Caso de Cicek contra Turquía, de 27/02/2001 [ENG]

Violation of Art. 2

EUROPEAN COURT OF HUMAN RIGHTS

FIRST SECTION

CASE OF ÇIÇEK v. TURKEY

(*Application no. 25704/94*)

JUDGMENT

STRASBOURG

27 February 2001

FINAL

05/09/2001

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It is subject to editorial revision before its reproduction in final form in the official reports of selected judgments and decisions of the Court.

In the case of Çiçek v. Turkey,

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

Mr E. Palm, *President*,

Mrs W. Thomassen,

Mr L. Ferrari Bravo,

Mr B. Zupancic,

Mr T. Pantîru,

Mr R. Maruste, *judges*,

Mr F. Gölcüklü, ad hoc *judge*,

and Mr M. O'Boyle, *Section Registrar*,

Having deliberated in private on 6 February 2001,

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

PROCEDURE

1. The case originated in an application (no. 25704/94) against the Republic of Turkey lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Mrs Hamsa Çiçek ("the applicant"), on 8 November 1994.

2. The applicant was represented by Mr Kevin Boyle and Ms Françoise Hampson, both of whom are professors at the University of Essex (the United Kingdom). The Turkish Government ("the Government") were represented by their Agent.

3. The applicant alleged that her two sons, Tahsin and Ali Ihsan Çiçek and her grandson, Çayan Çiçek, had disappeared in circumstances engaging the responsibility of the respondent State. In this respect, she invoked Articles 2, 3, 5, 13, 14 and 18 of the Convention.

4. The application was declared admissible by the Commission on 26 February 1996. 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 two sons and her grandson, conducted its own investigation pursuant to former Article 28 § 1 (a) of the Convention. The Commission appointed three delegates to take evidence from witnesses at hearings conducted in Ankara between 16-20 June 1997 and between 15-19 June 1998. The case was transmitted to the Court on 1 November 1999 in accordance with Article 5 § 3, second sentence, of Protocol No. 11 to the Convention, the Commission not having completed its examination of the case by that date.

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

6. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The Chamber decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 2 *in fine*).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The applicant

7. The applicant, Mrs Hamsa Çiçek, who was born in 1930, is a Turkish citizen and lives in Dernek, a village in Lice District of the province of Diyarbakir in South-East Turkey. Her application is brought on behalf of herself, as well as of her two sons, Tahsin (44 years old in 1994) and Ali Ihsan Çiçek (20 years old in 1994) and her grandson Çayan Çiçek, who have allegedly disappeared in circumstances engaging the responsibility of the State.

B. The facts

8. The facts surrounding the disappearance of the applicant's two sons and her grandson are disputed. The facts presented by the applicant are contained in Section 1 below. The facts as presented by the Government are set out in Section 2.

9. A summary of the documents that are submitted by the applicant and the Government in support of their assertions and the evidence gathered from the witnesses at hearings conducted in Ankara by the Commission is given below in Part C.

1. Facts as presented by the applicant

10. On 10 May 1994 at approximately 6.00 a.m., about a hundred soldiers from the Lice District Gendarmes Headquarters raided the applicant's village. Leaving their vehicles at the entrance of the village, they arrived on foot.

11. The soldiers went round the houses to wake villagers up, telling them to gather by the mosque and to bring their identity cards with them. When about 400 villagers gathered by the mosque, the soldiers collected the identity cards of the male villagers. The women and children were sent home, as a result of which they were not able to witness what happened next. According to what the applicant was told by the male villagers who were present, the soldiers carried out an identity check by calling out the villagers' names one by one from a list. Thereafter, the soldiers gave back the villagers' identity cards except for those of Ramazan Akyol, Fevzi Fidantek, Mehmet Özinekçi, Mehmet Demir and Ali Ihsan Çiçek (the applicant's son). These five villagers were told to stand aside. The identity card of Tahsin Çiçek (the second son of the applicant) was initially returned but he was immediately called back and sent to join the other five.

12. The soldiers left the village, taking these six villagers into custody. Witnesses confirmed that the detainees were taken to Lice Regional Boarding School. It is alleged that Tahsin Çiçek, Ali Ihsan Çiçek and Ramazan Akyol were ill-treated there.

13. It appears that, on the second day of their custody, the soldiers separated Tahsin and Ali Ihsan Çiçek from the other detainees saying that they were releasing the two brothers and would release the rest of them as well.

14. On the following day, the other four villagers were released. When they returned home, they were surprised to find that Tahsin and Ali Ihsan Çiçek had not come back although they had been released.

15. After about 20 days subsequent to the detention of her sons, the applicant contacted a villager who had been released from Lice Regional Boarding School, where she believed her sons had been detained. Upon the applicant's description of her sons, the villager affirmed that he had been detained with two brothers, who corresponded to her description.

16. The applicant also met another villager released a month earlier from custody at Lice Regional Boarding School. When the applicant described her sons and asked whether he had seen them, this villager confirmed that he had been detained with someone who resembled Tahsin.

17. The applicant was told by witnesses that, on 27 May 1994, Tahsin's son Çayan (i.e. her grandson) was taken away by security forces from the garden of their family house. Çayan, who was sixteen years old at the time of the events, is visually impaired; he cannot see at all at night and his vision is limited to approximately one meter in daylight.

18. The applicant has made several applications in search of her sons and grandson. She went to Lice District Gendarme Headquarters on two occasions and asked about them**.** She was told that they could not help her. The applicant is elderly, lives in a village and cannot speak Turkish. This limits the enquiries she can make. Her daughter, Feride Çiçek, who lives in Diyarbakir, submitted verbal petitions to the Diyarbakir State Security Court Public Prosecutor. She was given a verbal reply to the effect that her brothers and nephew (i.e. the applicant's sons and grandson) were not in custody.

2. Facts as presented by the Government

19. The Government state that the applicant's sons and grandson were not taken into custody by the security forces and deny that an operation had been conducted in Dernek on 10 May 1994 by the security forces. They note that this village did not fall within the zone between Kulp and Lice districts in Diyarbakir, where military operations were conducted between 23 April - 10 May 1994. In this respect, the Government refer to custody records that do not mention the names of Tahsin Çiçek, Ali Ihsan Çiçek and Çayan Çiçek and to the testimonies of two villagers from Dernek, who confirm that no operation was carried out in their village on 10 May 1994.

20. A full scale investigation based on the applicant's allegations was first initiated by the Gendarme General Commandment and later a preliminary investigation was initiated by the Lice public prosecutor under file number 1997/182. The village muhtar Behçet Yilmaz and another habitant of the Dernek village, Sükrü Çelik, were heard by the gendarmes on 29 September 1995. Another subject living in Dernek, Raif Aksu, stated before the gendarmes that he did not remember any operation taking place in his village and those names read to him had not been detained as alleged. The public prosecutor of Lice heard on 8 July 1997 Ramazan Akyol, Fevzi Fidantek, Mehmet Özinekçi and Mehmet Demir as witnesses in this case.

21. The Government also maintain that there are strong grounds to believe that the applicant's sons, Tahsin and Ali Ihsan Çiçek, have moved to Syria, where they have relatives.

C. The evidence gathered by the Commission

1. Written evidence

22. The parties submitted various documents concerning the investigation following the disappearances of Ali Ihsan Çiçek, Tahsin Çiçek and Çayan Çiçek.

(a) Official Records

Custody Records

23. The custody records of the Lice Gendarmerie Station concerning tthe period between 24 April 1994 and 3 July 1994 show that Tahsin Çiçek had been taken into custody on 24 April 1994 and released on 26 April 1994.

24. The custody records of the Lice Security Directorate Anti-Terrorism Department and the Interrogation Unit of the Provincial Gendarmes Headquarters in Diyarbakir for the period between 1 April - 31 May 1994 do not contain the names of Tahsin Çiçek, Ali Ihsan Çiçek and Çayan Çiçek.

Plan of the Lice Regional Boarding School

25. Upon the request of the Commission delegates the Government submitted the plan of the Lice Regional Boarding School. The plan includes the ground floor, the first floor and the second floor, whereas it does not contain the basement.

The Operation Report by the Staff Colonel from Diyarbakir Gendarmes Headquarters, dated September 1997

26. The second commando regiment reported that between 23 April - 10 May 1994 military operations had been conducted in Saggöze, Kaygisiz, Daltepe, Mizagül Dagi, Çotuk and Herpinos regions, situated between Kulp and Lice Districts, in the Diyarbakir province. According to this report, Dernek and Arikli villages, albeit near, remained outside the operation area.

Statement of Behçet Yilmaz, Mayor of Dernek Village, dated 29 September 1995, taken by the gendarmes

27. In this statement, the witness was asked about his knowledge and observations as regards Hamsa Çiçek's allegations as stated in her application to the European Commission of Human Rights. He replied that he did not recall whether or not an operation had been carried out in the village on 10 May 1994. He maintained that Ramazan Akyol, Fevzi Fidantek, Mehmet Özinekçi and Mehmet Demir had not been taken into custody. He further stated that these persons were not actually living in the village.

Statement of Sükrü Çelik, an inhabitant of the Dernek Village, dated 29 September 1995, taken by the gendarmes

28. In his statement, the witness was asked about his knowledge and information about the allegations of Hamsa Çiçek as stated in her application to the European Commission of Human Rights. In reply, the witness stated that he did not remember an operation being conducted on 10 May 1994. He stated that the persons mentioned in the application had not been taken into custody by the security forces.

Statement of Mehmet Demir, dated 8 July 1997, taken by the public prosecutor

29. In his statement, the witness explained that three years earlier soldiers had come to Dernek and questioned the villagers about terrorists who made frequent visits to the village. Subsequently, he was arrested together with Ramazan Akyol, Fevzi Fidantek, Mehmet Özinekci, Ali Ihsan Çiçek and Tahsin Çiçek and taken to Lice Boarding School. The witness explained that, on their arrival, the soldiers blindfolded them and placed them all in the same room. On the third day of their detention they were taken to another military base in Lice and released from there. According to him, Ali Ihsan and Tahsin had been released the day before. The witness further maintained that no one had been ill-treated in custody. He had not seen Ali Ihsan or Tahsin after their release and had no information concerning Çayan's disappearance.

Statement of Mehmet Özinekçi, dated 8 July 1997, taken by the Public Prosecutor

30. The witness explained that about three years earlier, on a Thursday, early in the morning, soldiers had come to their village, carried out an identity check and arrested Fevzi Fidantek, Ramazan Akyol, Mehmet Demir, Ali Ihsan Çiçek, Tahsin Çiçek and himself. They were then taken to Lice Regional Boarding School, together with some other detainees from neighbouring villages. At the boarding school, they were all blindfolded and put in a room close to the *hamam*, in the basement of the building. The witness maintained that during the two nights they spent in custody, the detainees were not interrogated by the soldiers. They were released from the Regiment on Saturday, whereas Tahsin and Ali Ihsan had already been released on Friday. He had no information on their whereabouts or on Çayan Çiçek's disappearance. Moreover, he had not heard or seen Ali Ihsan Çiçek and Tahsin Çiçek being ill-treated in custody.

Statement of Fevzi Fidantek, dated 8 July 1997, taken by the public prosecutor

31. In his statement to the public prosecutor, Fevzi Fidantek stated that about three years earlier, soldiers had come to their village and asked the villagers to gather by the mosque. The soldiers then separated Ramazan Akyol, Mehmet Demir, Mehmet Özinekçi, Ali Ihsan Çiçek, Tahsin Çiçek and himself from the others and took them to the Lice Regional Boarding School. The witness stated that there had also been other detainees from neighbouring villages. The soldiers kept the detainees in the basement of the boarding school for two nights and three days. According to the witness, Tahsin and Ali Ihsan had been released on Friday and the remaining detainees, including the witness, on Saturday. The witness stated that Tahsin had a taxi and had been travelling quite frequently. The witness further maintained that about twenty days subsequent to their detention, a new operation was carried out in Dernek, after which Tahsin's son Çayan also disappeared. Fevzi Fidantek stated that his eyes were blindfolded while in custody but, as there were no soldiers in the room, the detainees were able to communicate with

each other. He also maintained that no one had been ill-treated while in detention. The witness finally stated that he had no idea as to the whereabouts of the two brothers.

(b) Diyarbakir Human Rights Association Documents

Reports drafted by the Diyarbakir Human Rights Association (thereafter "HRA") concerning the petitions of Feride Çiçek, the applicant's daughter, that were filed with the Diyarbakir State Security Court Public Prosecutor

32. The documents contain a description of steps taken by Feride Çiçek in her search for her relatives.

33. On 20 July 1994 Feride Çiçek filed two petitions with the Diyarbakir Public Prosecutor asking whether her brothers, who had been taken away by the security forces on 10 May 1994, were actually held in custody. She only received a verbal reply to the effect that they were not in custody. The same day she filed another petition with the public prosecutor as regards the disappearance of her nephew, Çayan Çiçek. Again, verbally, she was told that Çayan was not in custody.

Statement of Hamsa Çiçek, dated 27 July 1994, made to a member of the Diyarbakir HRA

34. In her statement to the HRA, Hamsa Çiçek stated that she had been living in the village of Dernek, in Lice District, Diyarbakir and gave the following account concerning the disappearance of her two sons, Ali Ihsan Çiçek and Tahsin Çiçek, and her grandson, Çayan Çiçek.

35. On 10 May 1994 soldiers from the Lice District Gendarme Headquarters raided their village and told the villagers to gather by the mosque. An identity check was carried out and, subsequently, the women and children were sent home. Hamsa could therefore not see what followed. According to what she heard from other villagers, the soldiers arrested Ramazan Akyol, Fevzi Fidantek, Mehmet Özinekçi, Mehmet Demir and her two sons Ali Ihsan Çicek and Tahsin Çiçek, and took them to Lice Regional Boarding School. Hamsa was told that her sons had been released on the second day of their detention and the remaining detainees on the following day.

36. After about twenty days following the detention of her two sons, Hamsa Çiçek met a villager who had been detained with her sons. Upon her description, the villager told Hamsa Çiçek that he had seen her sons in custody. He also said that he had been ill-treated in custody like almost everyone who had been there.

37. Subsequently, Hamsa Çiçek met another villager released from Lice Regional Boarding School a month earlier. This villager told Hamsa that, while in custody, he had seen someone who could have been Tahsin and who seemed to be in suffering due to ill-treatment. This villager confirmed that he had last seen the person who resembled Tahsin at the Lice Gendarme Headquarters.

38. According to what Hamsa was told on 27 May 1994, Tahsin's son Çayan had also been taken away by the security forces from the garden of their house.

39. Hamsa further stated that she had requested information from the Lice District Gendarmes Headquarters as regards her two sons and her grandson. In reply, she was told that the Lice District Commander could do nothing to help her. Moreover, Hamsa Çiçek's daughter, Feride Çiçek, filed two petitions with the Diyarbakir State Security Court

Public Prosecutor, who informed them that Tahsin Çiçek and Ali Ihsan Çiçek were not in custody. Hamsa Çiçek stated that she was concerned that her sons might have been killed in custody by security forces.

2. Oral evidence

40. The Commission conducted two hearings in Ankara between 16-20 June 1997 and 15-19 June 1998 and took oral evidence from eight witnesses. The evidence of the witnesses may be summarised as follows.

(a) Hamsa Çiçek

41. The applicant, who was born in 1930, was currently living in Dernek. At the time of the events, she was in the village. She confirmed that she had lodged a petition with the Diyarbakir Human Rights Association (HRA) about the disappearance of her two sons, Tahsin Çiçek and Ali Ihsan Çiçek, and her grandson, Çayan Çiçek. She further stated that she had instructed Ms Hampson to represent her before the European Commission of Human Rights.

42. In May 1994 Tahsin Çiçek was living in Dernek in his own house situated opposite that of the applicant's. He was married and had seven children. Ali Ihsan, who lived with the applicant, was preparing for his military service. The applicant had also four more daughters. Çayan was Tahsin's son and lived with his father.

43. On the day of the incident, early in the morning, leaving their vehicles at the entrance of the village, soldiers came to the village on foot. They ordered the villagers to gather by the mosque. The applicant assumed that these soldiers came from Lice. They carried out an identity check. Making five of the villagers stand aside, including the applicant's son Ali Ihsan, they told the rest of the villagers to return home. Although the soldiers released Tahsin at first, they called him back a few minutes later and ordered him to join the group of five.

44. From a distance, the applicant had seen Ali Ihsan and Tahsin being arrested. The soldiers ordered the detainees to strip naked to search them. When they left, the applicant tried to follow but was blocked by three gendarmes. Later, she heard that the detainees had been taken to the regional boarding school. On two occasions, she went to the commandos from the Lice Gendarme Station and asked about her sons. She was referred to the Lice District Gendarme Commander.

45. The applicant explained that Lice Regional Boarding School was partially used by the military. The building housed students and teachers as well as soldiers. According to what the applicant had heard, her sons had been released one day ahead of the rest of the detainees, who showed surprise at not seeing Tahsin and Ali Ihsan in Dernek on their return.

46. The applicant had also heard that her sons suffered ill-treatment in custody. Some other detainees claimed seeing them in wet clothes.

47. When the applicant went to see the Lice Gendarmes Commander, a captain received her. The mayor of the village accompanied her, as she could not speak Turkish. The captain told the applicant that he had no information about her sons, but that it was possible that gendarmes from the Bolu region might have information about this incident. However, when she visited the commander a second time, the gendarmes from Bolu were not mentioned.

48. The applicant explained that Tahsin had disputes with some of the villagers. He had been taken into custody about a month before his disappearance, on his way home from a wedding. She was told that a young man, called Cihat, son of the village mayor at the time, denounced Tahsin to the gendarmes. When Tahsin was released from custody a week later, he accused the mayor, Behçet Yilmaz, of spying on him and the mayor had to leave the village. The applicant further claimed that, when she went to Lice in search of information on her sons, she came across Cihat, who told her that Ali Ihsan had been killed and that Tahsin was in the hands of the soldiers.

49. About a month after the disappearance of her sons, the applicant learned that her grandson, Çayan, had been arrested by the soldiers. She was not in the village at the time of the incident, but was told that Çayan had been taken away from their garden by soldiers. The applicant explained that she was concerned about her grandson's fate as he suffered from poor health.

(b) Feride Çiçek

50. The witness, who was born in 1964, was the applicant's daughter. She lived in Diyarbakir, where she had moved five years ago. She gave the following account as regards the disappearance of her two brothers and her nephew. At the time of the events, her brothers, Ali Ihsan and Tahsin, lived in Dernek. Tahsin lived with his family in a house close to their mother's and Ali Ihsan lived with his mother. Approximately three or four weeks before the alleged incident Tahsin had been arrested on his way home from a wedding, upon a complaint filed against him by a young man. The witness had last seen her two brothers a couple of days prior to their disappearance, when they brought her belongings to Diyarbakir. The witness explained that the family had no enemies in Dernek and that there was no conflict within the family.

51. On 10 May 1994 towards noon, she received a telephone call from Seithan Özinekçi, the son of Haci Mehmet Özinekçi. Seithan told her that six people from the village had been arrested including his father and her two brothers. She went to Dernek immediately.

52. She reached the village that afternoon, and was told by her mother that the soldiers had raided the village in the morning, searching all the houses and ordering everyone to gather at the square by the mosque bringing their identity cards. The men and women had been separated. After an identity check, five men were set apart, including Ali Ihsan. These five men were stripped naked and searched.

53. According to her mother's account, there had been more than 100 soldiers. The villagers also told her that there had been different types of soldiers; the first group wore blue berets, while those in the second had none. She was further told that the soldiers had then gone to Tahsin's house to arrest him as well. The detainees were then taken away on foot. Although her mother and some other villagers tried to follow the group, they were told to turn back. The testimony of other villagers confirmed her mother's story.

54. The witness explained that she had stayed in Dernek for two nights and then returned to Diyarbakir. A few days later, when a minibus driver coming from Dernek told her that four of the detained villagers had been released, she went back to Dernek.

55. In Dernek, she spoke to Ramazan Akyol, released from custody that very day. He told her that her brothers had been released the day before. Ramazan Akyol also

affirmed that they had been taken to the boarding school together and kept there blindfolded until noon the following day. He recalled that first Ali Ihsan and then Tahsin had been taken away for interrogation. He told the witness that Ali Ihsan had been ill-treated and a statement had been taken from him. Ramazan did not mention what happened to Tahsin, though he told the witness that Ali Ihsan and Tahsin had been taken away. He did not know where they went but when he was given back his identity card, he got the impression that the two brothers had already been released.

56. The witness submitted that apart from the four villagers, a crippled man, also detained in the regional boarding school, had seen her brothers. A minibus driver, who drove this person to his house after his release, informed the applicant that there was someone who had seen her brothers in custody. Consequently, the witness went to see this man, who told her that he had been detained with two brothers. The man said that one of the brothers told him that he came from a village, which was not Dernek. He recalled that although he had not spoken to the other one, he had the chance to see both of them from beneath his blindfold. He described one as a bit on the short side, plump and balding, and the second as very slim. The witness decided that the first description corresponded to Tahsin and the second to Ali Ihsan.

57. Moreover the witness learned from her mother that a certain Ramazan, also detained in Lice Prison, told her mother that he and Tahsin had been chained together in prison for 30-40 days. Tahsin had been more or less unconscious and had kept repeating the name of his daughter.

58. The witness further explained that about sixteen days after the arrest of her brothers, her nephew Çayan, Tahsin's son, had also been arrested. At that time she had been in the village. In the morning his mother put Çayan on a donkey and sent him to the fields. Çayan did not come back. Later that evening, they were contacted by a relative who claimed she saw Çayan being taken away by soldiers from the field along with two other women. The witness recalled that the soldiers had passed through the village on the day when Çayan was arrested.

59. The witness maintained that her mother had tried everything to locate her sons. She explained that she, herself, applied to the Human Rights Association, where a lawyer prepared petitions for her. She took these petitions to the Diyarbakir State Security Court Public Prosecutor, who verbally replied that these people were not in custody. The petitions were not registered and nothing was written on them. However, she was given a paper and told to go to the security forces.

(c) Hasan Çakir

60. The witness was a non-commissioned senior gendarme sergeant. He was commander of the central gendarme station in Lice at the time of the events. He explained that in May 1994, Lice was a very considerable PKK activity area, and the gendarmes from Lice paid frequent visits to the villages in and around the district. Military units, which came from time to time to Lice were lodged at the regional boarding school for a period of ten or fifteen days. These units participated in operations with the gendarmes. However, they were under the command of their own unit commander, who generally held a higher rank than the district gendarmes commander. The witness explained that prior to an operation, the two units studied maps of the area and shared out tasks. Before such a unit arrived or left the region, a written message was sent to all other units who had to ensure their security.

61. During operations all soldiers wore the same uniform for security reasons, including the commandos, who normally wore “blue berets” When gendarmes paid a visit to a village, they acted in accordance with the orders received. Sometimes they just talked to villagers to warn them not to support or help the PKK.

62. The witness stated that about twenty-five villages were within his jurisdiction. He dealt with their judicial and security problems, taking over the duties of the police. He recalled having gone to Dernek a couple of times, as it was his duty to visit the villages frequently. There were a few PKK supporters in that village and he had heard about Tahsin Çiçek. He explained that if Tahsin and Ali Ihsan had been taken into custody, their names would definitely appear in the custody records.

63. When soldiers planned to enter a village, the superior commander was immediately informed by a written message, which indicated the number of persons who would take part in the operation and the leader of the group. All messages were registered. They also kept a logbook, in which all incidents were recorded, if necessary, hour by hour. To verify whether soldiers had been to Dernek on 10 May 1994, it would suffice to check records, which would indicate exactly where the gendarmes had been on that day. The soldiers lodged in the regional boarding school also kept records as they assisted gendarmes during operations.

64. The witness further submitted that the district gendarme headquarters had custody facilities for only two or three detainees. If there were more, they were put in an office under the supervision of a soldier. Detainees were initially kept in the offices and then placed in the detention area. At that stage, their names were not registered. Following the interrogation, if it was established that the detainee had committed an offence, he was transferred to the Public Prosecutor’s office. If not, he was released. The commando units did not have the authority to take people into custody. If they found a person who had committed an offence, they would hand this person over to the gendarmes.

65. There were no detention facilities at Lice Regional Boarding School. If an army unit, based at the boarding school, took part in an operation with the gendarmes and arrested a number of villagers, then it could be possible that these people were first brought to the regional boarding school before being referred to the gendarmerie.

66. If the military found people on the “wanted” list during an identity check, they had to inform the gendarmes by phone or radio who would then take over. When placed in detention, a person’s name would be registered in a custody ledger book and he would be searched. Only after these steps, could he be placed in custody. Some detainees might be referred to the intelligence unit of the gendarmerie in Diyarbakir for further investigation.

(d) Sahap Yarali

67. The witness, who was a captain at the time of the incidents, was commander of Lice District Gendarme Headquarters. He was based in Lice between August 1993 and August 1995.

68. The witness, who knew Dernek, had never actually entered it, though he had passed by frequently. Dernek was known to give considerable support to the PKK. He had not met Tahsin Çiçek personally although he had heard that the Çiçek family had

connections with the PKK. He recalled that Çiçek was a name used by several families, not all of whom were PKK supporters. On the dates in question he had not taken part in an operation where suspected terrorists had been arrested or detained.

69. All military units, when engaged in an operation, sent a message or an operation information form / pro forma document indicating the time, place and purpose of the operation and the units that would be involved in it. This was conveyed to the superior officer. Such operations should be distinguished from the regular visits made by gendarmes to villages for administrative and judicial purposes. When the witness received information on terrorist presence in the area, he had to complete a pro forma message for his superiors. Whenever someone was taken into custody, be it during an ordinary visit or during an operation, soldiers had to inform their superior of this. Anyone taken into custody was registered in the ledger and the public prosecutor was subsequently notified.

70. Lice consisted of a settlement area involving 65 villages divided into ten or twelve sections and each section was attached to a gendarme station. There were six gendarme stations under the command of the witness, including the central gendarme station commanded by Hasan Çakir and to which Dernek was attached.

71. From time to time military units were based in the regional boarding school. In general, the gendarmes alone were responsible for security in rural areas. However, if the forces were insufficient to control a particular situation, reinforcements would be requested and infantry or ground forces deployed in the area. In joint operations, the most superior officer of the participating units would take command. Although the witness was independent in the execution of his administrative/judicial powers, he nevertheless had responsibility towards the Governor for his administrative acts and to the district public prosecutor for judicial ones.

72. The reinforcement units could never perform the gendarmes' judicial duties. If these units went out on an operation in the mountain areas and found a suspect, they would wire the gendarmes to check whether the individual was wanted and, if so, then could bring him in. The reinforcement units had a totally different system of records and, as far as the witness knew, did not use service ledgers or custody records, given that they had no judicial functions to perform. During operations, the “blue beret” gendarme commanders removed their caps and wore normal army caps for camouflage.

73. The witness did not accept that anybody detained during a joint military and gendarme operation could be taken even temporarily to the regional boarding school. He explained the difference between taking a person into custody and putting him in a custody room. To render a suspect ineffective and perform a body search, the witness had the authority to keep the person near him, for example in the cafeteria under guard. That suspect might then be released within 24 hours. Such a person would not be put in a custody room and therefore would not be mentioned in a custody ledger. The witness said that this was “taking somebody in for observation” and not custody. The suspect’s statement would be taken and, if guilty of an offence, he would be put in the custody room and mentioned in the ledger. If someone was clearly dangerous and required interrogation or was to be kept overnight, he would definitely be placed in the custody room and registered in the ledger. However, if somebody were to be sent straight to Diyarbakir for interrogation for terrorist offences, he might not be mentioned in the Lice records. As there was no interrogation unit in Lice, people were sent to Diyarbakir or

sometimes an interrogation team was invited to come to Lice. Sometimes a person's interrogation would reveal other names, in which case Diyarbakir Security Department might request their arrest and dispatch to Diyarbakir.

74. The witness further explained that he had not checked the records before coming to the hearing and did not remember exactly what he was doing on 10 May 1994. However, he had checked that he had not been in Dernek on that day. He could not recall anyone who had asked information about their relatives in detention. He had no comment on the fact that some people had disappeared in the Lice area in 1994.

(e) Mustafa Küçük

75. The witness stated that he had been commander of the Gendarme Commando Company in May 1994. His whole unit consisted of about 140 men. Mr Yarali was his district commander and Hasan Çakir, his station commander. His job was to secure an area. The administrative and judicial tasks were performed by other gendarmes. He had never seen commandos search or detain people or carry out identity checks. The “blue berets” of the commando units were not used in operations as they were too conspicuous.

76. It was possible that commando units based in the regional boarding school be sent out on an operation. There was a unit of about 40 soldiers stationed at the regional boarding school to ensure security in the region, given the number of schools that had been burned down. Commando units did not keep separate written records or daily service ledgers. They reported to the superior officer after completing their activities. If they had taken part in an operation, it would be indicated on the operation pro forma beforehand. However, the preparation of this form was not his task but that of the district gendarmes commander. His duty was training and exercise of his men. Anyone caught by his forces would be taken directly to the gendarmes headquarters. The district gendarmes had exclusive authority to detain people.

77. He knew the village of Dernek but had never actually gone into it. He had passed by. He had not participated in any operation in that village around 10 May 1994. It would be difficult to say which units had been involved in such an operation. If it was a major operation, then all the commando units in the area would have participated; otherwise, it would have been just the local gendarmes.

(f) Fevzi Fidantek

78. The witness lived in Dernek. He knew Tahsin and Ali Ihsan Çiçek, both fellow villagers. Tahsin was married and had six children; he lived in a house close to his mother’s, near the mosque. He owned a taxi and was occasionally away from the village. Ali Ihsan was a bachelor and lived with his mother.

79. On 10 May 1994, about 300 gendarmes came to the village on foot early in the morning. The villagers were already up for their morning prayers. The witnesses could not recall whether the soldiers were commandos or gendarmes from Lice. He did not recognise any of the gendarmes or their commanders. He stated that, before 10 May 1994, when soldiers came to the village, they had gone straight to the mountains in search of terrorists. The villagers had not been disturbed.

80. The witness could not remember exactly on which day of the week they had been detained. He thought it might have been a Tuesday. On the day of the operation,

the soldiers ordered all the villagers to gather by the mosque. They took everyone's identity cards and compared the names with a list. The soldiers then returned most of the identity cards except for those of Ali Ihsan Çiçek, Tahsin Çiçek, Mehmet Özinekçi, Mehmet Demir, Ramazan Akyol and himself. The rest of the villagers went home. The soldiers also searched the houses, and subsequently took the six villagers directly to the regional boarding school on foot.

81. The witness said they were not blindfolded at first. They walked to the boarding school, which he knew well as his children had studied there. He confirmed that part of the building was used by the military. At the school they were blindfolded, but their personal belongings were not registered. Neither did they undergo a medical examination.

82. They were kept all together in the basement of the building near the toilet and washing area. Their hands were free but their eyes were blindfolded The witness asserted that he knew Ali Ihsan and Tahsin Çicek had been with him because they sat side by side and could talk quietly. At night they slept on chairs. They were given bread, biscuits and water.

83. During their detention no explanation was given as to the reason of their arrest. He was the only one to be interrogated. He was asked whether his son had joined the guerrillas in the mountains and he told the soldiers that his son was in Istanbul. Then he was asked about his son's precise address; he told the soldiers that he did not know and was released. The soldiers only took his statement. He emphasised that no one had been ill-treated while they were in the boarding school.

84. The witness stated that they had stayed at the school for two or three days. The soldiers released Tahsin and Ali Ihsan on Friday. He had heard someone say "Tahsin Çiçek, Ali Ihsan Çiçek, take your identity cards, you're free". The others stayed one more night in the boarding school. On Saturday the rest of the detainees were taken to the regiment on the border of Lice and released from there. The witness could not make out whether the soldiers were commandos or army regulars. A helicopter came and they were told that the villagers from Dernek were to go out. They were then told that they were free. The witness and the other detainees went to the Lice station a week later to get their identity cards back. The witness explained that the Lice gendarme station and the regiment were distinct organisms.

85. When the witness returned home, the villagers asked him about Ali Ihsan and Tahsin. He told them that Ali Ihsan and Tahsin had already been released. The witness stated that he never said to Hamsa that either he or her sons had been ill-treated.

86. Tahsin had a son, called Çayan. The witness had not been in the village at the time when Çayan disappeared. When he returned, he was told that Çayan was not in the village any more.

87. The muhtar of Dernek in May 1994 was Behçet. He was a neighbour of the witness, who also knew the muhtar's son, Cihat. Although Cihat had not been taken into custody, he had followed the group to the regional boarding school. When the soldiers asked him why he was coming with them, Cihat answered that he had lost his identity card and wanted to have a new one issued. He consequently went with the detainees to Lice. The witness had not seen him after the operation day. Cihat was not kept with the detainees at the regional boarding school.

(g) Mehmet Özinekçi

88. The witness lived in Dernek and was in the village during the incident of 10 May 1994. Tahsin and Ali Ihsan Çiçek were sons of his uncle's daughter, Hamsa.

89. In April - a month before they were taken into custody - Tahsin had been arrested during the wedding of the witness' son in the district. The witness explained that some men had come and taken Tahsin away and released him four or five days later. He did not know the reason of this arrest.

90. In May 1994 the witness was in the village when the operation took place. According to the witness there were around 1000 soldiers, some of them commandos, though he could not be sure. The soldiers gathered the villagers and carried out an identity check. A soldier had a list of names but the witness could not see the list. The soldiers separated five or six villagers and the witness from the rest and took them to Lice. Tahsin and Ali Ihsan were amongst those arrested. The soldiers also brought people from other hamlets. The witness could not remember how many detainees there were in total. The detainees were taken to the square near the school on the lower side of the village. The soldiers searched all the houses. From the square they were taken on foot to the Lice Boarding School. As soon as they were inside the building, they were blindfolded. In the boarding school there were students as well as soldiers. From the room where they were kept, the detainees could hear the children talking outside.

91. When they arrived at the boarding school, the soldiers did not take down their details or enter their names in a register. Their identity cards were not given back. They were taken to the basement of the building near the toilet and washing area. They were all kept together in the same room, together with villagers from other hamlets. There were no chairs or tables in the room. The floor was concrete and they sat on the floor. They were all blindfolded. Ali Ihsan and Tahsin were in the same room with the witness, sitting next to him. The witness was not interrogated. The detainees managed to talk quietly to each other although it was forbidden. When necessary, the detainees collected money and the soldiers bought food for them. The witness gave some money to Ali Ihsan and asked him to give it to a soldier to buy bread. A soldier brought them bread. However, they never talked about why they had been taken into custody.

92. According to the witness, they were taken out one by one to give statements. The soldiers did not question him, but the witness confirmed that Tahsin and Ali Ihsan had been taken for questioning. However, he had no knowledge as to what they had been asked about. The witness stated that he could not recall how many times the two brothers had been taken away for interrogation.

93. The witness submitted that he had not been subjected to ill-treatment whilst he was held in the regional boarding school. For two nights they waited in the room and were then taken to the regiment and released from there. The witness continued that he had not heard anyone else being ill-treated. However, he stated that he had not seen anything because of the blindfold. Tahsin had been sitting next to him and Ali Ihsan's coat lay near him. The soldiers took Tahsin and Ali Ihsan away from the room for about twenty minutes and later brought them back. The witness stated that he did not know whether they had taken them to another room or outside. They were detained on a Thursday, and on Friday Tahsin and Ali Ihsan Çiçek were released. The soldiers read out their names and probably returned their identity cards too. The witness heard a voice say, "Go now. You're

both free." He was sitting on Ali Ihsan's coat when they took him away. Ali Ihsan must have told the soldier about his coat as the soldier came back and told the witness to give Ali Ihsan's coat. The witness stated that he did not know where the brothers were taken and added that he had not seen them since then. Thereafter, on Saturday, the soldiers released the rest of the detainees. The soldiers removed their blindfold when they arrived at the regiment. The witness explained that the regiment was in the centre of Lice. They waited there for about half an hour and were then released. They were told to come back in a week's time to get their identity cards.

94. All the detainees then returned to the village. Ali Ihsan and Tahsin's mother came and asked the witness about her sons' whereabouts. The witness told Hamsa that her sons had already been released on Friday. Hamsa told him that they had not come home.

95. The witness explained that he did not say to Hamsa that Ali Ihsan, Tahsin or himself had been ill-treated at the boarding school. He had not been subjected to ill-treatment. The witness further pointed out that it was possible that the brothers might have been ill-treated when the soldiers took them out of the room. However, he had not heard or seen anything.

96. The witness further stated that he did not know where Çayan was. Tahsin had many sons, including Çayan, who was blind. He had heard that Çayan had disappeared from the village. He, however, had not seen anything. He had no knowledge as to why they had taken Çayan. He had heard that Çayan had disappeared 6 or 7 days after the operation. By that time, the witness was in Diyarbakir. He was not aware that there had been an operation.

97. The witness confirmed that he had talked to Feride Çicek, Hamsa's daughter once or twice. He last talked to her two years ago. In reply to Feride's question, he replied that he had witnessed the soldiers taking her brothers away. Feride then went to the Diyarbakir HRA and told them about the incident. She also asked him to testify in Diyarbakir. The witness confirmed that he repeated the story to the public prosecutor and insisted that he was not scared to testify on this matter.

(h) Mehmet Demir

98. The witness, a farmer, lives in Dernek and was in the village during the incident of 10 May 1994.

99. He knew that Ali Ihsan lived with his mother, Hamsa. Tahsin lived in his own house with his own family and had six children. Tahsin Çiçek used to work in the village but sometimes found jobs elsewhere. He had sheep, goats, animals and some agricultural land. He also had a taxi, which was taken from him before his custody. The witness explained that he had no knowledge of whether Tahsin had ever been in trouble with the authorities before May 1994. He had not attended the wedding of Mehmet Özinekçi's son.

100. He was in the village when the operation took place. The soldiers came on foot during morning prayers. There were a lot of soldiers, however he could not discern whether they were gendarmes or regular soldiers. The soldiers had come to the village before this operation but had had nothing to do with the villagers; they had gone up into the mountains. On that day, however, they came and gathered the villagers. They carried out an identity check and kept some identity cards (including the cards of the witness and

four or five other villagers). Finally the soldiers took them away. There were also other villagers from other hamlets. Ramazan Akyol, Fevzi Fidantek, Mehmet Özinekçi, Tahsin Çiçek and Ali Ihsan Çiçek were among those arrested. They were taken to the Lice Boarding School on foot. Although it was a boarding school, a part of the building was used by the soldiers. The witness had never been in the school before.

101. The soldiers did not take down the details of the detainees or register them in a record or ledger. They took away their belongings. In the school, they first blindfolded Tahsin and then the witness. He never had the chance to remove his blindfold.

102. The detainees were taken to a room in the basement of the building. It was made of concrete. It was a place like a bath (hamam). As the witness was blindfolded, he couldn't really see but noted that there was no furniture. All the detainees were fellow-villagers and there were a few people from nearby hamlets. Their hands and feet were not bound. The guards and soldiers remained near them to stop any attempts at conversation. However, the room was small and the detainees could speak covertly. The witness could hear the voices of Tahsin and Ali Ihsan, who were kept in detention for one night. The witness was not taken to interrogation at any stage. The detainees were not informed of the reasons of their arrest. The witness stated that he did not know whether Tahsin and Ali Ihsan had been interrogated. The soldiers took them elsewhere; he had no knowledge of what could have happened to them. He did not see Ali Ihsan or Tahsin being taken away for questioning at any stage of the detention.

103. The witness stated that he did not hear the soldiers call out Ali Ihsan's and Tahsin's names since his hearing was not good. It is possible that that they did so without his being aware. At some point he heard some detainees say that Tahsin and Ali Ihsan had been released and sent home. The soldiers later said that they had released the brothers. The other detainees stayed for one more night. They were then conveyed to the regiment in vehicles, still blindfolded, and released. Their identity cards were returned later. The witness went to his village and asked about Tahsin and Ali Ihsan. He was told that they had not come back. Their mother came to his house and asked him where her sons were. The witness told her that they had been released the day before. The witness stated that he had not been subjected to ill-treatment in detention. Neither had he told Hamsa that others had been ill-treated. The soldiers had treated people well. After that date the witness did not see or hear anything about Ali Ihsan or Tahsin.

104. Tahsin had a son called Çayan, who was blind. The witness did not know where he was. At the time when Çayan disappeared, the witness had been tending animals on the mountain. In the evening, he came down and was told that Çayan had disappeared. A long time had elapsed after their detention. The witness was not aware of a military operation in the village on the day Çayan disappeared.

105. The witness knew the muhtar's son Cihat as well. He had not heard anything about him either joining the PKK, or accompanying the soldiers during an operation; nor did he know whether he had been the one who informed against Tahsin and Ali Ihsan. He did not know where Cihat was. When they were taken into custody, Cihat came with them in order to get his identity card. When they were released, he wasn't with them.

106. The witness stated that he was not frightened to testify and had not told anyone that he was scared to testify.

107. The witness finally explained that as Hamsa Çiçek's sons have disappeared, she lives by others' charity. Her husband had died a long time ago in a traffic accident and she has five or six grand children with health problems.

II. RELEVANT DOMESTiC LAW

A. State of emergency

108. Since approximately 1985, serious disturbances have raged in the south-east of Turkey between the security forces and the members of the PKK (Workers' Party of Kurdistan). This confrontation has, according to the Government, claimed the lives of thousands of civilians and members of the security forces.

109. Two principal decrees relating to the south-eastern region have been made under the Law on the State of Emergency (Law no. 2935, 25 October 1983). The first, Decree no. 285 (10 July 1987), established a regional governorship of the state of emergency in ten of the eleven provinces of south-eastern Turkey. Under Article 4 (b) and (d) of the decree, all private and public security forces and the Gendarmerie Public Peace Command are at the disposal of the regional governor.

110. The second, Decree no. 430 (16 December 1990), reinforced the powers of the regional governor, for example to order transfers out of the region of public officials and employees, including judges and prosecutors, and provided in Article 8:

"No criminal, financial or legal responsibility may be claimed against the state of emergency regional governor or a provincial governor within a state of emergency region in respect of their decisions or acts connected with the exercise of the powers entrusted to them by this Decree, and no application shall be made to any judicial authority to this end. This is without prejudice to the rights of individuals to claim indemnity from the State for damage suffered by them without justification."

B. Constitutional provisions on administrative liability

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

"All acts and decisions of the administration shall be liable to indemnify any damage caused by its own acts and measures."

112. This provision is not subject to any restrictions even in the 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.

C. Criminal law and procedure

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

- to commit unintentional homicide (Articles 452,459), intentional homicide (Article 448) and murder (Article 450).

114. 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.

115. Generally, if the alleged author of a crime is a State official or a 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 officer 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.

D. Civil-law provisions

116. Any illegal act by the civil servants, be it a criminal offence or a tort, which causes material or moral damage may be 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.

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

E. Impact of Decree no. 285

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

119. The public prosecutor is also deprived of jurisdiction with regard to offences alleged against members of the security forces in the state of emergency region. Decree no. 285, Article 4 § 1, provides that all security forces under the command of the regional governor (see paragraph 50 above) shall be subject, in respect of acts performed in the course of their duties, to the Law of 1914 on the prosecution of civil servants. Thus, any prosecutor who receives a complaint alleging a criminal act by a member of the security forces must make a decision of non-jurisdiction and transfer the file to the Administrative Council. These councils are made up of civil servants, chaired by the governor. A

decision by the Council not to prosecute is subject to an automatic appeal to the Supreme Administrative Court. Once a decision to prosecute has been taken, it is for the public prosecutor to investigate the case.

THE LAW

120. The applicant complains of the disappearance of her sons and her grandson. The Court will first examine complaints concerning her two sons.

I. alleged violations of articles 2, 3 and 5 of the Convention in respect of the disappearance of the applicant's two sons

A. Evaluation of evidence and establishment of the facts

1. Arguments of the parties

(a) The applicant

121. The applicant complains about the unacknowledged detention or disappearance of her two sons, who were taken into custody in the village of Dernek, in Diyarbakir Province. She requests the Court to find that the disappearance of her two sons engage the responsibility of the respondent State under Articles 2, 3, and 5 of the Convention and that each of these Articles had been violated.

(b) The Government

122. The Government maintain that there was no operation as alleged on 10 May 1994 in Dernek. In this respect, they submit an operation report prepared by the Staff Colonel in September 1997, which states that although being in close proximity to the regions where certain operations had been conducted between 23 April-10 May 1994, Dernek was outside the operation area (see paragraph 26 above). The Government further refer to the oral testimonies of Behçet Yilmaz (the village mayor) and Sükrü Çelik (a villager from Dernek) who explained in their statements taken by gendarmes on 29 September 1995 that they did not remember an operation being carried out on 10 May 1994 (see paragraphs 27 and 28 above).

123. The Government also submit that none of the persons mentioned in the instant case were detained by security forces. In this respect, they refer to the custody records kept by the Lice Security Directorate Anti-Terrorism Department and the Interrogation Unit of the Provincial Gendarme Headquarters of Diyarbakir for the period between 1 April- 31 April 1994, which contain no mention of either the applicant's two sons or the other detainees who claim to have seen Tahsin and Ali Ihsan Çiçek (see paragraph 24 above).

124. The Government conclude that, as it has not been proved beyond reasonable doubt that the applicant's sons were detained by the security forces, these disappearances cannot engage their responsibility.

2. The Court's assessment

(a) The operation in Dernek on 10 May 1994 and the alleged taking into custody of the applicant's sons Tahsin and Ali Ihsan Çiçek.

125. The Court notes that the applicant's allegation that the security forces had conducted a military operation in the village of Dernek on 10 May 1994, during which some of the villagers had been detained, is in dispute between the parties. Therefore, the Court is now required to establish and verify these alleged facts by assessing the weight and effects of the evidence gathered by the Commission.

126. The Court observes in the first place that the military authorities accepted that there had been a large scale military operation in the vicinity of Dernek on 10 May 1994 (see paragraph 26 above). This finding is also in conformity with the villagers' testimonies before the Commission's delegates, where they stated that on the day of the operation a large group of soldiers from different military units came to the village to participate in the operation (see paragraphs 53 and 79 above).

127. The Court has examined carefully the applicant's, her daughter's and the three villagers' testimonies taken by the Commission's delegates and compared them with the statements taken by the public prosecutor and the Diyarbakir Human Rights Association (see, for example above paragraph 35, the applicant's statement before the Diyarbakir HRA and paragraph 42-43, her statement before the Commission's delegates; paragraphs 52 and 53, Feride Çiçek's statement before the Commission's delegates; paragraph 29, Demir's statement before the prosecutor and paragraph 100-103, Demir's statement before the Commission's delegates; paragraph 30, Özinekçi's statement before the prosecutor and paragraph 89-97, Özinekçi's statement before the Commission delegates; paragraph 31, Fidantek's statement before the prosecutor and paragraphs 79-84, Fidantek's statement before the Commission's delegates). As a result, the Court considers that all the above-mentioned statements are consistent with each other in almost every detail as to the operation conducted in Dernek on 10 May 1994 and the subsequent arrest of the applicant's sons, Tahsin and Ali Ihsan Çiçek. The Court is therefore satisfied that the villagers who gave evidence before the Commission's delegates gave a truthful and, in its essential details, accurate account of the incident of 10 May 1994.

128. On the other hand, the Court cannot accept the testimonies given by the officials appearing before the Commission's delegates. These witnesses agreed that an operation had been carried out in the vicinity of Dernek but asserted that the security forces had not entered the village. However none of these witnesses were able to identify with precision where the operation had actually taken place or which villages had been affected. Nor had they been able to provide any explanation as to who had entered the village on that day (see above paragraphs 60-66 for the statement of Hasan Çakir, paragraphs 67-74 for the statement of Sahap Yarali and paragraphs 75-77 for the statement of Mustafa Küçük). Moreover, no contemporaneous records had been produced to the delegates showing the nature of the operations carried out or the units involved; in particular, no information as to whether units from Bolu were involved as the applicant alleges she was told. The only record produced is an operation record dated September 1997 - three and a half years after the events in question.

129. Further, the statements of the villagers Yilmaz (see paragraph 27) and Çelik (see paragraph 28) are inconclusive as to whether any operation had been carried out and are, in any event, stereotyped and relate the same story in almost identical terms. The Court must therefore treat these statements with caution and attaches no particular weight to them.

130. The witnesses of the Government have thus failed to provide information as to which military units had been based in the regional boarding school at the time or what had happened in Dernek village at the relevant time.

131. In the light of the foregoing, the Court accepts the following account as the true facts of the operation conducted in the Dernek Village on 10 May 1994, as a result of which six villagers, including the applicant's two sons Tahsin and Ali Ihsan Çiçek were detained.

132. On 10 May 1994 soldiers came to the Dernek village and ordered the villagers to gather by the mosque (see paragraphs 43 and 80). They then carried out an identity check. Separating Ramazan Akyol, Fevzi Fidantek, Mehmet Özinekçi, Mehmet Demir and Ali Ihsan Çiçek (the applicant's son), the soldiers sent the rest of the villagers to their houses. Tahsin Çiçek (the applicant's second son) was initially released with the rest of the villagers; however, immediately afterwards, he was ordered to join the five who had been detained (see paragraphs 43, 80, 90, 100). The soldiers took these six villagers to the Lice Boarding School on foot (see paragraphs 44, 81, 90, 100).

(b) The detention of Tahsin and Ali Ihsan Çiçek at the regional boarding school

133. The Government deny that Tahsin and Ali Ihsan Çiçek were detained by the security forces. Indeed there was a conflict of evidence as to whether persons could ever be held at the regional boarding school. It was accepted that visiting units were based at the school from time to time. The witness Çakir agreed that it was possible that persons taken into custody might first be brought to the school (see paragraph 65 above). Yarali, however, disputed this (see paragraph 73).

134. The Government also refer to the fact that neither their names nor those of the other detainees, who claim to have seen them under custody, appear in the custody records.

135. The Court must therefore examine in the first place whether these records can be regarded as irrefutable evidence that Tahsin and Ali Ihsan Ciçek had not been detained in Lice Regional Boarding School. The Court observes from the statements of the gendarme officers that military units, which came from time to time to Lice, were lodged at the regional boarding school for a period of ten to fifteen days. These units participated in operations with the gendarmes (see paragraph 60 above). There are no detention facilities at the regional boarding school; however, if an army unit based at the boarding school took part in an operation with the gendarmes, it was possible to keep detainees in the regional boarding school before referring them to the gendarmes (see paragraph 65 above). Whether the soldiers lodged in the regional boarding school kept or should keep custody records when they assist gendarmes during operations is controversial (see paragraph above 63 and 72).

136. The Court also observes that according to the practice of the Lice Gendarmes, there was a difference between taking persons in for questioning or observation and putting them in a custody room. While ledgers were kept for those who were placed in custody, the names of the persons who were taken in for observation or questioning were not always registered in the ledgers. The gendarmes could keep a suspect under surveillance, for instance in a cafeteria, until their suspicions were allayed. Such a person would not be put in a custody room and would not be mentioned in a custody ledger. This

was explained as taking somebody in "for observation" rather than as taking him into custody (see paragraph 73 above).

137. The Court recalls the earlier findings of the Commission and Court concerning the inadequacy and unreliability of custody records (see *Çakici v. Turkey* [GC], no. 23657/94, § 105, ECHR 1999-IV; Aydin v. Turkey judgment of 25 September 1997, Reports 1997-VI, Opinion of the Commission, p. 1941, §172) that such records cannot in general be relied upon to prove that a person was not taken into custody. In particular, the Court has previously found that Çakici had been detained at Lice District gendarmerie without his name being entered in the record (see the above cited Çakici v. Turkey judgment, § 107). Further doubt is cast on the accuracy of the records by the testimony of the witness Yarali who, when confronted with the facts in the Çakici case, admitted that not everyone held in the gendarmerie would be entered in the custody record. Finally the Court cannot attach any weight to the unsatisfactory and arbitrary distinction drawn between being taken into custody and being taken in for observation.

138. Against the above background, the Court considers that even if the applicant's sons' names do not appear in the custody registers, this does not prove that they were not arrested by the gendarmes.

139. On the other hand, the Court observes that the testimonies of the three villagers, who were allegedly co-detainees of the applicant's sons, were well-balanced, detailed and consistent with each other. In the light of the gendarmes' explanations about custody ledgers, the Court's establishment of facts as regards the arrest of the applicant's sons in Dernek during an operation and the credible testimonies of the three villagers who had been under custody with the applicant's sons, the Court is satisfied that the events related by the villagers to the Commission's delegates reflect the true facts of the detention period in the regional boarding school.

140. Accordingly the Court accepts the following account as the true facts of the detention period of Tahsin and Ali Ihsan Çiçek in the regional boarding school.

141. Following the identity check in Dernek, six villagers (Tahsin Çiçek, Ali Ihsan Çiçek, Fevzi Fidantek, Mehmet Özinekçi, Mehmet Demir and Ramazan Akyol) were taken to the regional boarding school on foot. Cihat, the son of the village mayor also went with the detainees in order to have his lost identity card reissued (see above paragraphs 87 and 105). However, he was not taken inside the boarding school. When they arrived at the school, the detainees were blindfolded (see above paragraphs 81, 90, 101). They were detained in the basement of the building, where there were toilets and a hamam. Their hands were not bound. They were all kept together in the same room. There was no furniture and they sat on the floor. The detainees were given bread, biscuits and water (see above paragraphs 82 and 91). Ali Ihsan and Tahsin were sitting close to Fevzi Fidantek (see paragraph 82). During their detention, Mehmet Özinekçi gave some money to Ali Ihsan asking him to request the soldiers to buy biscuits (see paragraph 91). None of the detainees was subjected to ill-treatment (see paragraphs 83, 93, 103). On Friday the detainees heard a male voice saying "Tahsin and Ali Ihsan Çiçek, take your identity cards, you are free". Consequently, the two brothers were taken out of the room (see paragraphs 84, 93). A few minutes later a soldier came and took Ali Ihsan's coat on which Mehmet Özinekçi was sitting (see paragraph 93). A day after the release of the two brothers, the rest of the detainees were taken to the regiment on the border of Lice and released there. Their identity cards were returned to them a week later at the Lice

Gendarme Station (see paragraphs 84, 93, 103). When the three villagers returned home, they were surprised to find out that Tahsin and Ali Ihsan Çiçek had not come back to the village (see paragraphs 85, 94, 103).

142. In view of the circumstances of the case and in the absence of custody records in this respect, the Court does not accept as a fact that the applicant's sons were released on the second day of their custody.

B. Compliance with Article 2

1. Whether Tahsin and Ali Çiçek should be presumed dead

143. The applicant contends that her sons' disappearance occurred in a context which was life-threatening in that, following their arrest during a military operation, they were last seen in the hands of the soldiers. She submits that the State is responsible for the fate of her sons, in as much as the Government have failed to provide a plausible explanation for their disappearance. There is accordingly a violation of Article 2 of the Convention, which provides:

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

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

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

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

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

144. The Government maintain that the applicant has not substantiated her allegations that her sons had been detained by the security forces. Accordingly, they contend that no issue could arise under Article 2 of the Convention.

145. In the case of Timurtas v. Turkey (judgment of 13 June 2000, no. 23531/94, §§ 82-83), the Court has stated as follows:

(...) where an individual is taken into custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which an issue arises under Article 3 of the Convention (...). In the same vein, Article 5 imposes an obligation on the State to account for the whereabouts of any person taken into detention and who has thus been placed under the control of the authorities (...). Whether the failure on the part of the authorities to provide a plausible explanation as to a detainee's fate, in the absence of a body, might also raise issues under Article 2 of the Convention will depend on all the circumstances of the case, and in particular on the existence of sufficient circumstantial evidence, based on concrete elements, from which it may be concluded to the requisite standard of proof that the detainee must be presumed to have died in custody (...).

In this respect the period of time which has elapsed since the person was placed in detention, although not decisive in itself, is a relevant factor to be taken into account. It

must be accepted that the more time goes by without any news of the detained person, the greater the likelihood that he or she has died. The passage of time may therefore to some extent affect the weight to be attached to other elements of circumstantial evidence before it can be concluded that the person concerned is to be presumed dead. In this respect the Court considers that this situation gives rise to issues which go beyond a mere irregular detention in violation of Article 5. Such an interpretation is in keeping with the effective protection of the right to life as afforded by Article 2, which ranks as one of the most fundamental provisions in the Convention (...)."

146. The Court considers that there are a number of elements distinguishing the present case from other cases, such as Kurt v. Turkey (judgment of 25 May 1998, Reports 1998-III, p. 1182, § 108), in which the Court held that there were insufficient persuasive indications that the applicant's son had met his death in custody. In the first place, six and a half years have now elapsed since Tahsin and Ali Ihsan Çiçek were apprehended and detained. Furthermore, it has been established that the two brothers were taken to a place of detention - the military area in Lice Regional Boarding School- by authorities for whom the State is responsible. Finally, the fact that the soldiers did not release Tahsin and Ali Ihsan Çiçek together with the other villagers within a few days, taken together with the other elements in the file, suggests that both were identified as persons under suspicion by the authorities (see above paragraph 78, especially Yarali's statement that if people were deemed clearly dangerous or required interrogation, they were handed over to the interrogation units at the end of a short period called "the observation period"). In the general context of the situation in south-east Turkey in 1994, it can by no means be excluded that the unacknowledged detention of such a person would be life-threatening (see the above cited Timurtas v. Turkey judgment, § 85). It is to be recalled that the Court has held in earlier judgments that defects undermining the effectiveness of criminal law protection in the south-east during the period relevant also to this case, permitted or fostered a lack of accountability of members of the security forces for their actions (see *Cemil Kiliç v. Turkey*, no. 22492/93, § 75, and *Mahmut Kaya v. Turkey*, no. 22535/93, § 98, both to be published in ECHR 2000).

147. For the above reasons, and taking into account that no information has come to light concerning the whereabouts of the applicant's sons for a period of six and a half years, the Court is satisfied that Tahsin and Ali Ihsan Çiçek must be presumed dead following an unacknowledged detention by the security forces. Consequently, the responsibility of the respondent State for their death is engaged. Noting that the authorities have not provided any explanation as to what occurred following Tahsin and Ali Ihsan's apprehension, and that they do not rely on any ground of justification in respect of any use of lethal force by their agents, it follows that liability for their death is attributable to the respondent Government (see Timurtas v. Turkey, cited above, § 86). Accordingly, there has been a violation of Article 2 on that account.

2. The alleged inadequacy of the investigation

148. The Court reiterates that the obligation to protect life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention "to secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see, Timurtas v. Turkey, loc. cit., § 87, and *mutatis mutandis*, the McCann and Others v. the

United Kingdom judgment of 27 September 1995, Series A no. 324, p. 49, § 161 and the Kaya v. Turkey judgment of 19 February 1998, *Reports* 1998-I, § 105).

149. The Court notes the length of time it took before an official investigation got underway and before statements were obtained from witnesses, and the manner in which relevant information was ignored by the investigating authorities. The Court observes that it was only one and a half years after the detention of the applicants' sons that enquiries were first made by the Lice gendarmes. Furthermore, the public prosecutor of Lice heard testimonies from the co-detainees of Tahsin and Ali Ihsan three and a half years after the incident. On the other hand, it is not in dispute that the applicant had apprised the Lice gendarme authorities and the public prosecutor's office at the Diyarbakir State Security Court, that her sons had not been released with other villagers arrested at the same time. Moreover, there is no evidence to suggest that the public prosecutors themselves made an attempt to inspect the veracity of the information contained in the custody ledgers or as regards the places of detention (the Regional Boarding School of Lice); nor were the Lice gendarmes or other soldiers asked without any insistence to account for their actions on 10 May 1994.

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

C. Compliance with Article 3 in respect of the applicant's sons

151. The applicant further alleges that her sons had been the victims 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."

152. Relying, *mutatis mutandis*, on the arguments used to support her complaints under Article 2, the applicant maintains that the respondent State is in breach of Article 3 of the Convention since the very fact of her sons' disappearance in a context devoid of the most basic judicial safeguards must have exposed them to acute psychological torture. In addition, she was told that her sons had been ill-treated in the regional boarding school. The applicant submits 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 requests the Court to conclude that her sons were the victims of an aggravated violation of Article 3 on account of the existence of an officially tolerated practice of disappearances and ill-treatment of detainees. She submits further that the failure of the authorities to provide any satisfactory explanation for her sons' disappearance also constituted a violation of Article 3, and that the absence of any adequate investigation into her complaint results in a separate breach of that provision.

153. The Government deny the factual basis of the applicant's allegation under Article 3.

154. Having regard to the strict standards applied in the interpretation of Article 3 of the Convention, according to which ill-treatment must attain a minimum level of severity to

fall within the provision's scope and the practice of the Convention organs that requires compliance with a standard of proof "beyond reasonable doubt" that ill-treatment of such severity occurred, the Court is not satisfied that the disappearance of the applicant's sons in the circumstances of the instant case can be categorised in terms of this provision (see the Ireland v. the United Kingdom judgment of 18 January 1978, Series A No. 25, p. 65, §§ 161-62, the Kurt v. Turkey judgment, cited above, the report of the Commission, p. 1216, § 195).

155. Where an apparent forced disappearance is characterised by a total lack of information, whether the person is alive or dead or the treatment which he or she may have suffered can only be a matter of speculation. In this respect, the Court first recalls its establishment of the facts that following their arrest on 10 May 1994 the detainees were not subjected to ill-treatment in the regional boarding school (see above paragraph 141). Moreover, the applicant has not presented any specific evidence that her sons were indeed the victims of ill-treatment in breach of Article 3; nor can the allegation that her sons were the victims of an officially tolerated practice of disappearances and associated ill-treatment of detainees be said to have been substantiated.

156. The Court recalls that the acute concern which must arise in relation to the treatment of persons apparently held without official record and excluded from the requisite judicial guarantees, is an added and aggravated aspect of the issues arising under Article 5 (see the above cited Kurt v. Turkey judgment, p. 1183, § 115).

157. Accordingly, the Court considers that there is no evidential basis which would permit it to reach a conclusion to the applicable standard of proof that Tahsin Çiçek and Ali Ihsan Çiçek suffered ill-treatment contrary to Article 3.

158. The Court concludes therefore that there has been no violation of Article 3 of the Convention in respect of Tahsin Çiçek and Ali Ihsan Çiçek.

D. Compliance with Article 5

159. The applicant submits that the disappearance of her two sons give 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."

160. The applicant alleges that the very fact that her two sons' detentions were unacknowledged meant that they were deprived of their liberty in an arbitrary manner contrary to Article 5 § 1. She contends that the official cover-up of their whereabouts and fate placed her sons beyond the reach of the law and they were accordingly denied the protection of the guarantees contained in Article 5 §§ 2, 3, 4 and 5.

161. The Government reiterates that the applicant's contentions regarding the disappearance of her sons are unsubstantiated. In their submission, no issue could arise under Article 5.

162. The Court stated in its Kurt v. Turkey judgment of 25 May 1998 as follows (pp. 1184-85, § 122; see also the Çakici v. Turkey, cited above, § 104 and the Timurtas v. Turkey, cited above, § 103) :

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

163. The Court also emphasised in the above-mentioned Kurt v. Turkey judgment (p. 1185, § 123) as follows:

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

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

165. Against that background, the Court recalls that it has established that Tahsin and Ali Ihsan Çiçek were apprehended by the security forces on 10 May 1994 during an operation in Dernek village (see paragraph 132 above). They were subsequently brought to Lice Boarding School where they stayed for at least two days. Their detention at that time was not logged and there exists no official trace of their subsequent whereabouts or fate (see paragraphs 141 and 142 above). This fact in itself must be considered a most serious failing since it enables those responsible for the act of deprivation of liberty to conceal their involvement in a crime, to cover their tracks and to escape accountability for the fate of the detainee. In the view of the Court, the absence of holding data recording such matters as the date, time and location of detention, the name of the detainee as well as the reasons for the detention and the name of the person effecting it must be seen as incompatible with the very purpose of Article 5 of the Convention (see the Timurtas v. Turkey, loc.cit., § 105 and the Çakici v. Turkey, cited above, § 105).

166. Moreover, it appears from the statements of the gendarmes given before the Commission delegates that the gendarmes had set up a practice according to which there was a difference between detaining suspected persons and putting them into custody. The period between these two acts is called “period for observation” and can be prolonged up to 24 hours. Detained persons can be interrogated in this period. The detention during this period was not logged (see above paragraph 73). The Court notes however that such an “unofficial” period of detention is not allowed by national law.

167. Furthermore, the Court considers that having regard to the applicant’s and her daughter’s (Feride Çiçek) insistence that Tahsin and Ali Ihsan Çiçek had been 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 114 above). The public prosecutor interviewed three eyewitnesses (co-detainees of Tahsin and Ali Ihsan) who confirmed in general the allegations of the applicant. However, that line of inquiry was never pursued and no statements were taken from any of the soldiers. The public prosecutor was unwilling to go beyond the gendarmerie’s assertion that the custody records showed that Tahsin and Ali Ihsan had neither been taken into custody in the village nor held in detention in the regional boarding school.

168. 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 two sons after they were detained in the village and in the regional boarding school and that no meaningful investigation was conducted into the applicant’s repeated assertion that they were in detention and that she was concerned for their life. They have failed to discharge their responsibility to account for them and it must be

accepted that they have been held in unacknowledged detention in the complete absence of the safeguards contained in Article 5.

169. The Court, accordingly, finds that there has been a violation of the right to liberty and security of person guaranteed under Article 5.

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

170. The applicant complains that the disappearance of her two sons at the hands of the security forces constitutes inhuman and degrading treatment contrary to Article 3 of the Convention in respect of herself. She accordingly requests the Court to find that the suffering, which she has endured, engages the responsibility of the respondent State under Article 3 of the Convention.

171. The Government maintain that there was no credible evidence to support the applicant's view that her sons had been detained by the security forces. They contend that there was no causal link between the alleged violation of her sons' rights under the Convention and her distress and anguish.

172. The Court reiterates 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). Further, the Court has held that the suffering occasioned must attain a certain level before treatment can be considered as inhuman. The assessment of this minimum is relative and depends on all the circumstances of the case, such as the duration of the treatment and its physical or mental effects (see the above cited, Ireland v. the United Kingdom judgment, p. 65, § 162).

173. It recalls in this respect that the applicant and her daughter made several applications to the public prosecutor and the gendarme commander following her sons' disappearance in the definite belief that they had been kept in custody in the Lice Regional Boarding School. However, the public prosecutor and the gendarmerie commander gave no serious consideration to her complaint. The Court observes that the applicant has had no news of her sons for almost six years. She has been living with the fear that her sons are dead and has made attempts before the public prosecutor and requested the authorities to be at least given their bodies. The uncertainty, doubt and apprehension suffered by the applicant over a prolonged and continuing period of time has undoubtedly caused her severe mental distress and anguish.

174. Having regard to the circumstances described above as well as to the fact that the complainant is the mother of victims of grave human rights violations 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.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

175. The applicant submits that the failure of the domestic authorities to conduct an effective investigation into her sons' disappearance give rise to a breach of Article 13 of

the Convention. The applicant further contends that her experience is a typical example of the practice of ineffective remedies in South-East Turkey.

176. The Government maintain that both the General Command of the Gendarmerie and the Lice Public Prosecutor commenced a full-scale investigation based on the applicant's allegations.

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."

177. 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 Aksoy v. Turkey judgment of 18 December 1996, Reports 1996-VI, no. 26, p. 2286, § 95; the Aydin v. Turkey judgment, cited above, pp. 1895-96, § 103; and the Kaya v. Turkey judgment, also cited above, pp. 325–26, § 89).

178. 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 sons. 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, Aydin 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 2 to conduct an effective investigation into the disappearance of a person at the hands of the authorities (see Kiliç v. Turkey, cited above, §93).

179. For the reasons given earlier (see paragraph 168 above), Mrs Çiçek can be considered to have had an arguable complaint that her sons had been taken into custody. That complaint was never the subject of any serious investigation. No written statement was taken from the applicant by the public prosecutor in response to her complaint and no enquiries were pursued with the soldiers who allegedly participated in the operation conducted in Dernek Village on 10 May 1994.

180. The public prosecutor had a duty under Turkish law to carry out an investigation of allegations of unlawful deprivation of liberty (see paragraph 114 above). The superficial approach which he took to the applicant's insistence that her sons 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.

181. Accordingly, in view 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 sons had disappeared in circumstances engaging the responsibility of the authorities. There has therefore been a violation of Article 13.

IV. ALLEGED VIOLATION OF ARTICLES 2, 3, 5 AND 13 OF THE CONVENTION IN CONJUNCtION WITH aRTICLE 14 OF THE CONVENTION

1. Article 14 in conjunction with Articles 2, 3 and 5 of the Convention

182. The applicant maintains that because of her Kurdish origin the various alleged violations of her Convention rights were discriminatory, in 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."

183. The Government have not addressed these allegations beyond denying the factual basis of the substantive complaints.

184. The Court notes that the applicant has not adduced any evidence to substantiate her allegations that her sons were the deliberate targets of a forced disappearance on account of their ethnic origin. Accordingly, there has been no violation of the Convention in this regard.

2. Article 14 in conjunction with Article 13 of the Convention

185. The applicant further invokes Article 14 of the Convention in conjunction with Article 13 of the Convention in that she was denied effective access to judicial process on account of the failure of the Turkish authorities to make adequate provision for the use of Kurdish language before gendarmes, prosecutors and other officials exercising judicial functions. She maintains that she was deprived of the ability to make or pursue a complaint.

186. The Government recalls that pursuant to Section 3 of the Constitution, the language of the Turkish State is Turkish. They further maintain that judicial authorities must use the services of an interpreter whenever an accused or a complainant cannot speak the Turkish language.

187. The Court observes in the first place that Turkish legislation provides the assistance of an interpreter to persons who do not have the command of Turkish language. Moreover, the applicant has never maintained before the Court that she had asked the assistance of a translator and that this request had been rejected by the Turkish authorities. Although it is clear that the applicant cannot speak Turkish, her daughter Feride Çiçek, who had filed petitions with the Diyarbakir Public Prosecutor had the assistance of a lawyer from the Diyarbakir Human Rights Association to draft these petitions.

188. In the light of the foregoing, the Court considers the applicant's allegations to be unsubstantiated. Accordingly, there has been no violation of the Convention under this head of complaint.

IV. ALLEGED VIOLATION OF ARTICLE 18 OF THE CONVENTION

189. The applicant complains that the disappearance of a person in detention necessarily involves a cover-up, since denial of the detention or of the continuing detention is part of the definition of a disappearance. She further maintains that such a cover-up is inconsistent with the requirement of good faith implicit in Article 18, 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."

190. In support of her assertion, the applicant claims that the denial by the security forces that anyone was held in Lice Regional Boarding School, when it was a matter of common knowledge that it was used as a detention center, is evidence of a collective attempt by those forces to conceal what happened there.

191. The Government have not addressed these allegations beyond denying the factual basis of the substantive complaints.

192. In the light of its finding that the applicant's sons were kept in unacknowledged detention and that there has been a violation of their right to liberty and security, the Court finds it unnecessary to examine this complaint separately since the applicant's allegations have in essence been examined under Articles 2 and 3.

V. ALLEGED VIOLATIONS OF THE CONVENTION IN RESPECT OF THE DISAPPEARANCE OF THE APPLICANT'S GRANDSON

193. The applicant alleges that her grandson Çayan Çiçek, who was 16 years old at the time of the events, was detained by the security forces approximately a month after the detention of Tahsin and Ali Ihsan Çiçek. The applicant states that on the day of her grandson's disappearance, she had gone to Lice with Çayan's mother. When they returned to the village at night, a villager informed them that Çayan had been arrested along with two other women.

194. The Court observes that the evidence concerning the disappearance of her grandson is inconsistent. Before the Diyarbakir HRA and the Commission delegates, the applicant affirmed that Çayan had been detained by the security forces in the garden of their house, whereas according to the applicant's daughter Feride, who was in the village at the time of the events, Çayan had been arrested in the fields in the outskirts of the village.

195. The Court further notes that the applicant was neither able to give the names of the witnesses who told her about Çayan's arrest, nor to bring them before the Commission delegates to give oral evidence. Moreover, there is no evidence to confirm

that there had been an operation on the day of Çayan's alleged arrest. The other witnesses who gave oral evidence have no information about Çayan's disappearance.

196. In these circumstances, the Court notes that there is no evidence to substantiate the alleged detention of Çayan by the security forces. No sufficient evidence has been submitted by the applicant to establish what had or could have happened to her grandson Çayan. Accordingly, there has been no violation of the Convention under this head of complaint.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

197. Article 41 of the Convention provides:

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

A. Pecuniary damage

198. The applicant claimed a total of 109,795.02 pounds sterling (GBP) pecuniary damage for loss of income in respect of her two sons, Ali Ihsan Çiçek and Tahsin Çiçek, who have disappeared in circumstances engaging the responsibility of the Government. She calculated this amount on basis of the salaries of the two brothers for their respective fields of employment.

199. The Government submitted that there was no violation to be compensated and any just satisfaction should not exceed reasonable limits or lead to unjust enrichment.

200. The Court recalls that there must be a causal connection between the damage claimed by the applicant and the violation of the Convention and that this may, in the appropriate case, include compensation in respect of loss of earnings (see amongst others, the Barberà, Messegué and Jabardo v. Spain judgment of 13 June 1994 (*Article 50*), Series A no. 285-C, pp. 57-58, §§ 16-20; the Çakici v. Turkey judgment cited above, § 127). The Court has found (paragraphs 147 and 164-168 above) that it may be taken as established that Tahsin Çiçek and Ali Ihsan Çiçek disappeared following an unacknowledged detention and that the State's responsibility is engaged under Articles 2 and 5 of the Convention. In these circumstances, there is a direct link between the violation of Articles 2 and 5 and the loss by the heirs of the financial support which they provided for them.

201. In the light of the foregoing, the Court, deciding on an equitable basis, awards the sum of GBP 5000 for each of the applicant's sons, which amount is to be paid and held by the applicant for her sons' heirs. Accordingly, the Court rejects the remainder of the applicant's claims for pecuniary damage.

B. Non-pecuniary damage

202. The applicant maintained that both she and her sons had been victims of specific violations of the Convention. She requested the Court to award GBP 40,000 for

each of her sons in respect of their disappearance, which the applicant would hold for the benefit of their heirs. The applicant further claimed GBP 10,000 in respect of herself for non-pecuniary damage. She also requested GBP 1000 per month by way of non-pecuniary compensation for the continuing violation of the Convention, until the respondent Government inform her of the fate of her sons.

203. The Government maintained that those amounts were exaggerated and would lead to unjust enrichment.

204. The Court recalls that there have been findings of violations of Articles 2, 5, and 13. It considers that an award of compensation should be made in their favour having regard to the gravity of the breaches in question. Accordingly, it awards the sum of GBP 20,000 for each of the applicant's sons, which is to be paid to the applicant and held by her for her sons' heirs.

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

C. Costs and expenses

206. The applicant claimed a total of GBP 7760 for fees and costs incurred in the application by the legal team in the United Kingdom and a total of GBP 8143 for the fees and costs in respect of work undertaken by lawyers in Turkey. This included fees and costs incurred in respect of attendance at the taking of evidence before the Commission delegates at two hearings in Ankara. The applicant further requested GBP 1205 to be paid to the Kurdish Human Rights Project ("KHRP") for postage, telecommunications, interpretation and translation expenses.

207. The Government regarded the professional fees as exaggerated and unreasonable and submitted that regard should be had to the applicable rates for the Ankara Bar Association.

208. In relation to the claim for costs, the Court, deciding on an equitable basis and having regard to the details of the claims submitted by the applicant, awards her the sum of GBP 10,000, together with any value-added tax that may be chargeable.

209. On the other hand, the Court is not persuaded of the merits of the claim (GBP 1205) 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.

D. Default interest

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

FOR THESE REASONS, THE COURT

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

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

3. *Holds* unanimously that there has been a violation of Article 5 of the Convention in respect of the applicant's sons;

4. *Holds* unanimously that there has been a violation of Article 3 of the Convention in respect of the applicant;

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

6. *Holds* unanimously that there has been no violation of Article 14 of the Convention taken together with Articles 2, 3, 5 and 13 of the Convention;

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

8. *Holds* unanimously that there has been no violation of the Convention in respect of the applicant's grandson;

9. *Holds* by six votes to one

(a) that the respondent State is to pay the applicant, within a period of three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following sums to be converted into Turkish liras at the rate applicable on the date of payment:

(i) by way of compensation for pecuniary damage, 10,000 (ten thousand) pounds sterling, which sum is to be held by the applicant for her sons' heirs;

(ii) by way of compensation for non-pecuniary damage, 40,000 (forty thousand) pounds sterling, which sum is to be held by the applicant for her sons' heirs;

(iii) in respect of compensation for non-pecuniary damage, 10,000 (ten thousand) pounds sterling;

(b) that simple interest at an annual rate of 7.5 % shall be payable from the expiry of the above-mentioned three months until settlement;

10. *Holds* unanimously

(a) that the respondent State is to pay the applicant, within a period of three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, and into the latter's bank account in the United Kingdom, in respect of costs and expenses, 10,000 (ten thousand) pounds sterling together with any value-added tax that may be chargeable;

(b) that simple interest at an annual rate of 7.5 % shall be payable from the expiry of the above-mentioned three months until settlement;

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

Done in English, and notified in writing on 27 February 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE Elisabeth PALM

Registrar President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgement:

(a) concurring opinion of Mr R. Maruste;

(b) partly concurring and partly dissenting opinion of Mr F. Gölcüklü.

E.P.

M.O.B.

CONCURRING Opinion of JUDGE Maruste

I am in agreement with the majority in finding a violation of Article 2 both under the substantive and procedural heads. But to my regret, I am unable to follow the conclusive finding of the chamber presented in § 145, where it is said, that « *it follows that liability for their death is attributable to the respondent Government».* This formulation indicates clearly and definitively that the two disappeared persons are considered dead.

To my understanding, it is questionable to use such definite language for the following reasons:

The court has no evidence concerning the fate of the disappeared persons. There is no dead body, no evidence of ill-treatment of these persons (see finding in § 156) or even signs of any kind of ill-treatment. Neither can the situation be regarded as life-threatening. In this respect, the case differs for example from the Kurt case. The only argument in favour of presumed death is the lack of any information on their whereabouts during six and a half years. In the Kurt judgment, it was emphasised that the Court must carefully scrutinise whether there does in fact exist concrete evidence which would lead it to conclude that (the person) was, beyond reasonable doubt, killed by the authorities while in detention or at some subsequent stage. I find the evidential bases in this case too weak for such a definitive conclusion as referred to above.

Moreover, I do not think that it is legally correct to equalise death and disappearance in these circumstances. I do not wish to speculate about the possibility of the applicant's sons being found alive at some point in future. As long as this possibility has not been irreversibly excluded, it would be premature for an international court to conclude that death has definitely occurred. For these reasons, I would add to that conclusion the word "presumed" or "possible" (death).

But to my mind , even this solution is not the best and it would be more appropriate to qualify the situation as it really is, i.e. a disappearance for which the Government is responsible, since the disappeared persons were last seen alive and in good health when they were under the control of the authorities. It is clear that the burden of proof in these circumstances shifts to the Government, who, as it has been established, have not produced compelling evidence as to the fate of the disappeared persons.

Disappearance is a recognised category in international law [see for example the UN Declaration on the Protection of All Persons from Enforced Disappearance - G.A. res. 47/133, 18.12. 1992, which provides *inter alia,* that «… disappearance...violates...the right to life»; see also the UN Human Rights Committee Case-law on that respect (for example Quinteros v. Uruguay, 107/1981, Report of the Human Rights Committee, GAOR, 38th Session, Supplement no. 40, 1983, Annex XXII, § 14) and the case-law of the Inter-American Court of Human Rights (for example Velásquez Rodríguez Case, Judgment of July 29, 1988, Series C, No. 4, § 157). I do not see serious obstacles to the application of that doctrine in this particular case (and in similar circumstances in the Court's jurisprudence in general), even if such a finding is not bolstered by more general analyses and assessment of what is, according to the allegations, an officially tolerated practice of disappearances. To my understanding, under the positive obligation doctrine, even one single disappearance would fall under the first sentence of Article 2 § 1, which obliges states to protect everyone`s right to life. The disappearance of a person under the control of the authorities means that their life has not been properly protected. Such a qualification would be more appropriate in these circumstances and leave the door open for any subsequent developments whatever they may be.

PARTLY CONCURRING, PARTLY DISSENTING Opinion of JUDGE Gölcüklü:

(*Translation*)

To my great regret, it is impossible for me to share the conclusions of the majority as regards a violation of Articles 2 and 13 of the Convention and the applicability of Article 41 in respect of the award of compensation for pecuniary damage.

Allow me to explain.

1. In the instant case there is not even any prima facie evidence that the applicant's sons met their deaths while in the custody of the security forces. On the contrary, the other prisoners detained with them personally heard the soldiers say that they were going to release them (see paragraphs 84, 93 and 103). There is no evidence in the case file that establishes beyond all reasonable doubt that the applicant's sons died while in custody. They were presumed to have died purely and simply because they had been arrested and, according to the majority, of « the special circumstances which prevailed » in that part of the country due to the terrorist actions of the PKK. In my opinion, those facts – in themselves insignificant as regards the applicant's complaints under Article 2 – in no way suffice to justify the conclusion that there has been a violation of that Article. It is no more than idle speculation to suggest that the applicant's sons died in detention and that the respondent State is responsible (see paragraphs 141 et seq.)

I therefore conclude that Article 2 is inapplicable in the instant case and has certainly not been violated.

2. For a more detailed explanation on this point, I refer to my dissenting opinion in this case of Timurtas v. Turkey (judgment of 13 June 2000) and the Court's analysis in the case of Kurt v. Turkey (judgment of 25 May 1998) ; the latter case should be treated as the leading authority in cases of disappearance in which, as in the present case, death has not been established beyond all reasonable doubt.

As regards a violation of Article 13, to my mind, once the majority in this case reached the conclusion (see paragraph 148) that there had been a violation of Article 2 of the Convention on the ground that no effective investigation into the disappearance of the applicant's sons had been conducted (procedural aspect), no separate question arose under Article 13, since the same facts were at the origin of the applicant's complaints under both Articles 2 and 13. On that point, I also refer to my dissenting opinions in the cases of Kaya v. Turkey (judgment of 19 February 1998), Mahmut Kaya v. Turkey (judgment of 28 March 2000) and Akkoç v. Turkey (judgment of 10 October 2000).

3. Lastly, in the instant case, as I have just explained, since the deaths were established merely on the basis of a presumption and not beyond all reasonable doubt, there is no justification for awarding the heirs of the applicant's sons compensation for any pecuniary damage whatsoever.