993. It found that this was the last time he was seen by any member of his family or person from the village.

(c) Other aspects of the conduct of the operation

54. The Commission found it unnecessary to make any findings as to the cause of the burning of the applicant's house or as to the role, if any, played by the security forces in the decision of the villagers to abandon the village (see paragraph 14 above).

II. RELEVANT DOMESTIC LAW AND PRACTICE

55. The Government have not submitted in their memorial any details on domestic legal provisions which have a bearing on the circumstances of the case. The Commission in its Article 31 report provided an overview of domestic law and practice which may be of relevance to the case. This overview was based on submissions by the respondent State in previous cases.

A. Constitutional provisions on administrative liability

56. Article 125 of the Turkish Constitution provides as follows:

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

57. This provision is not subject to any restrictions even in a state of emergency or war. The latter requirement of the provision does not necessarily require proof of the existence of any fault on the part of the administration, whose liability is of an absolute, objective nature, based on the theory of "social risk". Thus the administration may indemnify people

who have suffered damage from acts committed by unknown or terrorist authors when the State may be said to have failed in its duty to maintain public order and safety, or in its duty to safeguard individual life and property.

B. Criminal law and procedure

58. The Turkish Criminal Code makes it a criminal offence

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

– to issue threats (Article 191),

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

In respect of all these offences complaints may be lodged, pursuant to Articles 151 and 153 of the Code of Criminal Procedure, with the public prosecutor or the local administrative authorities. The public prosecutor and the police have a duty to investigate crimes reported to them, the former deciding whether a prosecution should be initiated, pursuant to Article 148 of the Code of Criminal Procedure. A complainant may appeal against the decision of the public prosecutor not to institute criminal proceedings.

59. Generally, if the alleged author of a crime is a State official or civil servant, permission to prosecute must be obtained from local administrative councils (the Executive Committee of the Provincial Assembly). The local council decisions may be appealed to the Supreme Administrative Court; a refusal to prosecute is subject to an automatic appeal of this kind. If the offender is a member of the armed forces, he would fall under the jurisdiction of the military courts and would be tried in accordance with the provisions of Article 152 of the Military Criminal Code.

C. Civil-law provisions

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

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

D. The impact of Decree no. 285

62. In previous cases against the respondent State in which they were involved, the applicant's representatives have pointed to certain legal provisions which in themselves weaken the protection of the individual which might otherwise have been afforded by the above general scheme. Decree no. 285 modifies the application of Law no. 3713 (the Prevention of Terrorism Act 1981), in those areas which are subject to the state of emergency, with the effect that the decision to prosecute members of the security forces is removed from the public prosecutor and conferred on local administrative councils. These councils are made up of civil servants and have been criticised for their lack of legal knowledge, as well as for being easily influenced by the regional governor or provincial governors, who also head the security forces.

III. RELEVANT INTERNATIONAL MATERIAL

63. The applicant as well as Amnesty International in their written submissions to the Court have drawn attention to international material on the issue of forced disappearances. The Commission made reference to the following texts and decisions, which are analysed more fully in an appendix to its report (Article 31).

A. United Nations material

64. The United Nations Declaration on the Protection of All Persons from Enforced Disappearance (G.A. res. 47/133, 18 December 1992) provides, *inter alia*:

> "The systematic practice of disappearance is of the nature of a crime against humanity and constitutes a violation of the right to recognition as a person before the law, the right to liberty and security of the person, the right not to be subjected to torture: it also violates or constitutes a grave threat to the right to life."

B. Case-law of the United Nations Human Rights Committee (HRC)

65. The United Nations Human Rights Committee, acting within the framework of the International Covenant on Civil and Political Rights ("ICCPR") has drawn up reports on a number of cases of forced disappearances: Quinteros v. Uruguay (107/1981) Report of the Human Rights Committee, GAOR, 38th Session, Supplement no. 40 (1983) Annex XXII, § 14; Mojica v. Dominican Republic, decision of 15 July

1994, Committee's views under Article 5 § 4 of the Optional Protocol to the ICCPR concerning communication no. 449/1991: Human Rights Law Journal ("HRLJ") vol. 17 nos. 1–2, p. 18; Bautista v. Colombia, decision of 27 October 1995, Committee's views under Article 5 § 4 of the Optional Protocol to the ICCPR concerning communication no. 563/1993: HRLJ vol. 17 nos. 1–2, p. 19).

C. Material from the Organisation of American States (OAS)

66. The Inter-American Convention on Forced Disappearance of Persons (resolution adopted at the 7th Plenary Session by the General Assembly, 9 June 1994, OAS/Ser. P AG/doc. 3114/94 rev.1: not yet in force) provides, *inter alia*:

"**Preamble**

… Considering that the forced disappearance of persons constitutes an extremely serious form of repression, one that violates basic human rights enshrined in the American Declaration of the Rights and Duties of Man, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the American Convention on Human Rights,

…

Article 2

For the purposes of this Convention, forced disappearance is understood to be the abduction or detention of any person by an agent of a State or by a person acting with the consent or acquiescence of a State in circumstances where, after a reasonable period of time there has been made available no information that would permit the determination of the fate or whereabouts of the person abducted or detained.

…

Article 4

The forced disappearance of a person is a crime against humanity. Under the terms of this Convention, it engages the personal responsibility of its perpetrators and the responsibility of the State whose authorities executed the disappearance or consented to it.

…

Article 18

By means of ratification or accession to this Convention the States parties adopt the United Nations Standard Minimum Rules for the Treatment of Prisoners (Resolution 663 C [XXIV] of the Economic and Social Council, of 31 July 1957) as an integral part of their domestic law."

D. Case-law of the Inter-American Court of Human Rights

67. The Inter-American Court of Human Rights had considered the question of enforced disappearances in a number of cases under the provisions of the American Convention on Human Rights and prior to the adoption of the Inter-American Convention on Forced Disappearance of Persons: Velásquez Rodríguez v. Honduras, judgment of 29 July 1988 (Inter-Am. Ct. H. R. (Ser. C) no. 4) (1988)); Godínez Cruz v. Honduras, judgment of 20 January 1989 (Inter-Am. Ct. H. R. (Ser. C) no. 5) (1989)); and Cabellero-Delgado and Santana v. Colombia, judgment of 8 December 1995 (Inter-Am. Ct. H. R.).

E. Submissions of Amnesty International

68. In their written submissions to the Court, Amnesty International identified the following elements of the crime of "disappearances" from their analysis of the relevant international instruments addressing this phenomenon: (a) a deprivation of liberty; (b) by government agents or with their consent or acquiescence; followed by (c) an absence of information or refusal to acknowledge the deprivation of liberty or refusal to disclose the fate or whereabouts of the person; (d) thereby placing such persons outside the protection of the law.

69. According to Amnesty International, while "disappearances" often take the form of a systematic pattern, they need not do so. Furthermore, a "disappearance" is to be seen as constituting a violation not only of the liberty and security of the individual but also of other fundamental rights. They refer to the decision of the Inter-American Court of Human Rights in the Velásquez Rodríguez v. Honduras case (judgment of 29 July 1988) wherein that court affirmed that "the phenomenon of disappearances is a complex form of human rights violation that must be understood and confronted in an integral fashion." This complex of rights includes the right to life and the right not to be subjected to ill-treatment. The gravity of the violations of the rights attendant on a disappearance has led the United Nations Human Rights Committee to conclude in relation to Article 6 of the International Covenant on Civil and Political Rights that State Parties should take specific and effective measures to prevent the disappearance of individuals and should establish facilities and procedures to investigate

thoroughly cases of missing and disappeared persons which may involve a violation of the right to life (General Comment no. 6 (16th Session 1982) [37 UN GAOR, Supp, no. 40 (A/37/40), Annex V] paragraph 1). The Human Rights Committee later affirmed this statement in its Mojica v. Dominican Republic decision of 15 July 1994 with respect to the need to safeguard disappeared persons against the risks of ill-treatment.

70. Citing the above-mentioned Velásquez Rodríguez v. Honduras judgment of the Inter-American Court, Amnesty International reported that the practice of disappearances often involves the secret execution without trial and concealment of the body and that the prolonged isolation and deprivation of an individual are in themselves cruel and inhuman treatment, which is harmful to the psychological and moral integrity of the victim. In its Mojica v. Dominican Republic decision of 15 July 1994, the United Nations Human Rights Committee considered that the disappearance of a person is inseparably linked to treatment that amounts to a violation of Article 7 of the International Covenant on Civil and Political Rights which mirrors Article 3 of the European Convention on Human Rights.

71. Furthermore, Amnesty International has drawn attention to the fact that "disappearances" gravely violate the rights of the "disappeared" person's family, who almost certainly suffer severe mental anguish, often prolonged for years while uncertainty exists over their loved one's fate. Amnesty International notes that the United Nations Human Rights Committee has taken this approach in its Quinteros v. Uruguay decision of 21 July 1983.

PROCEEDINGS BEFORE THE COMMISSION

72. Mrs Koçeri Kurt applied to the Commission on 11 May 1994 on her son's behalf as well as on her own behalf. She complained that her son, Üzeyir, was taken into custody and that he has subsequently disappeared. She maintained that her son is a victim of breaches by the respondent State of Articles 2, 3, 5, 14 and 18 of the Convention and that she herself is a victim of breaches of Articles 3 and 13 of the Convention.

73. The Commission declared the application (no. 24276/94) admissible on 22 May 1995. In its report of 5 December 1996 (Article 31), it expressed the opinion that there had been a violation of Article 5 in respect of the disappearance of the applicant's son (unanimously); that there had been a violation of Article 3 in respect of the applicant (nineteen votes to five); that it was not necessary to examine separately the complaints made under Articles 2 and 3 of the Convention in relation to the applicant's son (unanimously); that there had been a violation of Article 13 of the Convention (unanimously) in respect of the applicant; that there had been

no violation of Articles 14 and 18 of the Convention (unanimously); and that Turkey had failed to comply with its obligations under Article 25 § 1 of the Convention (unanimously). The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT

74. The applicant requested the Court in her memorial to find that the respondent State was in violation of Articles 2, 3, 5, 14 and 18 of the Convention on account of her son's "disappearance" and that she herself is a victim of a violation of Articles 3 and 13. She further contended that the respondent State had failed to comply with its obligations under Article 25 § 1. She requested the Court to award her and her son just satisfaction under Article 50.

75. The Government, for their part, requested the Court in their memorial to rule that the case was inadmissible having regard to the absence of a valid application. Alternatively, they argued that the applicant's complaints were not substantiated. At the hearing the Government also maintained that the case should be declared inadmissible on account of the applicant's failure to exhaust domestic remedies.

AS TO THE LAW

I. THE GOVERNMENT'S FIRST PRELIMINARY OBJECTION

76. The Government maintained that the applicant had never intended to lodge a complaint against the authorities before the Convention institutions. Her sole concern in contacting the public prosecutor and other officials (see paragraphs 39–43 above) was to ascertain the fate of her son and to eliminate the possibility that he might be in detention following the military operation in her village. Her quest for information on her son's whereabouts was subsequently exploited by the Diyarbakır Human Rights Association whose representatives fabricated allegations against the State and manipulated the applicant into impugning the authorities for the disappearance of her son. They insisted that the applicant had on

1. *Note by the Registrar*. For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* 1998), but a copy of the Commission's report is obtainable from the registry.

two occasions gone of her own volition to a notary in Bismil to repudiate the allegations made in the application (see paragraph 34 above) which had been lodged with the Commission at the instigation of the association.

77. The Commission found that the applicant's oral statements before the delegates confirmed her intention to pursue her case against the authorities and that there was no reason to suppose that her application to the Commission, irrespective of the involvement of the Diyarbakır Human Rights Association in its preparation (see paragraphs 17 and 50 above), did not reflect her belief that the State was accountable for her son's disappearance.

78. The Court observes that the applicant confirmed her intention to take part in the proceedings before it and designated her legal representatives for this purpose (see paragraph 2 above). Moreover, she was present at the hearing before the Court in her case. Having regard also to her clear affirmation before the delegates (see paragraph 77 above), it must be concluded that when she first contacted the Diyarbakır Human Rights Association on 23 December 1993 she was seeking redress in respect of the authorities' refusal to admit that her son had been taken into custody and that he had not been seen since. That was the essence of her complaint against the authorities and she has steadfastly maintained that complaint in all her contacts with the domestic authorities (see paragraph 37 above) and throughout the proceedings before the Convention institutions. Her application must therefore be considered valid and freely lodged by her in the exercise of her right of individual petition.

The Government's objection is therefore dismissed.

II. THE GOVERNMENT'S SECOND PRELIMINARY OBJECTION

79. Although the Government did not allude to this matter in their memorial they asserted at the hearing, as they had done at the admissibility stage of the proceedings before the Commission, that the applicant had not exhausted available and effective remedies under domestic law. Her case must on that account be declared inadmissible having regard to the requirements of Article 26 of the Convention.

80. The Government pleaded that the applicant had never instituted legal proceedings to challenge the authorities' findings, firstly, that her son had not been detained in the village and, secondly, that he was not in detention. The applicant had herself conceded that at no stage had pressure ever been brought to bear on her to dissuade her from invoking the jurisdiction of the domestic courts. Turkish law guaranteed her a range of remedies if she believed that the State was linked to her son's disappearance. They stressed in this respect that she could have sued the authorities in administrative-law

proceedings, invoking the principle of strict liability in respect of the acts of public authorities (see paragraphs 56–58 above). Furthermore, the criminal law was there to assist her if she believed that her son had been unlawfully deprived of his liberty or had been killed or ill-treated at the hands of the authorities as alleged (see paragraph 59 above). Since the applicant had never resorted to any of these remedies she must on that account be considered to have failed to comply with Article 26 of the Convention.

81. The Court notes that the Government's objection was not raised in their memorial but only at the hearing and therefore outside the time-limit prescribed in Rule 48 § 1 of Rules of Court A, which stipulates:

> "A Party wishing to raise a preliminary objection must file a statement setting out the objection and the grounds therefor not later than the time when that Party informs the President of its intention not to submit a memorial or, alternatively, not later than the expiry of the time-limit laid down in Rule 37 § 1 for the filing of its first memorial."

82. The objection must therefore be dismissed (see the Olsson v. Sweden (no. 1) judgment of 24 March 1988, Series A no. 130, p. 28, § 56).

83. Moreover, the Court notes in this respect that Mrs Kurt did everything that could be expected of her to seek redress for the complaint. She contacted the public prosecutor in Bismil on two occasions; firstly, on 30 November 1993 and, secondly, on 15 December 1993. She also petitioned the National Security Court at Diyarbakır on 14 December 1993 (see paragraphs 39–43 above). At no stage did the authorities take a statement from her although she insisted that her son had been taken into custody following the clash between the soldiers and the PKK in her village. Her petition of 15 December was even more forceful since she stated that she was concerned for his life. Both the district gendarmerie command and Captain Cural of the provincial command, on the very day that the applicant lodged her first petition, reported back that it was supposed that Üzeyir Kurt had been kidnapped by the PKK. However, no reasons were given to support this hastily reached hypothesis and the public prosecutor did not inquire further into its merits. The applicant's reluctance to accept the official explanation is confirmed by the fact that she persisted with her request for information on her son's whereabouts by contacting the authorities on two further occasions, maintaining all along that he had been taken into custody. However, no serious consideration was ever given to this assertion, the authorities preferring instead to pursue an unsubstantiated line of inquiry that he had been kidnapped by the PKK. In the absence of any effective investigation by the authorities into her complaint there was no basis for any meaningful recourse by the applicant to the range of remedies described by the Government in their submissions before the Court.

In the opinion of the Court, these reasons would have been sufficient in themselves for it to have concluded in the light of its settled case-law (see, among other authorities, the Akdivar and Others v. Turkey judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, pp. 1210–11, §§ 65–69) that there existed special circumstances which dispensed the applicant from the obligation to exhaust domestic remedies and to have dismissed the Government's objection on that account.

III. ALLEGED VIOLATIONS OF ARTICLES 2, 3 AND 5 OF THE CONVENTION IN RESPECT OF THE DISAPPEARANCE OF THE APPLICANT'S SON

84. The applicant requested the Court to find on the basis of the facts established by the Commission that the disappearance of her son engaged the responsibility of the respondent State under Articles 2, 3 and 5 of the Convention and that each of those Articles had been violated. She urged the Court, in line with the approach adopted by the Inter-American Court of Human Rights under the American Convention on Human Rights and by the United Nations Human Rights Committee under the International Covenant on Civil and Political Rights (see paragraphs 63–71 above) to the phenomenon of disappearances, not to confine its consideration of her son's plight to the issues raised under Article 5 of the Convention but to have regard also to those raised under Articles 2 and 3.

85. The Government contended that the Commission's fact-finding and its assessment of the evidence were seriously deficient and could not ground a finding of a violation of any of the Articles invoked by the applicant.

86. The Commission concluded, for its part, that the respondent State had committed a particularly serious and flagrant violation of Article 5 of the Convention taken as a whole and for that reason had not found it necessary to examine separately the applicant's complaints under Articles 2 and 3.

A. Establishment of the facts

1. Arguments of those appearing before the Court

(a) The Commission

87. Before the Court the Delegate of the Commission stressed that the Commission's findings of fact had been reached on the basis of an investigation conducted by its delegates in a scrupulously fair and impartial manner and without the benefit of any findings of a domestic inquiry. The

Commission was fully conscious of the inconsistencies and contradictions in the applicant's various written and oral statements on the course of events in the village during the military operation. Notwithstanding, she was found to be credible and convincing on the essential aspects of her account. Before the delegates she had never wavered under cross-examination, including by the Government lawyers present, in her assertion that she had seen her son outside Hasan Kılıç's house on the morning of 25 November 1993 surrounded by soldiers and village guards. The Government's contention that Üzeyir Kurt had been either kidnapped by the PKK or had left the village to join the terrorists had no basis in fact and could not rebut the applicant's eyewitness account of her son's detention.

88. The Delegate insisted that the Commission had duly considered every single discrepancy identified by the Government in the applicant's version of the events. In particular, careful consideration was given to the seemingly conflicting statement provided by Hasan Kılıç to the gendarmes (see paragraph 31 above). Admittedly, Hasan Kılıç's account raised doubts about the accuracy of the applicant's recollection of the events on the morning of 25 November 1993. However, unlike the applicant, Hasan Kılıç had never testified before the delegates and his statement had to be treated with caution since it had been taken by the very officers whom the applicant alleged had detained her son.

89. For the above reasons, the Delegate requested the Court to accept the facts as found by the Commission (see paragraph 53 above).

(b) The applicant

90. The applicant agreed with the facts as found by the Commission and its conclusions thereon. She had seen her son surrounded by soldiers and village guards outside Hasan Kılıç's house on the morning of 25 November 1993. She confirmed before the Court that she has not seen him since.

(c) The Government

91. The Government strenuously disputed the Commission's findings of fact, and in particular the undue weight which it gave to the applicant's evidence. They insisted that the applicant was in fact the only person claiming to have seen her son outside Hasan Kılıç's house surrounded by soldiers and village guards. However, the Commission found her testimony to be credible despite the fact that she had retracted earlier allegations made against the security forces (see paragraphs 30 and 32 above) and many features of her account were highly implausible and at odds with other evidence (see paragraph 30 and 31 above).

92. The Government criticised the Commission for not having given due weight to the evidence of other villagers who had confirmed that Üzeyir Kurt had not been detained in the village as alleged (see paragraph 38 above). Hasan Kılıç in particular had clearly affirmed when questioned that Üzeyir Kurt left his house in the company of the applicant and that there were no security forces outside the house at the relevant time (see paragraph 38 above). They regretted the Commission's unwillingness to give serious consideration to the official view that there might have been PKK involvement in his disappearance. That view had support in the statements of the villagers who had been questioned by the authorities (see paragraph 38 above).

93. For the above reasons the Government maintained that it had not been proved beyond reasonable doubt that the applicant had seen her son in the circumstances alleged and his disappearance could not therefore engage their responsibility.

2. The Court's assessment

94. The Court notes at the outset that it clearly emerges from paragraphs 159–79 of its Article 31 report that the Commission meticulously addressed the discrepancies in the applicant's account as well as each of the Government's counter-arguments.

95. As an independent fact-finding body confronted with an allegation which rests essentially on the eyewitness evidence of the complainant alone, the Commission paid particular regard to the applicant's credibility and to the accuracy of her recollection of the events on the morning of 25 November 1993. It is to be observed that at the hearing in Ankara she was questioned extensively on her account by the delegates and by the lawyers appearing for the Government. While there were marked inconsistencies between the statement she gave to the Diyarbakır Human Rights Association (see paragraph 50 above) and her oral account before the delegates, the applicant was steadfast in all her contacts with the authorities in her assertion that she had seen her son surrounded by soldiers and village guards in the village.

96. In the Court's view, the Commission properly assessed all the evidence before it, weighing in the balance the elements which supported the applicant's account and those which cast doubt on either its credibility or plausibility. Even though Hasan Kılıç did not respond to the Commission's summons to appear before the delegates, his statement, which the Government consider as central to their case, was carefully scrutinised by the Commission alongside the applicant's testimony (see paragraph 50 above). Significantly, Mr Kılıç's account was found to be flawed in material respects and his non-appearance meant that, unlike the applicant's testimony, neither his credibility as a witness nor the probative

value of the statement taken from him by gendarmes could be tested in an adversarial setting.

97. Furthermore, the Government's contention that the applicant's son had either been kidnapped by the PKK or had left the village to team up with the terrorists was duly considered by the Commission. However, support for this was mainly based on statements taken from villagers by the very gendarmes who were the subject of the applicant's complaint (see paragraph 38 above) and these statements could properly be considered by the Commission to be of minimum evidential value.

98. The Court recalls that under its settled case-law the establishment and verification of the facts are primarily a matter for the Commission (Articles 28 § 1 and 31 of the Convention). While the Court is not bound by the Commission's findings of fact and remains free to make its own appreciation in the light of all the material before it, it is only in exceptional circumstances that it will exercise its powers in this area (see, for example, the McCann and Others v. the United Kingdom judgment of 27 September 1995, Series A no. 324, p. 50, § 169; the Aksoy v. Turkey judgment of 18 December 1996, *Reports* 1996-VI, p. 2272, § 38; the Aydın v. Turkey judgment of 25 September 1997, *Reports* 1997-VI, pp. 1888–89, § 70; and the Menteş and Others v. Turkey judgment of 28 November 1997, *Reports* 1997-VIII, pp. 2709–10, § 66).

99. Having regard to the above considerations which are based on its own careful assessment of the evidence and the transcripts of the delegates' hearing, the Court is not persuaded that there exist any exceptional circumstances which would compel it to reach a conclusion different from that of the Commission. It considers that there is a sufficient factual and evidentiary basis on which the Commission could properly conclude, beyond reasonable doubt, that the applicant did see her son outside Hasan Kılıç's house on the morning of 25 November 1993, that he was surrounded by soldiers and village guards at the time and that he has not been seen since.

B. Article 2

100. The applicant maintained that a number of factors militated in favour of a finding that her son was the victim of violations of Article 2 of the Convention, which stipulates:

> "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."

101. The applicant stressed that her son's disappearance occurred in a context which was life-threatening. She requested the Court to base itself on the approach taken by the Inter-American Court of Human Rights in the Velásquez Rodríguez v. Honduras case (judgment of 29 July 1988) as well as by the United Nations Human Rights Committee in the Mojica v. Dominican Republic case (decision of 15 July 1994) to the issue of enforced disappearances (see paragraphs 65–71 above) and to find the respondent State in breach of its positive obligation under Article 2 to protect her son's life. Such a finding could be reached, she maintained, even though there may not exist specific evidence that her son had died at the hands of the authorities of the respondent State.

102. In an alternative submission, the applicant asserted that there existed a well-documented high incidence of torture, unexplained deaths in custody as well as of "disappearances" in south-east Turkey which not only gave rise to a reasonable presumption that the authorities were in breach of their obligation to protect her son's life under Article 2 but, in addition, constituted compelling evidence of a practice of "disappearances" such as to ground a claim that her son was also the victim of an aggravated violation of that provision. She contended that the Inter-American Court in the above-mentioned Velásquez Rodríguez v. Honduras judgment of 29 July 1988 was prepared to draw the conclusion that the respondent State in that case had violated the right to life provision of the American Convention on Human Rights on the existence of either sort of evidence.

103. The applicant further submitted that the Court's own case-law provided two additional reasons why the respondent State should be found to be in breach of Article 2, given that it had been established that her son had been taken into custody on 25 November 1993 and has not been seen since. In the first place, the authorities had failed to provide any convincing explanation as to how he had met his presumed death. Having regard to the approach taken by the Court in its Tomasi v. France judgment of 27 August 1992 (Series A no. 241-A) to evidence of ill-treatment of a detainee, she reasoned that a similar approach should be taken, *mutatis mutandis*, in respect of the presumed death of her son. Secondly, and with reference to the McCann and Others judgment previously cited, the applicant maintained that the failure of the authorities to conduct a prompt, thorough and effective investigation into her son's disappearance must in itself be seen as a separate violation of Article 2.

104. The Government replied that the applicant had not substantiated her allegations that her son had been detained by the security forces. Accordingly, no issue could arise under Article 2.

105. The Commission found that in the absence of any evidence as to the fate of Üzeyir Kurt subsequent to his detention in the village, it would be inappropriate to draw the conclusion that he had been a victim of a violation of Article 2. It disagreed with the applicant's argument that it could be inferred that her son had been killed either from the life-threatening context she described or from an alleged administrative practice of disappearances in the respondent State. In the Commission's opinion, the applicant's allegation as to the apparent forced disappearance of her son and the alleged failure of the authorities to take reasonable steps to safeguard him against the risks to his life attendant on his disappearance fell to be considered under Article 5 of the Convention.

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

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

108. It is to be observed in this regard that the applicant's case rests entirely on presumptions deduced from the circumstances of her son's initial detention bolstered by more general analyses of an alleged officially tolerated practice of disappearances and associated ill-treatment and extra-judicial killing of detainees in the respondent State. The Court for its part considers that these arguments are not in themselves sufficient to compensate for the absence of more persuasive indications that her son did

in fact meet his death in custody. As to the applicant's argument that there exists a practice of violation of, *inter alia*, Article 2, the Court considers that the evidence which she has adduced does not substantiate that claim.

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

C. Article 3 in respect of the applicant's son

110. The applicant, consonant with her approach to her complaints under Article 2, further alleged that her son had been the victim of breaches by the respondent State of Article 3 of the Convention, which stipulates:

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

111. Relying, *mutatis mutandis*, on the arguments used to support her complaints under Article 2, she reasoned that the respondent State was in breach of Article 3 of the Convention since the very fact of her son's disappearance in a context devoid of the most basic judicial safeguards must have exposed him to acute psychological torture. In addition, she had seen with her own eyes that he had been beaten by the security forces and this in itself gave rise to a presumption that he was physically tortured subsequent to his detention outside Hasan Kılıç's house.

112. The applicant maintained that this presumption must be considered even more compelling in view of the existence of a high incidence of torture of detainees in the respondent State. With reference to the materials relied on by her to ground her allegation of a practice of violation of Article 2, she requested the Court to conclude also that her son was the victim of an aggravated violation of Article 3 on account of the existence of an officially tolerated practice of disappearances and ill-treatment of detainees.

113. She submitted further that the failure of the authorities to provide any satisfactory explanation for her son's disappearance also constituted a violation of Article 3, and that the absence of any adequate investigation into her complaint resulted in a separate breach of that provision.

114. The Government repudiated the factual basis of the applicant's allegation under Article 3.

115. Before the Court, the Delegate explained that in the absence of any evidence as to the ill-treatment to which Üzeyir Kurt may have been subjected while in custody the Commission did not find it appropriate to find a violation of that provision. It considered that the applicant's complaints in respect of her son under Article 3 fell, like the Article 2 complaints, to be examined in the context of Article 5 of the Convention.

116. The Court agrees with the conclusion reached by the Commission on this complaint and refers in this respect to the reasons which have led it to reject the applicant's arguments alleging a violation of Article 2 (see paragraphs 107–09 above). In particular, the applicant has not presented any specific evidence that her son was indeed the victim of ill-treatment in breach of Article 3; nor has she adduced any evidence to substantiate her claim that an officially tolerated practice of disappearances and associated ill-treatment of detainees exists in the respondent State.

117. The Court, like the Commission, considers that the applicant's complaints concerning the alleged violations by the respondent State of Article 3 in respect of her son should, like the Article 2 complaints, be dealt with from the angle of Article 5 of the Convention.

D. Article 5

118. The applicant submitted that the disappearance of her son gave rise to multiple violations of Article 5 of the Convention, which, to the extent relevant, provides:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> …
>
> 2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
>
> 3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

119. The applicant reasoned that the very fact that her son's detention was unacknowledged meant that he was deprived of his liberty in an arbitrary manner contrary to Article 5 § 1. She contended that the official cover-up of his whereabouts and fate placed her son beyond the reach of the law and he was accordingly denied the protection of the guarantees contained in Article 5 §§ 2, 3, 4 and 5.

120. The Government reiterated that the applicant's contention regarding the disappearance of her son was unsubstantiated by the evidence and had been disproved by the investigation which the authorities had conducted. In their submission, no issue could therefore arise under Article 5.

121. The Commission considered that the disappearance of the applicant's son raised fundamental and grave issues under Article 5 having regard to the importance of the guarantees offered by the provision for securing respect for the rights guaranteed by Articles 2 and 3. Having established that Üzeyir Kurt was in the custody of the security forces on 25 November 1993, the Commission reasoned that this finding gave rise to a presumption of responsibility on the part of the authorities to account for his subsequent fate. The authorities could only rebut this presumption by offering a credible and substantiated explanation for his disappearance and by demonstrating that they had taken effective steps to inquire into his disappearance and ascertain his fate. The Commission concluded that neither of these requirements was satisfied in the circumstances. For these reasons in particular, the Commission found that the unacknowledged detention and subsequent disappearance of Üzeyir Kurt involved a flagrant disregard of the guarantees of Article 5.

122. The Court notes at the outset 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 (see, among many other authorities, the Chahal v. the United Kingdom judgment of 15 November 1996, *Reports* 1996-V, p. 1864, § 118). 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 (see, *mutatis mutandis*, the Quinn v. France judgment of 22 March 1995, Series A no. 311, p. 17, § 42).

123. It must also be stressed 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 (see, *mutatis mutandis*, the above-mentioned Aksoy judgment, p. 2282, § 76). 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.

124. The Court emphasises 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 taken into custody and has not been seen since.

125. Against that background, the Court recalls that it has accepted the Commission's finding that Üzeyir Kurt was held by soldiers and village guards on the morning of 25 November 1993. His detention at that time was not logged and there exists no official trace of his subsequent whereabouts or fate. That 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 holding data recording such matters as the date, time and location of detention, the name of the detainee as well as the reasons for the detention and the name of the person effecting it must be seen as incompatible with the very purpose of Article 5 of the Convention.

126. Furthermore, the Court considers that having regard to the applicant's insistence that her son was detained in the village the public prosecutor should have been alert to the need to investigate more thoroughly her claim. He had the powers under the Code of Criminal Procedure to do

so (see paragraph 58 above). However, he did not request her to explain why she was so adamant in her belief that he was in detention. She was neither asked to provide a written statement nor interviewed orally. Had he done so he may have been able to confront the military personnel involved in the operation in the village with her eye-witness account. However, that line of inquiry was never opened and no statements were taken from any of the soldiers or village guards present in the village at the time. The public prosecutor was unwilling to go beyond the gendarmerie's assertion that the custody records showed that Üzeyir Kurt had neither been held in the village nor was in detention. He accepted without question the explanation that Üzeyir Kurt had probably been kidnapped by the PKK during the military operation and this explanation shaped his future attitude to his enquiries and laid the basis of his subsequent non-jurisdiction decision.

127. The Court, like the Commission, also considers that the alleged PKK involvement in the disappearance of the applicant's son lacked any firm and plausible evidentiary basis. As an explanation it was advanced too hastily by the gendarmerie in the absence of any corroborating evidence; nor can it be maintained that the statements given by the three villagers to the gendarmes on 28 February 1994 lent credence to what was in effect mere supposition as to the fate of Üzeyir Kurt. The questions put to the villagers can only be described as formulated in a way designed to elicit responses which could enhance the credibility of the PKK kidnapping theory (see paragraph 18 above). Furthermore, and as noted earlier (see paragraph 97 above), the Government's other contention that the applicant's son had left the village to join the PKK also lacks any firm evidentiary basis.

128. Having regard to these considerations, the Court concludes that the authorities have failed to offer any credible and substantiated explanation for the whereabouts and fate of the applicant's son after he was detained in the village and that no meaningful investigation was conducted into the applicant's insistence that he was in detention and that she was concerned for his life. They have failed to discharge their responsibility to account for him and it must be accepted that he has been held in unacknowledged detention in the complete absence of the safeguards contained in Article 5.

129. The Court, accordingly, like the Commission, finds that there has been a particularly grave violation of the right to liberty and security of person guaranteed under Article 5 raising serious concerns about the welfare of Üzeyir Kurt.

IV. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION IN RESPECT OF THE APPLICANT HERSELF

130. The applicant contended that she herself was the victim of inhuman and degrading treatment on account of her son's disappearance at the hands of the authorities. She requested the Court to find, like the Commission, that the suffering which she has endured engages the responsibility of the respondent State under Article 3 of the Convention.

She invoked in support of her argument the decision of the United Nations Human Rights Committee in the case of Quinteros v. Uruguay of 21 July 1983 (see paragraph 71 above) affirming that the next-of-kin of disappeared persons must also be considered victims of, *inter alia*, ill-treatment.

131. The Commission considered that the uncertainty, doubt and apprehension suffered by the applicant over a prolonged and continuing period of time caused her severe mental distress and anguish. Having regard to its conclusion that the disappearance of her son was imputable to the authorities, the Commission found that she had been subjected to inhuman and degrading treatment within the meaning of Article 3.

132. The Government contested the Commission's conclusion, reiterating that there was no credible evidence to support the applicant's view that her son had been detained by the security forces. While sympathising with the applicant's plight, they contended that there was no causal link between the alleged violation of her son's rights under the Convention and her distress and anguish.

133. The Court notes that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 (see, among other authorities, the Cruz Varas and Others v. Sweden judgment of 20 March 1991, Series A no. 201, p. 31, § 83). It recalls in this respect that the applicant approached the public prosecutor in the days following her son's disappearance in the definite belief that he had been taken into custody. She had witnessed his detention in the village with her own eyes and his non-appearance since that last sighting made her fear for his safety, as shown by her petitions of 30 November and 15 December 1993 (see paragraphs 39 and 42 above). However, the public prosecutor gave no serious consideration to her complaint, preferring instead to take at face value the gendarmes' supposition that her son had been kidnapped by the PKK. As a result, she has been left with the anguish of knowing that her son had been detained and that there is a complete absence of official information as to his subsequent fate. This anguish has endured over a prolonged period of time.

134. Having regard to the circumstances described above as well as to the fact that the complainant was the mother of the victim of a human rights violation and herself the victim of the authorities' complacency in the face of her anguish and distress, the Court finds that the respondent State is in breach of Article 3 in respect of the applicant.

V. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

135. The applicant, with whom the Commission agreed, asserted that the failure of the authorities to conduct an effective investigation into her son's disappearance gave rise to a breach of Article 13 of the Convention. The Government challenged this contention.

Article 13 provides:

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

136. The applicant endorsed the reasoning of the Commission in finding a violation of Article 13 (see paragraph 138 below). She maintained further that not only did the inadequacy of the official investigation into her complaint result in her being denied access to an effective remedy in respect of her son's disappearance but that this failure on the part of the authorities was indicative of the lack of an effective system of remedies in the respondent State to address the occurrence of serious violations of Convention rights.

137. The Government reaffirmed that when the applicant first contacted the public prosecutor she never intimated that she feared that her son had been unlawfully detained or that his life was at risk. She simply wanted to ascertain whether he had been taken into custody. No complaint was lodged against the authorities. They reiterated that in the circumstances best endeavours had been made to try to trace his whereabouts. Enquiries were made (see paragraphs 39–43 above) and statements were taken by gendarmes from villagers on 23 February and 7 December 1994 which reinforced the official view that the applicant's son had either been kidnapped by the PKK or had left the village to join the terrorists (see paragraph 38 above). There was therefore no basis on which to find a violation of Article 13.

138. The Commission found that the applicant had brought the substance of her complaint to the attention of the public prosecutor. However, her petitions received no serious consideration. The public prosecutor was not prepared to inquire further into the report issued by the gendarmes that her son had not been detained; no statements were taken from the soldiers or village guards who were involved in the military operation in the village and the inadequacy and ineffectiveness of the

investigation were further compounded by the fact that the task of taking witness statements from villagers was entrusted to the gendarmes against whom the complaint had been made (see paragraph 38 above). For these reasons the Commission found that the authorities were in breach of Article 13.

139. The Court recalls that Article 13 guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision.

The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or the omissions of the authorities of the respondent State (see the above-mentioned Aksoy judgment, p. 2286, § 95; the above-mentioned Aydın judgment, pp. 1895-96, § 103; and the above-mentioned Kaya judgment, pp. 325–26, § 89).

140. In the instant case the applicant is complaining that she has been denied an "effective" remedy which would have shed light on the whereabouts of her son. She asserted in her petitions to the public prosecutor that he had been taken into custody and that she was concerned for his life since he had not been seen since 25 November 1993. In the view of the Court, where the relatives of a person have an arguable claim that the latter has disappeared at the hands of the authorities, the notion of an effective remedy for the purposes of Article 13 entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure (see, *mutatis mutandis*, the above-mentioned Aksoy, Aydın and Kaya judgments at p. 2287, § 98, pp. 1895–96, § 103 and pp. 329–31, §§ 106 and 107, respectively). Seen in these terms, the requirements of Article 13 are broader than a Contracting State's obligation under Article 5 to conduct an effective investigation into the disappearance of a person who has been shown to be under their control and for whose welfare they are accordingly responsible.

141. For the reasons given earlier (see paragraphs 124 and 126 above), Mrs Kurt can be considered to have had an arguable complaint that her son had been taken into custody. That complaint was never the subject of any serious investigation, being discounted in favour of an unsubstantiated and hastily reached explanation that he had been kidnapped by the PKK. The

public prosecutor had a duty under Turkish law to carry out an investigation of allegations of unlawful deprivation of liberty (see paragraph 58 above). The superficial approach which he took to the applicant's insistence that her son had not been seen since being taken into custody cannot be said to be compatible with that duty and was tantamount to undermining the effectiveness of any other remedies that may have existed (see paragraphs 56–61 above).

142. Accordingly, in view in particular of the lack of any meaningful investigation, the Court finds that the applicant was denied an effective remedy in respect of her complaint that her son had disappeared in circumstances engaging the responsibility of the authorities.

There has therefore been a violation of Article 13.

VI. ALLEGED VIOLATION OF ARTICLES 2, 3 AND 5 OF THE CONVENTION IN CONJUNCTION WITH ARTICLE 14 OF THE CONVENTION

143. The applicant contended that forced disappearances primarily affected persons of Kurdish origin. The conclusion had to be drawn that her son was on that account a victim of a breach of Article 14 of the Convention, which provides:

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

144. The applicant stated that her claim was borne out by the findings contained in the reports published between 1991 and 1995 by the United Nations Working Group on Enforced or Involuntary Disappearances.

145. The Government repudiated this allegation, maintaining that there was no factual basis to support it. They stressed further that the Turkish Constitution guarantees the enjoyment of rights to everyone within its jurisdiction regardless of considerations of, *inter alia*, ethnic origin, race or religion.

146. The Commission concluded that the applicant had not adduced any evidence to substantiate a breach under this head of complaint.

147. The Court agrees with the conclusion of the Commission. The evidence which has been presented by the applicant in support of her complaint does not substantiate her allegation that her son was the deliberate target of a forced disappearance on account of his ethnic origin. Accordingly, there has been no violation of the Convention under this head of complaint.

VII. ALLEGED VIOLATION OF ARTICLE 18 OF THE CONVENTION

148. The applicant complained that the respondent State has knowingly allowed a practice of "disappearances" to develop and has not taken any measures to bring it to an end. She maintained that the attitude of the authorities in this respect gave rise to a violation of Article 18 of the Convention, which provides:

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

149. In support of her assertion the applicant claimed that the authorities acted outside the framework of domestic legislation governing matters such as detention. She illustrated her point by referring to the fact that custody records are not kept and that their absence enabled the authorities to circumvent the domestic rules on detention since they could simply deny that a particular individual had been detained.

150. The Government contested this allegation. Before the Court they maintained that even when operating under emergency powers in the extremely difficult security situation in south-east Turkey the military authorities were still required to act in accordance with the law.

151. The Commission concluded that the applicant had not substantiated her allegation.

152. The Court agrees with the conclusion of the Commission that the applicant has not substantiated her complaint. It notes in addition that this complaint is akin to her allegation of a practice of violation of the Convention which falls to be considered separately (see paragraph 169 below).

VIII. ALLEGED VIOLATION OF ARTICLE 25 § 1 OF THE CONVENTION

153. The applicant requested the Court to accept the Commission's finding that she had been subjected to pressure by the authorities to withdraw her application to the Commission in circumstances giving rise to a breach of Article 25 § 1 of the Convention, which stipulates:

> "The Commission may receive petitions addressed to the Secretary General of the Council of Europe 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, provided that the High Contracting

Party against which the complaint has been lodged has declared that it recognises the competence of the Commission to receive such petitions. Those of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right."

154. The applicant further maintained that the steps taken by the authorities to institute criminal proceedings against her lawyer in connection with statements he had made pertaining to her application to the Commission were incompatible with their obligations under Article 25 § 1 (see paragraph 25 above). She relied once again on the Commission's finding of a violation of that provision and the reasons it had adduced in support thereof.

155. The Government strenuously denied these assertions. They contended that the applicant was exploited throughout by the representatives of the Diyarbakır Human Rights Association for propaganda purposes in order to denigrate the image of the Turkish security forces. Mrs Kurt's sole concern was to ascertain the whereabouts of her son but she unwittingly became caught up in the campaign of misinformation waged by that association against the Turkish State.

156. The Government insisted that the authorities had never brought pressure to bear on the applicant to withdraw her application to the Convention institutions. She had gone voluntarily to the notary in Bismil on two occasions in order to repudiate the falsehoods which the Diyarbakır Human Rights Association had made in her application. They maintained that the applicant had reported to the delegates at the hearing in Ankara that no pressure had been brought to bear on her to withdraw her application, and this was confirmed by Mr Arap Kurt who had accompanied her to the office of the notary. It was her own decision to abandon her complaint lodged with the Commission.

157. The Government also contended that the Commission was wrong in its conclusion that they were in violation of Article 25 § 1 on account of the fact that the authorities had contemplated instituting criminal proceedings against the applicant's lawyer, Mr Şakar. They stressed that Mr Şakar had been under investigation for having aided and abetted the PKK. Any prosecution which would have been instituted would not have related to his involvement in the instant case; rather he would have been charged with membership of a terrorist organisation under Article 168 § 2 of the Turkish Criminal Code.

158. The Commission concluded that the authorities had not directly coerced the applicant. Nevertheless, and with particular regard to the circumstances of the applicant's two visits to the notary in Bismil, they had applied improper indirect pressure in respect of her complaint to the Convention institutions. Furthermore, the threatened criminal proceedings against the applicant's lawyer also gave rise to a serious interference with the exercise of the right of individual petition.

For these reasons the Commission considered that the respondent State was in breach of its obligations under Article 25 § 1.

159. The Court recalls that it is of the utmost importance for the effective operation of the system of individual petition instituted by Article 25 that applicants or potential applicants are able to communicate freely with the Commission without being subjected to any form of pressure from the authorities to withdraw or modify their complaints (see the above-mentioned Akdivar and Others judgment, p. 1219, § 105; and the above-mentioned Aksoy judgment, p. 2288, § 105).

160. The expression "any form of pressure" must be taken to cover not only direct coercion and flagrant acts of intimidation of applicants or potential applicants or their families or legal representatives but also other improper indirect acts or contacts designed to dissuade or discourage them from pursuing a Convention remedy.

The Court would observe that whether or not contacts between the authorities and an applicant or potential applicant are tantamount to unacceptable practices from the standpoint of Article 25 must be determined in the light of the particular circumstances at issue. 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 this connection, the Court, having 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, has found that the questioning of applicants about their applications to the Commission amounts to a form of illicit and unacceptable pressure, which hinders the exercise of the right of individual petition, in breach of Article 25 of the Convention (see the above-mentioned Akdivar and Others judgment, p. 1219, § 105).

161. Turning to the facts of the instant case, it is to be noted that the applicant was interviewed on several occasions by the authorities as from 19 November 1994 subsequent to the communication of her application by the Commission to the Government (see paragraphs 20–24 above). On 9 December 1994, and following an interview with the Bismil public prosecutor (see paragraph 20 above), she addressed statements to the Diyarbakır Human Rights Association and to the Foreign Affairs Ministry repudiating all petitions made in her name.

162. The Court is not convinced that these two statements, made shortly after the communication of the application to the Government and in the wake of the interview with the public prosecutor, can be said to have been drafted on the initiative of the applicant. Nor is it satisfied that the two visits which the applicant made to the notary in Bismil on 6 January and 10 August 1995 were organised on her own initiative. As the Commission observed (see paragraph 158 above), the applicant was brought to the notary's office by a soldier in uniform and was not required to pay the notary for drawing up the statements in which she purported to withdraw

her application to the Commission. It cannot be said that the arguments presented by the Government in this regard establish that there was no official involvement in the organisation of these visits.

163. For the above reasons, the Court finds that the applicant was subjected to indirect and improper pressure to make statements in respect of her application to the Commission which interfered with the free exercise of her right of individual petition guaranteed under Article 25.

164. As to the threat of criminal proceedings invoked against the applicant's lawyer, the Court does not agree with the Government's assertion that these were unrelated to the application lodged with the Commission (see paragraph 157 above). The threat of prosecution concerned the allegations which Mr Şakar made against the State in the application which he lodged on Mrs Kurt's behalf. While it is true that the statement of complaint which was submitted to the Commission contained allegations which were found to be false and which Mrs Kurt herself repudiated, it must be stressed that the task of examining the substance of particular complaints falls to the Commission in the context of its fact-finding powers and having regard to the procedures which the Convention offers the respondent State to challenge the merits of the accusations levelled at it. It is not for the authorities to interfere with that process through the threat of criminal measures against an applicant's representative.

165. For the above reasons, the moves made by the authorities to institute criminal proceedings against the applicant's lawyer, even though they were not followed up, must be considered an interference with the exercise of the applicant's right of individual petition and incompatible with the respondent State's obligation under Article 25.

IX. ALLEGED ADMINISTRATIVE PRACTICE OF VIOLATIONS OF THE CONVENTION

166. The applicant requested the Court to find that there was a practice of "disappearances" in south-east Turkey which gave rise to aggravated violations of Articles 2, 3 and 5 of the Convention. She highlighted in this regard the reports produced by the United Nations Working Group on Enforced and Involuntary Disappearances, in particular its 1994 report which indicated that the highest number of alleged cases of disappearances reported in 1994 was in Turkey.

The applicant further maintained that there was an officially tolerated practice of ineffective remedies in south-east Turkey, in aggravated violation of Article 13 of the Convention. She referred in support of her contention to the fact that there was convincing evidence of a policy of denial of incidents of extra-judicial killing, torture of detainees and disappearances and of a systematic refusal or failure of the prosecuting

authorities to conduct investigations into victim's grievances. Having regard to the centrality of the public prosecutor's role in the operation of the system of remedies as a whole it could only be concluded that remedies were wholly ineffective in south-east Turkey and that this result was condoned by the authorities.

167. The Government rejected the applicant's claim.

168. The Commission, for its part, found that it was unnecessary to decide whether or not there was a practice of unacknowledged detention in the respondent State as maintained by the applicant. As to the alleged practice of ineffective remedies, the Delegate informed the Court that the Commission had also found it unnecessary to examine this complaint in reaching its admissibility decision.

169. The Court recalls that it has rejected the applicant's complaints that there exists a practice of violation of Articles 2 and 3 of the Convention, being of the view that she had not substantiated her allegations (see paragraphs 108 and 116 above). It is not persuaded either that the evidence which she has adduced substantiates her allegations as to the existence of a practice of violation of either Article 5 or Article 13 of the Convention.

X. APPLICATION OF ARTICLE 50 OF THE CONVENTION

170. The applicant claimed compensation for non-pecuniary damage as well as reimbursement of costs and expenses under Article 50 of the Convention, which provides:

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Non-pecuniary damage

171. The applicant maintained that both she and her son had been victims of specific violations of the Convention as well as a practice of such violations. She requested the Court to award a total amount of 70,000 pounds sterling (GBP) which she justified as follows: GBP 30,000 for her son in respect of his disappearance and the absence of safeguards and effective investigative mechanisms in that regard; GBP 10,000 for herself to compensate for the suffering to which she had been subjected on account of her son's disappearance and the denial of an effective remedy with respect to his disappearance; and GBP 30,000 to compensate both of them on account of the fact that they were victims of a practice of "disappearances" in south-east Turkey.

172. The Delegate of the Commission made no submissions on the amount claimed by the applicant.

173. The Government maintained that the applicant had not substantiated her allegations concerning either her son's disappearance or the existence of a practice of violations of the Convention in south-east Turkey. Furthermore, there was no causal link between her son's disappearance and her own alleged suffering. For these reasons they requested the Court to reject her exorbitant and unjustified demands for compensation.

174. The Court recalls that it has found the respondent State in breach of Article 5 in respect of the applicant's son. It considers that an award of compensation should be made in his favour having regard to the gravity of the breach in question. It awards the sum of GBP 15,000, which amount is to be paid to the applicant and held by her for her son and his heirs.

175. Moreover, given that the authorities have not assisted the applicant in her search for the truth about the whereabouts of her son, which has led it to find a breach of Articles 3 and 13 in her respect, the Court considers that an award of compensation is also justified in her favour. It accordingly awards the applicant the sum of GBP 10,000.

B. Costs and expenses

176. The applicant claimed a total amount of GBP 25,453.44 in respect of costs and expenses incurred in advancing her and her son's rights before the Convention institutions. She provided the Court with the following specifications: professional fees of her United Kingdom-based lawyers (GBP 19,285.42); professional fees claimed by her Turkish lawyers (GBP 825); administrative expenses (GBP 70.22); administrative costs incurred in Turkey (GBP 1,050); research and administrative support provided by the Kurdistan Human Rights Project ("KHRP") (GBP 2,400); postage, telecommunications and other expenses incurred by the KHRP (GBP 635); interpretation and translation costs of the KHRP (GBP 690); interpreters' costs for attendance at the delegates' hearing (GBP 275.60); her Turkish lawyer's costs for attending the delegates' hearing (GBP 122.20); and reports and research costs (GBP 100).

177. The Delegate of the Commission did not offer any comments on the claim.

178. The Government firmly disputed their liability to reimburse the applicant. In the first place, the Diyarbakır Human Rights Association had been instrumental in circumventing the domestic legal system and in denying the domestic courts the opportunity to adjudicate on the applicant's grievances. Secondly, the involvement of non-Turkish lawyers in the Convention proceedings had not been justified and only served to inflate the costs of the case.

179. The Court notes that the issues raised by this case are particularly complex and involved on the part of the applicant's legal representatives considerable background research and analysis. Having regard to the fact that an applicant is free to designate a legal representative of his or her own choosing, Mrs Kurt's recourse to United Kingdom-based lawyers specialising in the international protection of human rights cannot be criticised. In view of the specifications submitted by the applicant and deciding on an equitable basis it awards the sum of GBP 15,000 in respect of costs and expenses claimed by the United Kingdom-based lawyers and her Turkish lawyers together with any value-added tax that may be chargeable, less the amounts received by way of legal aid from the Council of Europe which have not already been taken into account.

180. On the other hand, the Court is not persuaded of the merits of the claim (GBP 3,725) made on behalf of the KHRP, having been provided with no details on the precise extent of that organisation's involvement in the preparation of the case. This part of the claim is accordingly rejected.

C. Default interest

181. According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 8% per annum.

FOR THESE REASONS, THE COURT

1. *Dismisses* unanimously the Government's preliminary objection concerning the validity of the applicant's application;

2. *Dismisses* unanimously the Government's preliminary objection concerning the non-exhaustion of domestic remedies;

3. *Holds* unanimously that it is not necessary to decide on the applicant's complaint under Article 2 of the Convention;

4. *Holds* unanimously that it is not necessary to decide on the applicant's complaint in respect of her son under Article 3 of the Convention;

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

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

7. *Holds* by seven votes to two that there has been a violation of Article 13 of the Convention;

8. *Holds* unanimously that there has been no violation of Article 14 of the Convention taken together with Articles 2, 3 and 5 of the Convention;

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

10. *Holds* by six votes to three that the respondent State has failed to comply with its obligations under Article 25 § 1 of the Convention;

11. *Holds* by eight votes to one
(a) that the respondent State is to pay the applicant in respect of her son, within three months, by way of compensation for non-pecuniary damage, 15,000 (fifteen thousand) pounds sterling to be converted into Turkish liras at the rate applicable on the date of settlement, which sum is to be held by the applicant for her son and his heirs;
(b) that the respondent State is to pay the applicant, within three months, in respect of compensation for non-pecuniary damage, 10,000 (ten thousand) pounds sterling to be converted into Turkish liras at the rate applicable on the date of settlement;
(c) that simple interest at an annual rate of 8% shall be payable on these sums from the expiry of the above-mentioned three months until settlement;

12. *Holds* by eight votes to one
(a) that the respondent State is to pay the applicant, within three months, in respect of costs and expenses, 15,000 (fifteen thousand) pounds sterling together with any value-added tax that may be chargeable, less 27,763 (twenty-seven thousand seven hundred and sixty-three) French francs to be converted into pounds sterling at the rate applicable on the date of judgment;
(b) that simple interest at an annual rate of 8% shall be payable on that sum from the expiry of the above-mentioned three months until settlement;

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

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 25 May 1998.

Signed: Rudolf BERNHARDT
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 § 2 of the Convention and Rule 53 § 2 of Rules of Court A, the following separate opinions are annexed to this judgment:

(a) partly dissenting opinion of Mr Matscher;

(b) dissenting opinion of Mr Gölcüklü;

(c) dissenting opinion of Mr Pettiti.

Initialled: R. B.
Initialled: H. P.

PARTLY DISSENTING OPINION OF JUDGE MATSCHER

(*Translation*)

While I am conscious of the difficulties which the Commission faces in cases of this type, I consider that in the present case the manner in which it established the facts, which were accepted by the Court, was so superficial and insufficient and the analysis of those facts so clearly unsatisfactory that, in my view, neither provides a sufficiently sound basis for a finding of a violation. Furthermore, a careful study of the summary of the Commission's findings (see paragraphs 45–53 of the judgment) confirms that view, without it being necessary for me to go into detail.

None of the many witnesses heard by the local authorities or by the delegates of the Commission were able to say that the applicant's son had been taken away by the soldiers; the mere fact that the applicant "genuinely and honestly believed" (see paragraph 53) that such was the case does not amount to proof, especially as most of the witnesses said the opposite or declared that they had no personal direct knowledge of what, in this connection, is the crucial issue in the case.

Ultimately, here, as in the Menteş and Others v. Turkey case (judgment of 28 November 1997, *Reports of Judgments and Decisions* 1997-VIII), the applicant failed by a large margin to prove the truth of her allegations beyond all reasonable doubt.

On a separate issue, I voted in favour of finding a violation of Article 13 because, in a case as serious as this one, the authorities of the respondent State failed to carry out a genuine and thorough investigation.

DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

(*Translation*)

I agree entirely with the dissenting opinion of Judge Matscher in this case of Kurt v. Turkey except for the final paragraph concerning Article 13.

As regards that Article, I voted in favour of finding no violation because the facts alleged were not proved beyond all reasonable doubt and, in addition, since the applicant's complaints under Article 13 were that there had been no satisfactory and efficient investigation into the allegation concerning her son's disappearance, no separate question arose under that Article. In that regard I refer for further details to my dissenting opinion in the case of Kaya v. Turkey (judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I).

DISSENTING OPINION OF JUDGE PETTITI

(*Translation*)

I voted with the minority on the operative provisions relating to Articles 5 and 13 and with the majority on the operative provisions relating to Articles 2, 3, 14 and 18. As regards Mrs Kurt personally, I voted with the minority on the operative provisions relating to Articles 3 and 25.

I did not find a breach in the instant case (Article 5), mainly because I did not agree with the majority's reasoning.

The majority looked at the case as though it were an international criminal court trying a person suspected of a serious crime (*crime*) while using the personal conviction (*intime conviction*) standard applied in French and Belgian criminal courts. But that type of textbook example concerns the trial of an individual, whose evidence is weighed against that of all the witnesses.

The Kurt case concerns a presumed disappearance. Under the ordinary criminal law, disappearances may involve cases of running away, false imprisonment or abduction.

Under public international law, a policy of systematic political disappearances may exist, as occurred in Brazil, Chile, Argentina, etc.

In such cases, especially where they have been verified by the European Committee for the Prevention of Torture, it is for one or more member States of the Council of Europe to lodge an application against the State concerned. It would be cowardly to avoid the problem by leaving the Court to decide on the basis of an application by an individual. An application by a State would occasion an international regional inquiry enabling the situation to be assessed objectively and thoroughly. I could have found that there had been a violation if the case had concerned instructions given by the army, gendarmerie or the police, both with regard to the security operations and to the verification of their implementation and follow up. That would have come within the line of authorities established in the Ireland v. the United Kingdom (judgment of 18 January 1978, Series A no. 25) and McCann and Others v. the United Kingdom (judgment of 27 September 1995, Series A no. 324) cases (inadequate command and supervision, negligence and lack of subsequent review).

In the system of the European Convention on Human Rights, the fact that States are liable for the failings of the authorities of which they are composed means that the Court must identify the authorities and police or army units responsible. The Kurt case was in any event deficient in that there was no investigation of the type performed in cases before the Hague International Criminal Court and one of the main witnesses and the commanding officers of the gendarmerie units did not give evidence at the trial. The Commission itself acknowledged that it had doubts. The majority of the Court speculates on the basis of a hypothesis of continued detention

relying on their personal conviction. That, to my mind, is "heresy" in the international sphere, since the instant case could have been decided on the basis of the case-law under Article 5 requiring objective evidence and documents that convince the judges beyond all reasonable doubt; but both documents and witnesses were lacking in the present case.

In addition, the Kurt case occurred in a different context to the one that led to the decisions of the Inter-American Court.