



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

SECOND SECTION

**CASE OF T.A. v. TURKEY**

*(Application no. 26307/95)*

JUDGMENT  
(Striking out)

STRASBOURG

9 April 2002

**THIS CASE WAS REFERRED TO THE GRAND CHAMBER,  
WHICH DELIVERED JUDGMENT IN THE CASE ON  
08/04/2004**

*This judgment may be subject to editorial revision.*



**In the case of T.A. v. Turkey,**

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

Mr J.-P. COSTA, *President*,

Mr A.B. BAKA,

Mr GAUKUR JÖRUNDSSON,

Mr L. LOUCAIDES,

Mr C. BÎRSAN,

Mr M. UGREKHELIDZE, *judges*,

Mr. F. GÖLCÜCKLÜ, *ad hoc judge*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 12 March 2002,

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

**PROCEDURE**

1. The case originated in an application (no. 26307/95) against the Republic of Turkey lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Turkish national, T.A. (“the applicant”), on 29 October 1994. The applicant stated that the application was also lodged on behalf of his brother Mehmet Salim A.<sup>1</sup>

2. The applicant, who had been granted legal aid, was represented before the Court by Mr Philip Leach, a lawyer attached to the Kurdish Human Rights Project, a non-governmental organisation based in London. The Turkish Government (“the Government”) did not appoint an Agent for the purposes of the Convention proceedings.

3. The applicant alleged in particular that his brother Mehmet Salim A. had disappeared since 20 August 1994, when he was abducted by two unidentified persons – allegedly plain-clothes police officers. The applicant complained of the unlawfulness and excessive length of his brother’s detention, of the ill-treatment and acts of torture to which his brother had allegedly been subjected in detention, and of the failure to provide his brother with the necessary medical care in detention. The applicant further complained that his brother had been deprived of the services of a lawyer and of any contact with his family. The applicant relied on Articles 2, 3, 5, 6, 8, 13, 14, 18, 34 and 38 of the Convention.

4. The Commission declared the application admissible on 30 June 1997, and transmitted it to the Court on 1 November 1999 in accordance

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<sup>1</sup> In the documents submitted by the parties, Mehmet Salim A. is also referred to as Mehmet Salih A. or as Mehmet Selim A.

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 initially 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 Rıza 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.

6. The Chamber, having decided that no hearing on the merits was required (Rule 59 § 2 *in fine*), invited the parties to submit final written observations of which possibility both parties availed themselves. The parties further considered the possibility of a friendly settlement. No settlement was reached.

7. By letter of 27 August 2001, the Government requested the Court to strike the case out of its list and enclosed the text of a declaration with a view to resolving the issues raised by the applicant. The applicant filed written observations on the Government's request on 17 December 2001.

8. Following the general restructuring of the Court's Sections as from 1 November 2001 (Rule 25 § 1 of the Rules of Court), the application was assigned to the newly composed Second Section of the Court (Rule 52 § 1).

9. On 5 March 2002 the President of the Chamber refused the request of the Aire Centre to intervene in the procedure (Rule 61 § 3).

10. On 12 March 2002 the Chamber rejected the applicant's request that the Chamber relinquish jurisdiction in favour of the Grand Chamber (Rule 72 § 1).

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

#### A. Facts submitted by the applicant

11. The applicant's brother Mehmet Salim A. was a farmer living in Ambar, a village in the Bismil district in south-east Turkey. On 20 August 1994, while Mehmet Salim was working in a cotton field near Ambar, a white or grey Renault car without any registration plates stopped. Two armed men in plain clothes – claiming to be police officers – got out of the car and asked Mehmet Salim to accompany them in order to help them find

a field. When Mehmet Salim refused to get into the car, the two men threatened him with their weapons. They then took his identity card, tied his hands, blindfolded him, punched him in the head and stomach and forced him into their car and drove off.

12. The scene was witnessed by Mehmet Salim's son İhsan A. and İ.E., another farmer. After the car had driven off, İhsan ran to his home and told his mother Halise A. what had happened, who in turn informed the village headman. Abide A., Mehmet Salim's daughter, had seen her father sitting in the back seat of a "grey coloured" car passing through the village when she and a neighbour were washing clothes in a stream in the village. Another villager had allegedly seen Mehmet Salim being taken to the riverbank where five other people had been waiting in another car. Mehmet Salim's hands and feet had been tied, he had been blindfolded and his mouth had been taped. The two cars reportedly had driven off in the direction of Bismil. Nothing has been heard from Mehmet Salim since.

13. Mehmet Salim's family filed a series of petitions and complaints about his disappearance to the authorities, including the Deputy Governor and the Bismil gendarme forces, in order to find out where and why he was detained.

14. On or about 27 August 1997, Mehmet Salim's sister Meliha D. personally handed a written petition about her brother's disappearance to the Deputy Governor in Diyarbakır. After having read the petition and after having spoken to a gendarme officer, the Deputy Governor told her that Mehmet Salim was in the hands of the State and that there was nothing that she could do for the time being.

15. When leaving the Deputy Governor's office, Meliha D. was approached by a police officer who volunteered to make inquiries about her brother with a friend in the "torture place" of the Bismil gendarme station. This police officer rang Meliha D. three days later and told her that he had seen Mehmet Salim at the Bismil Gendarmerie Command and that he could bring him some clothes and cigarettes. After Meliha D. had fetched some clothes, the police officer told her that he would take these to her brother in one or two days. On 31 August 1994, the police officer called Meliha D. again and told her that her brother had been taken away from the Bismil Gendarmerie Command and that he did not know where to.

16. On 29 August 1994, Hüsna A., Mehmet Salim's mother, filed a petition with the Bismil public prosecutor requesting an investigation of her son's disappearance.

17. By letter of 2 September 1994, the public prosecutor requested information from the Bismil Gendarmerie Commander about the case. On the same day, the public prosecutor took statements from Hüsna A., Halise A., İhsan A., and the farmer İ.E.

18. On 19 October 1994, Hüsna A. asked the Bismil Chief public prosecutor for information about the progress of the investigation, but she received no reply.

19. In his letters of 29 November 1994 and 19 January 1995, the applicant asked the public prosecutor at the Diyarbakır State Security Court to investigate the whereabouts of his brother Mehmet Salim. These letters remained without any reply.

20. By letters of 15 March and 17 May 1995, the Bismil public prosecutor asked the Bismil Gendarmerie Commander for information about the case.

21. On 20 July 1995, the applicant requested the Bismil Chief public prosecutor for information about the case of Mehmet Salim and accused the gendarme officers İ.C. and A.B. and the village guard H.A. of being responsible for his brother's abduction.

22. On 26 and 27 July 1995, the applicant sent letters to the Minister for Human Rights and the Minister of Justice, seeking information about his brother's whereabouts and condition. On 24 August 1995, the Minister of Human Rights informed the applicant that his petition had been transmitted to the Office of the Diyarbakır Governor. In his reply of 30 August 1995, the applicant requested the Minister of Human Rights to ensure his brother's safety and to take urgent action.

23. On 21 August 1995, the Bismil public prosecutor informed the Minister of Justice that Mehmet Salim A. had been abducted by two armed men whose identities had not yet been established.

24. On 8 September 1995, gendarme officers took further statements from Hüsna A., Halise A. and İhsan A.

25. On 27 September 1995, the applicant was contacted by an unknown person who asked 1.1 billion Turkish Lira in return for his brother's release. The applicant was told that his brother would be interrogated at the Bismil Gendarmerie Command and that he would be able to meet his brother within a week. On 5 October 1995, Mehmet Salim's family was contacted by a person called Murat, who informed them that Mehmet Salim had been detained in Bolu and subsequently at a military base. He was alive and was working as an agent for the authorities. In order to have him released, the family would have to comply with the conditions of the Diyarbakır Regiment Commander, namely to keep secret the names of those who had abducted him, as well as where and by whom he had been detained. The family refused to accept these demands.

26. On 25 October 1995, Meliha D. gave a statement to the Bismil Gendarmerie Command that the gendarme officers İ.C. and A.B., and the village guard H.A. were responsible for her brother's abduction.

27. On 30 October 1995, the home of Meliha D. was raided by officers of the Diyarbakır Anti-Terror Branch, who threatened her with death and attempted to abduct her 12 year old son.

28. The applicant was informed in November 1995 by the Diyarbakır General Gendarmerie Command that his brother had not been apprehended by the Gendarmerie, but that he had been abducted by two unidentified civilians who claimed to be policemen.

29. The applicant also filed a petition about his brother's disappearance with the Human Rights Commission of the Turkish Grand National Assembly. On 1 December 1995, in reply for a request for information, the Office of the Diyarbakır Governor informed the Human Rights Commission that the case had been investigated, that the two gendarme officers whose names had been given by the applicant and his sister (see §§ 19 and 24 above) had not apprehended Mehmet Salim, that he had been abducted by two unidentified individuals and that the investigation of the case by the Bismil public prosecutor was ongoing. This information was transmitted by the Human Rights Commission to the applicant on 18 December 1995.

30. On 10 June 1996, Hüsna A. asked the Bismil public prosecutor for information about the investigation.

31. On 17 June 1996, the Bismil public prosecutor issued a decision of lack of jurisdiction (*görevsizlik kararı*) and transmitted the investigation opened against the gendarme officers İ.C. and A.B. and the village guard H.A. to the Diyarbakır Provincial Administrative Council (*İl İdare Kurulu*) for further proceedings under the Act on Proceedings on the Prosecution of Civil Servants (*Memurin Muhakematı Kanunu*).

32. On 25 November 1996, Meliha D. requested the Diyarbakır Governor to open an investigation of Mehmet Salim's disappearance. On 10 December 1996, the applicant wrote a letter to the President of Turkey and filed a further petition with the Diyarbakır Provincial Administrative Council. On 11 December 1996, Hüsna A. wrote a letter to the President of Turkey and to the Minister of the Interior, asking them to investigate the disappearance of her son Mehmet Salim. Both petitions were transmitted to the Office of the Batman Governor.

33. On 17 January 1997, the Diyarbakır Governor informed Meliha D. in response to her petition of 25 November 1996 that an investigation of the matter had been carried out by the Bismil Chief public prosecutor and that the perpetrators of the abduction of her brother had remained unidentified.

34. In its decision of 23 January 1997, the Diyarbakır Provincial Administrative Council decided, on the basis of a lack of sufficient evidence, not to take any proceedings against the two gendarme officers and the village guard.

35. On 2 February 2000, at 11.00 pm, Meliha D., Hüsna A. and Halise A. watched a news broadcast on television. The news reader announced that four persons had been apprehended in Diyarbakır, one of whom was named Mehmet Salim A. Pictures of the apprehended men were shown and all three of them recognised Mehmet Salim A. The three women continued to

watch the television news all night and saw him again during the 8.00 a.m. television news broadcast.

36. On 4 February 2000, Meliha D., Hüsna A. and Halise A. informed the Bismil public prosecutor in person of what they had seen. The public prosecutor telephoned the Office of the Diyarbakır public prosecutor and told them afterwards that three persons by the name of Mehmet Salim A. had been apprehended, but that, apart from the name, their particulars did not match those of their relative.

37. Two days later, the Bismil public prosecutor informed Meliha D. that her brother had in fact been apprehended, that he was being held in the prison in Muş, and that he would be released after having given a statement.

38. On 16 February 2000, Meliha D. told the Diyarbakır public prosecutor of her sighting of her brother on television and asked the public prosecutor for information about his fate. The public prosecutor referred her to the Şehitlik police station, from where she was referred to the Police Headquarters for a verification of the police computer records. There she was told that she would be informed about her brother and was asked to leave. She has subsequently received no further information from the Police Headquarters.

39. On 18 February 2000, Meliha D. made a similar request to the Office of the Diyarbakır Governor, and was again referred to the Şehitlik police station from where she was referred to the Anti-Terror Branch, and where a police officer took a statement from her and recorded her particulars. After about an hour, Meliha D. was told that her brother had not agreed to see his family. When she refused to accept this answer and insisted on seeing him, she was asked to leave. She was informed three days later that her brother was not in fact at the Anti-Terror Branch. She was subsequently told to go to the prison in Muş. When she and İhsan A. went to this prison, they were shown a person who was not Mehmet Salim A.

40. On 23 March 2000, three officers of the Anti-Terror Branch came to the home of Halise A., asking her for a family chart. She was told that they were looking for Mehmet Salim A. everywhere in Turkey and that he had not been found to be dead.

41. According to a decision of non-jurisdiction issued on 2 May 2000 by the Chief public prosecutor of Muş, the person placed in pre-trial detention in Muş was a Mehmet Salih A., whose year of birth and whose parents did not match the particulars of the applicant's brother.

42. On 11 May 2000, Meliha D. filed a petition with the Diyarbakır public prosecutor seeking an investigation of her sighting of her brother Mehmet Salim A. during the television news broadcast.

43. On 30 May 2000, the Diyarbakır Chief public prosecutor issued a decision not to open an investigation (*tapiksizlik kararı*) on the basis of the petition of 11 May 2000. This decision reads as follows:

“The complainant stated in her petition that her brother has disappeared 6 years ago and that nothing has been heard from him since, that she recognised one of the persons shown on a news programme in February about persons apprehended during operations conducted against the terror organisation Hizbullah, that this person’s name was the same as her brother’s name, and that she wished to be given the opportunity to watch a video recording <of the news broadcast> so that she could identify her brother.

Since it has been stated in the decision of non-jurisdiction dated 02.05.2000 of the Chief public prosecutor of Muş that the person detained in the Muş Province – a Mehmet Salih A., born in 1964 and the son of Yahya and Ayşe – is not the complainant’s brother, and since it appears from the above decision of non-jurisdiction and from the birth records that the person detained in Muş, who was put on trial by the Chief public prosecutor of the Van State Security Court, is not the complainant’s brother;

It is therefore concluded, in accordance with Article 164 of the Code of Criminal Procedure and under reservation of the right of appeal, that there is no basis to pursue the matter ...”

44. Later in 2000, Meliha D. spoke with a prison officer in the Muş prison. This officer confirmed that he had seen Mehmet Salim A. when he and five of six others had been apprehended and taken to the Muş prison. According to Meliha D., the officer’s description of Mehmet Salim corresponded to her brother’s features.

## **B. Facts submitted by the Government**

45. On 29 August 1994, the applicant’s mother filed a petition with the Bismil public prosecution requesting an investigation of the whereabouts of her son Mehmet Salim A., who had been kidnapped by two men.

46. The public prosecutor opened an investigation, in the course of which statements were taken from Hüsna A, Halise A. and of the two eye-witnesses of the events, İhsan A. and İ.E.

47. İhsan A.’s statement of 2 September 1994 to the public prosecutor, which was read out to him before he signed it, reads:

“On the day of the incident, my father and I were working in the field. When we went to sit under a tree to have lunch, İ.E., who was working in the field, joined us. There was 20 metres distance between my father and me. At this point, a grey coloured taxi with no number plate came and stopped near my father. The persons in the car spoke with my father. I saw that they took the identity cards of my father and of the person called İ., and then they returned İ.’s identity card, and I saw my father get onto the taxi. This taxi immediately headed towards the village of Ambar. Later, I went home and informed my mother of it. As I was far away, I was unable to recognise these people, but I heard that there were speaking Turkish. These people were wearing hats and glasses. That is all I know and what I have witnessed.”

48. İ.E.’s statement of 2 September 1994 to the public prosecutor, which was read out to him before he signed it, reads:

“On the day of the incident, while Mehmet Salih A. and I were having lunch in the field below the village of Ambar, a Renault TX model grey taxi without number plates approached us. The persons in the car asked us to give our identity cards. When we refused, they forced us by saying that they were the police and that we were therefore obliged to give our identity cards. The persons who asked for our cards had a western accent. Both of them were about 25 or 26 years old. One of them was wearing glasses. They did not give back Mehmet Salih’s identity card. They said that ‘Mehmet Salih will show us someone’s field and then we will send him back.’ That is all I know and what I have witnessed in relation to the incident.”

49. On 19 October 1994, Hüsna A. filed another petition with the Bismil public prosecutor.

50. On 15 March 1995, the Bismil public prosecutor requested the Bismil Gendarmerie Command to investigate whether or not Mehmet Salim A. had been kidnapped.

51. On 8 October 1995, gendarme officers took statements from Hüsna A., Halise A., İhsan A., and İ.E. On the basis of the applicant’s allegation that Mehmet Salim A. had been taken away by two officers of the Bismil gendarmerie and a local village guard, İ.E. was asked whether the persons whom he had seen worked at the Bismil Gendarmerie Command. He replied:

“Those persons were not persons working at the Bismil Gendarmerie Command. As I have already stated above, I have not seen these persons before. Moreover, Mehmet Salim A. did not behave as if he knew them.”

52. On 17 June 1996, the Bismil public prosecutor issued a decision of non-jurisdiction and referred the case to the Diyarbakır Provincial Administrative Council. The Administrative Council appointed İ.O. as inspector for the investigation of the allegations asserted by the applicant that his brother had been taken into detention by the gendarme officers İ.C. and A.B., under the guidance of the temporary village guard H.A.

53. On 23 January 1997, the Provincial Administrative Council issued a decision of non-prosecution, finding that there was insufficient evidence for taking proceedings against İ.C., A.B. or H.A.

54. Mehmet Salim A. has been included in the list of persons who are being searched for by the gendarme forces in the entire territory of Turkey, and the search for him continues.

55. The person who was apprehended and shown during a television news broadcast in February 2000 was not the applicant’s brother. Several persons being held in detention have the same name as the applicant’s brother. However the respective dates and places of birth, and particulars of these persons are different from those of the applicant’s brother.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

56. The relevant provisions of criminal, civil and administrative law are set out in the Court's judgment in the case of *Şarlı v. Turkey* (no. 23657/94, 22.5.2001).

## THE LAW

57. By letter dated 27 August 2001, the Deputy Permanent Representative of Turkey to the Council of Europe informed the Court as follows:

“... I have the pleasure to enclose herewith the text of a declaration which the Government would be willing to make unilaterally with a view to resolving the ... application.

The Government kindly requests the Court to decide that it is no longer justified to continue the examination of the application and to strike the case out of the list under Article 37 of the Convention.”

58. The text of the declaration reads as follows:

“1. I declare that the Government of the Republic of Turkey offer to pay *ex gratia* to the applicant, Mr <T.A.>, the amount of 70,000 pounds sterling [...] [in respect of] the application registered under no. 26307/95.

This sum, which covers any pecuniary and non-pecuniary damage as well as costs, shall be paid in pounds sterling, free of any taxes that may be applicable and to an account named by the applicant. The sum shall be payable within three months from the date of delivery of the judgment by the Court pursuant to the Article 39 of the European Convention on Human Rights. This payment will constitute the final resolution of the case.

The Government regret the occurrence of the actions which have led to the bringing of the present application, in particular the disappearance of the applicant's brother Mr Mehmet Salim <A.> and the anguish caused to his family.

It is accepted that unrecorded deprivations of liberty and insufficient investigations into allegations of disappearance, such as in the present case, constitute violations of Articles 2, 5 and 13 of the Convention. The Government undertake to issue appropriate instructions and adopt all necessary measures with a view to ensuring that all deprivations of liberty are fully and accurately recorded by the authorities and that effective investigations into alleged disappearances are carried out in accordance with their obligations under the Convention.

The Government consider that the supervision by the Committee of Ministers of the execution of Court judgments concerning Turkey in this and similar cases is an appropriate mechanism for ensuring that improvements will be made in this context. To this end, necessary co-operation in this process will continue to take place. ...”

59. The applicant, in his written reply, requested the Court to reject the Government's initiative. He argued, *inter alia*, that the terms of the declaration are unsatisfactory in that it contains no admission of any Convention violation in the present application; that it is not admitted that Mehmet Salim A. was abducted by State agents and that he must be presumed to have died in violation of Article 2 of the Convention; that it contains no undertaking to investigate the circumstances of the present case; that the compensation will be paid *ex gratia*; that it contains no acknowledgement that the Government acted contrary to Articles 34 and 38 of the Convention, and that it contains no acknowledgement that the unlawful abduction and "disappearance" of the applicant's brother undermines and is inconsistent with the prohibition of torture and inhuman or degrading treatment under Article 3 of the Convention.

60. The Court observes at the outset that no agreement could be reached between the parties as to a friendly settlement of the case (see paragraph 6 above). It recalls that, according to Article 38 § 2 of the Convention, friendly settlement negotiations are confidential. Rule 62 § 2 of the Rules of Court further stipulates in this connection that no written or oral communication and no offer or concession made in the framework of the attempt to secure a friendly settlement may be referred to or relied on in the contentious proceedings.

The Court will therefore proceed on the basis of the declaration made outside the framework of the friendly settlement negotiations by the respondent Government on 9 October 2001.

61. The Court recalls that Article 37 of the Convention provides that it may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to one of the conclusions specified under (a), (b) or (c) of that Article.

62. Article 37 § 1 (c) enables the Court in particular to strike a case out of its list if :

“for any other reason established by the Court, it is no longer justified to continue the examination of the application.”

63. Article 37 § 1 *in fine* states :

“However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the protocols thereto so requires.”

64. The Court has examined carefully the terms of the respondent Government's declaration. Having regard to the nature of the admissions contained in the declaration as well as the scope and extent of the various undertakings referred to therein, together with the amount of compensation proposed, the Court considers that it is no longer justified to continue the examination of the application (Article 37 § 1 (c)).

65. Moreover, the Court is satisfied that respect for human rights as defined in the Convention and the protocols thereto does not require it to

continue the examination of the application (Article 37 § 1 *in fine*). The Court notes in this regard that it has specified the nature and extent of the obligations which arise under the Convention for the respondent Government in cases of alleged disappearances (cf. Kurt v. Turkey judgment of 25 May 1998, *Reports of Judgments and Decisions* 1998-III, Çakıcı v. Turkey [GC], no. 23657/94, ECHR 1999-IV, Ertak v. Turkey, no. 20764/92, ECHR 2000-V, Timurtaş v. Turkey, no. 23531/94, ECHR 2000-VI, Taş v. Turkey, no. 24396/94, 14.11.2000, Çiçek v. Turkey, no. 25704/94, 27.2.2001, Şarlı v. Turkey no. 23657/94, 22.5.2001, and Akdeniz and Others v. Turkey, no. 23954/94, 31.5.2001).

66. Accordingly, the application should be struck out of the list.

### FOR THESE REASONS, THE COURT

1. *Takes note* of the terms of the respondent Government's declaration and of the modalities for ensuring compliance with the undertakings referred to therein (Rule 44 § 2 of the Rules of Court);
2. *Decides*, by six votes to one, to strike the application out of the list in accordance with Article 37 § 1 (c) of the Convention.

Done in English, and notified in writing on 9 April 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ  
Registrar

J.-P. COSTA  
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 judgment:

- (a) Concurring opinion of Mr Costa;
- (b) Dissenting opinion of Mr Loucaides.

J.-P.C.  
S.D.

## CONCURRING OPINION OF JUDGE COSTA

(Translation)

In this case the Court applied Article 37 § 1 (c) of the Convention, which enables it to consider that “for any other reason established by the Court, it is no longer justified to continue the examination of the application.”

It accordingly struck the application out of its list of cases, but not because the applicant did not intend to pursue his application (Article 37 § 1 (a)) or because the matter had been resolved (Article 37 § 1 (b)) or, lastly, because a friendly settlement had been reached (Article 39).

The majority based their decision on the following reasoning: the terms of the Turkish Government’s unilateral declaration, which the Court carefully examined, enabled it to reach that conclusion on the basis of the nature of the admissions contained in the declaration and the scope and extent of the various undertakings referred to therein, together with the amount of compensation proposed. Moreover, since the declaration specified the nature and extent of the obligations incumbent on the respondent Government in the event of violations such as those which have been alleged, the Court was satisfied that respect for the human rights guaranteed by the Convention and its Protocols does not require it to continue the examination of the applications under Article 37 § 1 *in fine*.

I come close to sharing the views expressed by my colleague, Judge Loucaides, in his dissenting opinion. In my view, striking out applications “for any other reason” is similar to what is sometimes called, in French administrative proceedings, discontinuation for the sake of expediency or convenience (*non-lieu expédient ou de commodité*). It must not therefore be abused. The Court usually has recourse to it in narrowly defined cases, such as where the applicant dies and the proceedings are not continued by his heirs (see *Gladkowski v. Poland*, judgment of 14 March 2000) or where proceedings are taken over by a legal entity which does not, in that particular case, have a legitimate interest allowing it to pursue the proceedings (see *S.G. v. France*, judgment of 18 September 2001). However, in the circumstances of the present case, and without calling into question the good faith and sincerity of the respondent State, I am very concerned by the unilateral nature of its undertakings. I also have some difficulty in fully reconciling the precedent thus established with that relating to loss of victim status which presupposes that the State acknowledges the violations and then fully compensates them (see, for example, the *Lüdi v. Switzerland* judgment of 15 June 1992, Series A no. 238).

I have, however, voted with my colleagues in the majority in order to avoid breaking ranks. These two cases are identical to those arising out of the *Akman v. Turkey* and *Aydın v. Turkey* applications, which were dealt with in an identical fashion. The judgments, voted unanimously, are dated 26 June and 10 July 2001. I wished to express a number of reservations, however, which are of a general rather than a specific nature.

## DISSENTING OPINION OF JUDGE LOUCAIDES

I disagree with the decision of the majority to strike the application out of the list in accordance with Article 37 § 1 (c) of the Convention.

The decision of the majority was based on the declaration by the respondent Government, the terms of which are set out verbatim in paragraphs 57 and 58 of the judgment. Through that declaration, the respondent Government offer to pay “*ex gratia* to the applicant Mr <T.A.> the amount of 70,000 pounds sterling [...] [in respect of] the application registered under no. 26307/95.” According to the same declaration this amount will be payable within three months from the date of delivery of the judgment by the Court and will constitute the final resolution of the case. The Government declare that “it is accepted that unrecorded deprivations of liberty and insufficient investigations into allegations of disappearance, such as in the present case, constitute violations of Articles 2, 5 and 13 of the Convention”. However, the Government do not accept any responsibility for the violation complained of and do not undertake to carry out any investigation in respect of the disappearance of the applicant’s brother, which was the subject-matter of the application. Instead, the Government undertake in the declaration generally “to issue appropriate instructions and adopt all necessary measures with a view to ensuring that all deprivations of liberty are fully and accurately recorded by the authorities and that effective investigations into alleged disappearances are carried out in accordance with their obligations under the Convention”. However such an “undertaking” does not add anything to the already existing obligation of the respondent Government under the Convention. The Government conclude with the following perplexing sentence:

“The Government consider that the supervision by the Committee of Ministers of the execution of Court judgments concerning Turkey in this and similar cases is an appropriate mechanism for ensuring that improvements will be made in this context.”

This sentence is perplexing, in my opinion, because it seems to imply that the Government consider the Committee of Ministers as a more appropriate mechanism for ensuring improvements in cases like the one in respect of which the declaration is made (“in this and similar cases”) than an examination of “this and similar” cases by the Court. The sentence signifies a preference for a political organ rather than a judicial one. In this respect it may be useful to point out that this political organ has until now been showing a noticeable leniency towards breaches of the Convention by the respondent Government. It is sufficient to mention only the fact that a

substantial number of judgments of the Court against the respondent Government, of which the Committee of Ministers are obliged under the Convention to supervise execution, remain unexecuted in circumstances that imply at least a certain tolerance and an ineffective monitoring on the part of the Committee of Ministers. It is this organ that the respondent Government consider “appropriate” for ensuring improvements in respect of the investigations into alleged disappearances of persons “such as in the present case”.

In the circumstances, the applicant’s request to the Court, as set out in paragraph 59 of the judgment, to reject the Government’s proposals is understandable. We are therefore dealing with a request for striking the case out of the list on the basis of a unilateral declaration of the Government which has been rejected by the applicant for reasons that I personally find reasonable.

The Court examined the matter under Article 37 § 1 (c) and decided to strike the case out of its list on the ground that “it is no longer justified to continue the examination of the application”, having found at the same time that respect for human rights does not require the examination of the application. I find it useful to repeat here the main part of the reasoning of the Court (paragraphs 64 and 65 above):

“The Court has examined carefully the terms of the respondent Government’s declaration. Having regard to the nature of the admissions contained in the declaration as well as the scope and extent of the various undertakings referred to therein, together with the amount of compensation proposed, the Court considers that it is no longer justified to continue the examination of the application (Article 37 § 1 (c)).

Moreover, the Court is satisfied that respect for human rights as defined in the Convention and the protocols thereto does not require it to continue the examination of the application (Article 37 § 1 *in fine* ). The Court notes in this regard that it has specified the nature and extent of the obligations which arise under the Convention for the respondent Government in cases of alleged disappearances...”.

The Court was influenced by

- (a) the nature of the admissions contained in the declaration;
- (b) the scope and extent of the various undertakings referred to in the declaration; and
- (c) the amount of compensation proposed.

As regards (a) it has already been pointed out that the Government do not admit any responsibility.

As regards (b) it has already been pointed out that the Government give no undertaking to investigate the alleged disappearance in this case.

As regards (c) this concerns an offer of compensation which is not accepted by the other side, it was not determined by the Court and, more importantly, it cannot rectify a violation in a situation where the State has not taken reasonable measures to give an effective remedy in respect of the

relevant complaint through an appropriate investigation (cf. *Donnelly and six others v. the United Kingdom*, DR 4, at p. 78).

It is submitted that, in the circumstances of the case, the Court's conclusion is not convincingly reasoned. On the contrary, I fear that the solution adopted may encourage a practice by States - especially those facing serious or numerous applications - of "buying off" complaints for violations of human rights through the payment of *ex gratia* compensation, without admitting any responsibility and without any adverse publicity, such payments being simply accompanied by a general undertaking to adopt measures for preventing situations like those complained of, from arising in the future on the basis of unilateral declarations which are approved by the Court even though they are unacceptable to the complainants. This practice will inevitably undermine the effectiveness of the judicial system of condemning publicly violations of human rights through legally binding judgments and, as a consequence, it will reduce substantially the required pressure on those Governments that are violating human rights.

It is true that a solution similar to the one applied in the present case was adopted for the first time on 26 June 2001 in the case of *Akman v. Turkey* and was followed on 10 July 2001 in the case of *Aydın v. Turkey*. However, I believe that those cases do not constitute an insurmountable obstacle in the form of a well-established precedent of case-law that would prevent a different solution. I base this opinion on the following:

(a) Those cases do not establish any principle of law; they do not even decide the merits of the case; they only concern procedural decisions.

(b) Those cases can be distinguished from the present one. The case of *Akman* concerned an alleged instantaneous violation, i.e. murder, while the present case concerns an alleged continuing violation, i.e. disappearance of a person. The *Aydın* case concerned a disappearance of a person in respect of which an investigation was still being pursued at the time of the decision of the Court to strike the case out of the list.

(c) Departure from both decisions is justified for cogent reasons<sup>1</sup>, namely to ensure more effective implementation of the obligations of the High Contracting Parties to the Convention through ceasing to strike cases out as a result of approving the method of compensation proposed by the respondent States on the basis of unilateral declarations unacceptable to the latter, like the one in the present case.

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<sup>1</sup> In this respect see the article of Mr Luzius Wildhaber, now President of the European Court of Human Rights, "Precedent in the European Court of Human Rights" in the studies in memory of Rolv Ryssdal "Protecting Human Rights: the European Perspective", pp. 1529-1545 at pp. 1530-1531 (2000).