CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

CASE OF İPEK v. TURKEY

(Application no. 25760/94)

JUDGMENT

STRASBOURG

17 February 2004

FINAL

17/05/2004

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

In the case of İpek v. Turkey,

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

Mr J.-P. COSTA, *President*,
Mr L. LOUCAIDES,
Mr R. TÜRMEN,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mrs W. THOMASSEN,
Mr M. UGREKHELIDZE, *judges*,
and Mr T.L. EARLY, *Deputy Section Registrar*,

Having deliberated in private on 14 May 2002 and on 27 January 2004,

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

PROCEDURE

1. The case originated in an application (no. 25760/94) 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, Mr Abdurrezak İpek ("the applicant"), on 18 November 1994.

2. The applicant, who had been granted legal aid, was initially represented before the Court by Professor Kevin Boyle and Professor Françoise Hampson, lawyers in the United Kingdom. On 13 March 2000 they stood down in favour of Mr William Bowring, also a lawyer practising in the United Kingdom. On the same date the applicant appointed as his representatives Mr Philip Leach, a lawyer with the Kurdish Human Rights Project ("KHRP"), a non-governmental organisation based in London, and Mr Osman Baydemir, a lawyer practising in Turkey. By letter of 11 June 2002 the applicant informed the Court that he had appointed Mr Mark Muller, Mr Tim Otty, Ms Jane Gordon and Mr Philip Leach, lawyers practising in the United Kingdom, as well as Mr Osman Baydemir, Mr Cihan Aydın and Ms Reyhan Yalçındağ, lawyers practising in Turkey. On 16 August 2002 Mr Philip Leach stood down. He was replaced by Ms Anke Stock of the KHRP.

3. The Turkish Government ("the Government") did not designate an Agent for the purposes of the proceedings before the Court.

4. The applicant complained of the disappearance of his two sons, İkram and Servet İpek, who were allegedly last seen by three other persons who were taken into detention with them, as well as the alleged destruction of his

family home and property by security forces in the course of an operation conducted in his hamlet of Dahlezeri, outside the village of Türeli, near Lice, on 18 May 1994. The applicant relied on Articles 2, 3, 5, 13, 14 and 18 of the Convention and Article 1 of Protocol No. 1.

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

6. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Second Section (Rule 52 § 1).

7. By a decision of 14 May 2002, the Court declared the application admissible.

8. The Court, having regard to the factual dispute between the parties over the circumstances surrounding the disappearance of the applicant's two sons and the destruction of his property, conducted an investigation pursuant to Article 38 § 1 (a) of the Convention. The Court appointed three Delegates to take evidence from witnesses at hearings conducted in Ankara between 18 and 20 November 2002.

9. 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 § 3 *in fine*). The parties replied in writing to each other's observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The applicant was born in 1942 and is at present living in Diyarbakır, Turkey. At the time of the events giving rise to his application, the applicant was living in the Çaylarbaşı (*Dahlezeri* in Kurdish) hamlet attached to Türeli village in the Lice district of the province of Diyarbakır. The application concerns the alleged unacknowledged detention and subsequent disappearance of the applicant's two sons, Servet and İkram İpek, in the course of an operation conducted by security forces in his village on 18 May 1994. It further pertains to the alleged destruction of his family home and property by the security forces during the same operation.

A. The facts

11. The facts surrounding the disappearance of the applicant's two sons and the alleged destruction of his family home and property are disputed between the parties.

12. The facts as presented by the applicant are set out in Section 1 below. The facts presented by the Government are contained in Section 2.

13. A summary of the documents submitted by the parties is to be found in Part B. The witness evidence taken by the Court's Delegates at hearings conducted in Ankara is summarised in Part C.

1. Facts as presented by the applicant

14. On 17 May 1994 the applicant and his son İkram İpek were tending their sheep away from the village of Türeli when soldiers approached them and asked them for identification. After being shown identification, the soldiers went on their way. The applicant's other son, Servet İpek, had good relations with soldiers from Lice and had even made tea for them on occasions.

15. On 18 May 1994 at about 10 a.m. the applicant, together with his son İkram İpek, was bringing his sheep back to their hamlet near Türeli village, when a group of about 100 soldiers in uniform raided the village. The soldiers left their vehicles outside the hamlet and entered it on foot. They were armed with G-3 rifles and other weapons. A military helicopter circled above the hamlet. The applicant has since learned that the soldiers were not from Lice, but from around Bolu. The Lice soldiers had told the applicant previously to be wary of the soldiers from Bolu.

16. The soldiers told the applicant and İkram İpek to gather with the other villagers, that is, men, women and boys –the young girls were told to remain in the hamlet – by the local school, which is located outside the hamlet. The houses in the hamlet cannot be seen from the school. One group of soldiers remained by the school; the other group went into the hamlet.

17. The applicant saw flames rising from the village and his hamlet, and the women and children began to weep. The soldiers who were with them threatened them, saying: “If you start crying, we will burn you just like your houses”. All the villagers then fell quiet.

18. Both the applicant's and his brother's houses were completely destroyed by fire. After most of the houses had been destroyed, the soldiers released the villagers. But they did not release the applicant's sons İkram İpek and Servet İpek, or Seyithan, Abdülkerim, Nuri and Sait Yolur. These men went with the soldiers in order to carry the latter's equipment to their vehicles.

19. When the applicant returned to the hamlet, he saw that the houses were in flames. The young girls told him and the other villagers that the

soldiers had thrown some white powder into the houses and had set them alight. The fires were so far advanced that there was nothing the applicant could do.

20. Since a few of the houses had not caught fire, the applicant and the other villagers thought they could shelter in them.

21. At about 3.30 p.m., the same soldiers raided the hamlet again. They asked why some of the houses had not been burned. When the applicant and the other villagers replied: “we did not put them out, you could not have lit them properly”, the soldiers said: “we shall burn them now”, and they burned the remaining houses. The applicant has since learned that the villages of Türeli and Makmu Kirami were also burned down that day.

22. The applicant's wife Fatma then asked the soldiers, in Kurdish, about what had happened to her sons İkram İpek and Servet İpek. The soldiers could not understand Kurdish, and asked what she had said. When the applicant explained that she was asking about her sons, the soldiers replied that they were in Lice and that they would be released soon.

23. After this second burning, the soldiers waited in the village, and only left in the direction of Lice in the evening.

24. Since his own house had been burned, the applicant with his wife Fatma, his son Hakim, and Sevgol, the wife of his son İkram İpek, moved to a house which had been evacuated two years previously in the hamlet of Kalenderesi, also attached to Türeli village. All they had left were the clothes they were wearing. Neighbours gave them a few more clothes. They remained there, in abject poverty, for some four months. The applicant has since moved to Diyarbakır. The Government have provided no aid or assistance to the applicant or his family ever since the time when his house was burned.

25. Abdülkerim, Nuri and Sait Yolur, who had been taken into custody together with İkram and Servet İpek, were released the next day. They themselves did not speak to the applicant afterwards but informed him through a third person that they had been held together until 10 p.m. the first night with their eyes bound. At 10 p.m. they were separated from İkram and Servet İpek and they never saw the two brothers again. Seyithan Yolur remained with İkram and Servet İpek. All three have been missing ever since.

26. About 15 days after İkram and Servet İpek were taken into custody, and having heard nothing about their whereabouts, the applicant travelled to Diyarbakır. With the help of a relative, he applied to the office of the Diyarbakır State Security Court (*Diyarbakır Devlet Güvenlik Mahkemesi*, hereafter DGM) chief public prosecutor. He also applied to the Lice public prosecutor's office and the Lice gendarmerie command. The applicant was unable to obtain any information about his sons from any of these State authorities.

27. In the meantime, in a letter dated 15 September 1994, Mr İbrahim Erge, a senior colonel at the Chief of Staff in Ankara, informed Mr Şakir Yolur that the security forces had not conducted any operation on 18 May 1994 in the Çağlarbaşı hamlet of Türeli village attached to the Lice district and that his son Seyithan Yolur had not been apprehended.

28. On 27 October 1994 the applicant filed another petition with the DGM chief prosecutor in Diyarbakır, asking him to investigate what had happened to his sons. The applicant was not permitted to meet the prosecutor, but a plain-clothes policeman who was there looked at the records and told the applicant verbally that the individuals in question were not there.

29. The applicant's other son, Hakim İpek, sent two or three petitions to the Governor of the State of Emergency. He received two replies consisting of denials that his brothers had ever been detained. He was so angry that he tore the letters up and disposed of the pieces.

30. On 23 December 1999 the applicant went to the Kulp Gendarmerie Commander's Office at the request of the latter. He was asked where his sons were. The applicant stated that they had been taken away by the State. The gendarmes accused him of lying, insisted that his sons had in fact been taken by the PKK, yelled at him, and asked him why he was complaining about the Turkish State. Under duress the applicant was obliged to apply his thumbprint to documents prepared by the gendarmes, the contents of which were not made known to him.

2. Facts as presented by the Government

31. No security operation was conducted in Türeli village or in Dahlezeri hamlet on 18 May 1994. Neither the applicant's sons nor any other persons had been taken into custody.

32. The applicant did file a petition with the DGM chief public prosecutor in Diyarbakır on 27 October 1994, stating that his sons Servet and İkram İpek had been taken into custody and requesting the prosecutor to investigate his sons' fate. The chief public prosecutor asked the security forces whether the applicant's sons had been taken into custody for an offence falling within the jurisdiction of DGMs. The security forces informed the prosecutor that this was not the case and the applicant was informed of this outcome.

33. The applicant made no applications about the alleged disappearance of his sons to the offices of the Lice public prosecutor or to the Lice District Gendarmerie Commander. However, following the communication of the application to the Government, an *ex officio* investigation into the allegations was conducted by the Lice public prosecutor. However, it was not possible to locate the applicant at the address given by the applicant in his application form as submitted to the Commission. Moreover, the applicant was not known by the people living in the neighbourhood. His

name was not registered in the registry of the head (*muhtar*) of the neighbourhood.

34. The Government further stated that no evidence has been found during the investigation to prove that the alleged offences had been committed by the security forces and that the Lice District Administrative Council *(Lice İlçe İdare Kurulu)* had rendered a decision not to prosecute members of the security forces. It had not been possible to communicate this decision to the applicant as his address was not known to the authorities and the Lice Governor had therefore ordered the publication of the outcome of the investigation in a newspaper.

35. The Government finally stated that the applicant had been invited to the Kulp Gendarmerie Commander's Office in order to make a statement as part of the administrative investigation in which the Kulp Gendarmerie Commander had been appointed as investigator.

36. On 26 December 1999 the Gendarmerie Commander questioned the applicant in relation to his allegations and the applications he had filed with various authorities, including a certain "European Human Rights Diyarbakır branch". The applicant repeated his allegations that his two sons, İkram and Servet, along with the Yolur brothers had been taken away and that all the houses in his hamlet had been burned down by soldiers. The applicant further deposed that he had not applied to the "European Human Rights Diyarbakır branch". Nor had he given any statement to the latter body or signed any document in respect of his allegations.

B. Documents submitted by the parties

37. The following information appears from documents pertaining to the investigation carried out following the communication of the application to the respondent Government on 7 March 1995.

1. The investigations instigated by the Diyarbakır and Lice prosecutors

38. On 3 March 1995 Mr Sefa Özmen, a deputy to the Diyarbakır Governor, informed Mr Hakim İpek, in response to the allegations contained in his petition of 23 January 1995, that the security forces had not conducted any operation in the region on the dates mentioned in his petition, that his brothers were not on the list of persons wanted by the security forces and that the whereabouts of his brothers were not known to the authorities.

39. On 25 April 1995 the Diyarbakır chief public prosecutor instructed the Diyarbakır police headquarters to summon the applicant to his office so that a statement could be taken from him. The address of the applicant recorded in this letter is the same as the one given in the application form with the exception of the name of the block of flats. According to the

application form, the name of the block of flats was 'Varol', but in the prosecutor's letter the name was recorded as 'Baro'.

40. On 2 May 1995 the Diyarbakır police informed the public prosecutor that there were no blocks of flats called Baro in the street indicated by him. This letter went on to say that the applicant was not known by the people living in the neighbourhood and that his name was not registered in the registry of the head (*muhtar*) of the neighbourhood.

41. On 18 May 1995 the commander of the Tepe gendarmerie station, in whose jurisdiction Türeli village was located, recorded in a report that Abdülrezzak İpek and his family had left the village and had gone to the town of Dörtyol near Hatay to work.

42. On 24 May 1995 the Diyarbakır chief public prosecutor sent a copy of the letter he had received from the International Law and Foreign Relations Directorate of the Ministry of Justice on 20 April 1995 to the Lice chief public prosecutor and asked him to investigate the applicant's allegations that his house had been burned down and that his sons had been taken away by the security forces.

43. On 7 June 1995 the Lice chief public prosecutor sent a letter to the gendarmerie commander of Lice and instructed the latter to confirm whether or not an operation had been conducted in Turalı village on 18 May 1995 and whether Servet and İkram İpek had been detained. He also asked the commander to find out the applicant's address and to summon the applicant to his, i.e. the prosecutor's, office.

44. On 13 June 1995 the Lice prosecutor sent another letter to the Lice gendarmerie commander's office and informed the latter that the name of the village was incorrectly recorded as 'Turalı' which was within the jurisdiction of the town of Hani. The prosecutor repeated his requests in his letter of 7 June 1995 and asked the gendarmerie commander to look for the applicant in the village of 'Türeli'.

45. On 20 June 1995 the Lice gendarmerie commander replied to the prosecutor's requests. The commander stated that the said persons had never been detained by his soldiers and that no operation had been conducted in the vicinity of Türeli village at that time. The commander finally stated that the applicant had moved to the town of Dörtyol in the province of Hatay to work.

46. On 21 June 1995 the Lice prosecutor took a decision of non-jurisdiction and sent the file to the office of the Lice district governor. This action was taken pursuant to the Law on the Prosecution of Civil Servants *Memurin Muhakematı Kanunu)* according to which authorisation must be sought in order to investigate the actions of members of the security forces.

47. On 2 February 1996 the gendarmerie commander of Diyarbakır, in an apparent response to a request from the Lice governor's office, appointed Turgut Alpı, a gendarmerie lieutenant-colonel, to investigate the applicant's allegations.

2. The investigation carried out by Lieutenant-Colonel Alpı

48. On 28 February 1996 the newly appointed Lieutenant- Colonel Alpı instructed the Lice gendarmerie commander to forward copies of the names and addresses of the military personnel who had been working in the area at the time of the incident. He further requested copies of all operation reports, operation logbooks, custody ledgers and any other relevant documents.

49. Also on 28 February 1996 Lieutenant-Colonel Alpı instructed the Diyarbakır police headquarters to take a statement from one Abdurrezzak İpek in respect of allegations of village destruction and disappearances. According to this letter, Abdurrezzak İpek was born in 1959 and living in Diyarbakır.

50. The Diyarbakır police headquarters forwarded a copy of the statement taken from Abdulrezak İpek on 8 March 1996 and a copy of his identity card to Lieutenant-Colonel Alpı.

51. Abdulrezak İpek stated in his statement that he did not even know where Türeli village was and that his children had not been taken away by soldiers. In fact, he did not have any children with those names. According to the copy of his identity card, this Abdulrezak İpek was born on 1 January 1959.

52. On 12 March 1996 the Lice gendarmerie commander replied to Lieutenant-Colonel Alpı's requests and enclosed copies of two pages of custody ledgers and copies of two pages of operation logbooks in which the day-to-day activities of the Lice gendarmerie were recorded. The Lice commander further stated in his letter that his soldiers had not conducted an operation in Türeli village on 18 May 1994 and that Servet and İkram İpek had not been detained. The letter further states that Major Şahap Yaralı had been Lice gendarmerie commander on 18 May 1994 but he had since been posted to another town in central Anatolia. Sergeant-Major Şükrü Günlükçü had been commander of the Tepe gendarmerie station in whose jurisdiction Türeli village was located. He had since been posted to a town in the west of the country.

53. Copies of the custody ledgers, which were enclosed with this letter, have been submitted to the Court. They do not contain the names of İkram or Servet İpek. A copy of the daily activities logbook kept at the Lice gendarmerie station does not mention any operation planned, or conducted, at the relevant time.

54. On 25 March 1996 Lieutenant-Colonel Alpı concluded his investigation report. He came to the conclusion that no operation had been conducted by security forces in Türeli village on 18 May 1994 and that the security forces had not even gone to that village on that day. Lieutenant-Colonel Alpı further considered that the statement taken from Abdurrezzak İpek in which the latter stated that he was not from Türeli

village and that his house had never been burned down or that his children had not been taken away, also proved that no operation had taken place. He recommended that authorisation to prosecute members of the security forces should not be granted as there was no evidence to prove that the alleged events had taken place. This report was forwarded to the Lice governor's office on 1 April 1996.

3. Proceedings before the Lice District Administrative Council and the Diyarbakır Regional Administrative Court

55. On 16 May 1996 the Lice District Administrative Council, under the presidency of the Lice Governor, decided on the basis of the information submitted by Lieutenant-Colonel Alpı not to grant authorisation for the prosecution of members of the security forces. This decision was appealed against *ex officio* pursuant to domestic law.

56. On 18 October 1996 the Diyarbakır Regional Administrative Court (*Diyarbakır Bölge İdare Mahkemesi*), sitting as an appeal court, rejected the appeal and upheld the decision not to grant authorisation for the prosecution of members of the security forces. It had not been possible to communicate this decision to Abdurrezzak İpek since his address was unknown to the authorities. Thus, the Lice Governor ordered the publication of this decision in a newspaper.

57. Finally, the applicant has submitted a letter dated 21 January 2000 and signed by Şakir Yolur, the father of Seyithan Yolur and the uncle of Sait and Nuri Yolur who were allegedly taken from the village by soldiers and detained together with the applicant's sons.

58. Mr Yolur, who also lived in the same village as the applicant, confirmed the applicant's version of events and added that Sait and Nuri had been released but that his son Seyithan had not been released. He has not heard from his son Seyithan since the incident.

59. Mr Yolur made inquiries at various military establishments in the region and sent a telegram to the Chief of Staff of the Turkish Armed Forces in Ankara (*Genel Kurmay Başkanlığı*) complaining about the disappearances in the course of the impugned events.

60. The Chief of Staff stated in his reply that no operation had taken place and that the persons referred to had not been detained.

C. Oral evidence

61. The facts of the case being in dispute between the parties, the Court conducted an investigation with the assistance of the parties. In this respect, three delegates of the Court took oral evidence between 18 and 20 November 2002 from eight witnesses. A further three witnesses had been summoned but did not appear for various reasons. The evidence given by the witnesses may be summarised as follows.

1. The applicant

62. The witness told the delegates that he had lived in the hamlet of Dahlezeri outside Türeli village between 1969 and May 1994 when the "Government destroyed the hamlet." About twenty families lived in the hamlet. The inhabitants were all in some way related. The applicant kept livestock and grew crops for his living.

63. The applicant stated that two military raids had taken place on the hamlet on 18 May 1994. The first raid began around noon, at the time of the midday prayer. The soldiers gathered all the inhabitants (about a hundred) in front of the school, including the children. The village *muhtar*, with whom he enjoyed a good relationship, was not present. The men were separated from the women and children. When questioned by the Delegates, the applicant stated that the soldiers had collected the inhabitants' identity documents. No names were called out. Six persons, including his sons, İkram and Servet, were led away by the soldiers. These persons were chosen at random ("You, you and you.") and were made to carry the soldiers' rucksacks. The soldiers returned the identity documents to the other inhabitants and then released them. During this time, the applicant could see that the hamlet had been set on fire. When he returned to the hamlet, he found that the houses, including his own house, belongings and livestock, had been burned.

64. The inhabitants started to salvage their property and belongings. However, at 6 p.m., the soldiers returned and ordered everyone to evacuate the village. According to the applicant, an order was given to shoot the inhabitants if they tried to put out the flames. They were made to walk for a long time. During this time he could hear messages coming through on the soldiers' walkie-talkies to halt the operation. They were threatened that they would be killed if they tried again to put the fires out. On being questioned at the hearing, the applicant affirmed that he could understand Turkish. The applicant later mentioned in his evidence that other villages had been burned that day, including Türeli.

65. The applicant confirmed his belief during questioning that the raids were conducted by soldiers. He related that they were dressed as such, carried G-3 or G-1 rifles and used military vehicles and helicopters during the raids. The applicant stated that he had never seen any members of the PKK in the hamlet. While there may have been clashes between the PKK and the security forces away from the area, there had never been any clashes in his neighbourhood. He maintained that there had been no PKK members in the hamlet. When questioned, the applicant stated that PKK members may have come to the hamlet and may have been given food since the inhabitants were afraid of them. According to the applicant, there were no village guards in the hamlet, although the authorities had proposed that inhabitants set up a village-guard system.

66. The applicant further testified that the soldiers who carried out the raids were from Bolu. They were accompanied by soldiers from Lice. Soldiers from Lice had come to the area in the past to carry out checks. The applicant also affirmed that his sons İkram and Servet had never been arrested by the security forces before the operation on 18 May 1994, and he could offer no explanation as to why they had been taken away. His son, İkram, had returned home from Ankara two days before the military operation to enjoy a rest. His other son, Servet, worked as a shepherd.

67. As to his own enquiries concerning the whereabouts of his sons, the applicant stated that he had applied to the authorities in Kulp, Lice, Istanbul and Ankara, as well as to the Human Rights Association in Diyarbakır. He deposed that, following the events of 18 May 1994, he had obtained from a soldier the name of the commander in charge of the operation, a Major Osman Duman. He had never disclosed that information to anyone before.

2. Sevgol İpek

68. The witness had been married to İkram İpek for six months at the relevant time. She stated that her husband had just returned to the hamlet from Ankara where he had spent three months. On the morning of 18 May 1994 her brother-in-law, Servet İpek, informed the family that the hamlet was full of soldiers. Everyone was forcibly made to assemble at the school outside the hamlet. In the meantime, the houses were set alight. The witness stated that the raid occurred at 11 a.m. and that the burning took place at noon.

69. When the inhabitants were outside the school, the soldiers took their identity cards. Six people, including her husband İkram and her brother-in-law Servet, were picked out, apparently on account of their youth, and told to carry the soldiers' gear to the military vehicles.

70. The remaining inhabitants were allowed to return to their houses at 1 p.m. However, with the exception of a few houses, everything had been burned down, including their family home and belongings. The soldiers returned to the hamlet again at around 6 p.m. with orders to kill the inhabitants. Houses which had only partly been burned or where the flames had been extinguished were again set on fire. The inhabitants were all led away from the hamlet. The witness stated that she could make out from the radio communications between the soldiers that the order to kill them had been revoked. They were released at 7 p.m. but ordered not to stay in the hamlet. The witness went to live with her parents in Diyarbakır.

71. The witness had no doubts that the operation was carried out by Turkish soldiers. She was unable to assess how many soldiers were involved. She testified that there were no members of the PKK living in the hamlet and that she had no recollection of PKK members ever having come to the hamlet for assistance. When questioned by the Delegates, the witness affirmed that neither her husband nor her brother-in-law had ever been in

trouble with the authorities. The witness stated that she was never requested by the authorities to give a statement about the above events.

3. Hakim İpek

72. The witness is the applicant's son and the brother of İkram and Servet İpek. He stated that the events under investigation had taken place on 18 May 1994 when soldiers arrived in the village. He estimated that five thousand soldiers were involved in what he referred to as the "general operation." The soldiers approached the hamlet on foot from Pilgrimage Hill where they had left their military vehicles. They rounded up the inhabitants at the local school where they separated the men from the women. Everyone's identity cards were taken. The soldiers picked out six of the villagers including his brothers İkram and Servet İpek and the three Yolur brothers to carry their rucksacks back to the vehicles. The witness affirmed that he saw these individuals being led away on foot towards the military vehicles and getting into the vehicles. The soldiers handed back the identity cards to the remaining villagers who went back to the hamlet only to find that the houses had been set alight. The witness stated that his family's livestock and belongings had been destroyed. According to the witness, these events took place at noon.

73. Some villagers attempted to extinguish the flames. However, the soldiers returned around 4 or 5 p.m. with orders to kill them. The villagers were rounded up and taken away. However, an order came over the military radio not to fire on the villagers. They were allowed to return but were threatened with death if they tried to put out the fires.

74. When questioned by the Delegates the witness stated that there were no PKK members living in the hamlet or in the neighbouring village, and if any members visited they would be denied assistance since the inhabitants were afraid of reprisals from the authorities. Moreover, there were no guards in the hamlet - although the authorities had proposed the setting up of a village-guard system. The witness had no explanation as to why the hamlet had been destroyed and his brothers taken away. He did however refer to an incident in Türeli village about a half an hour away in which a number of soldiers were killed. The witness informed the Delegates that all the villages in the neighbouring region had been burned.

75. The witness stated that he and his father (the applicant) had made many attempts in writing to find out from the authorities about the fate of his missing brothers. They were consistently informed that İkram and Servet were not in detention. The witness stated that, out of anger, he tore up and threw away the replies which he had received from the regional governor. The witness told the Delegates that his father had been told the name of the commander of the operation by a soldier whom he had met in the Kiran neighbourhood. His father had written down the name.

4. Mehmet Nuri Yolur

76. The witness stated that he had been born in Dahlezeri hamlet. However, at the beginning of 1994 he was living in Diyarbakır. There were twenty households in the hamlet and all the families were in some way related. He knew both İkram and Servet İpek. The witness had returned to the hamlet two days before the start of the military operation. He related to the Delegates that troops from Bolu and other areas had arrived in the vicinity on 17 May 1994 and that there may have been thousands of them involved in the operation. On the following day, all the villagers were made to assemble in a group in front of the local school while the soldiers, who had arrived in the hamlet on foot, burned down the houses. When questioned by the Delegates, the witness stated that five or six soldiers stood guard around the inhabitants outside the school, and he estimated that there may have been sixty to seventy, maybe even a hundred, soldiers involved in the operation in the hamlet.

77. According to the witness, the school where everyone was grouped was ten metres away from the hamlet. He could see the fires burning in the hamlet. The villagers' identity documents were taken by the soldiers and six of them (himself, Abdülkerim Yolur, Sait Yolur, Seyithan Yolur, İkram İpek and Servet İpek) were requested to carry the soldiers' rucksacks up to their vehicles which had been parked on the hilly area around the village. When questioned, the witnessed stated that the military vehicles were not visible from the school. The witness told the Delegates that the soldiers commented that Seyithan Yolur would be taken to Lice and conscripted into the army since he had evaded his military service. The witness estimated that the six of them left with the soldiers around 9 to 10 a.m. On their way to the military vehicles, he could see from a hill that smoke was rising again from the village. By the time they reached their destination, it was late afternoon. However, rather than being released, they were then taken in an open-top military vehicle to Lice along with fifty or sixty soldiers. He could see smoke rising from the villages along the route to Lice. It was dark when they arrived there. They were made to get out of the vehicle and to lie face down. The witness remarked that many other persons arrived around this time. He estimated that about one hundred and fifty persons were lying down in front of the establishment. Their identity cards were collected. The witness stated that he and two others (his brothers Sait and Abdülkerim Yolur) were taken to a custody room where they spent the night. They were never ill-treated during this time. In the morning their identity documents were returned and they were told to leave. The last time that he saw İkram and Servet İpek was when they were lying down after being taken from the military vehicle. The witness stated that when he arrived back in the hamlet, the houses had been burned.

78. The witness had no explanation as to why he and his two brothers were released whereas the İpek brothers and Seyithan Yolur were kept in

custody. When questioned, the witness deposed that the place to which they had all been taken was “a large military place in Lice”.

79. The witness had no doubt that the people who raided the hamlet were soldiers carrying G-3s. He had never heard of any PKK activity in or around the hamlet, and had no explanation as to why the hamlet had been burned; nor had he ever heard of a Major Osman Duman.

5. Abdülkerim Yolur

80. The witness stated that he was from the same hamlet as the İpek family. All the families living there were related. He had returned to the hamlet on 17 May 1994 from Aydın for a visit. Soldiers on foot raided the village between 11 a.m. and noon on 18 May 1994. He was certain that they were soldiers since they were carrying G-3s. A helicopter flew above the area. The soldiers arrived in the hamlet on foot. The inhabitants were all made to assemble at the school on the edge of the hamlet, men on one side, women on the other. The soldiers took everyone's identity documents. He could see the hamlet being burned. Six of them (himself, Mehmet Nuri Yolur, Sait Yolur, Seyithan Yolur, İkram İpek and Servet İpek) were requested to carry the soldiers' bags up to Türeli village. The soldiers kept their identity documents, but returned the identity documents of the persons who remained behind. They set off around noon with the soldiers for Türeli village, which was burning. They reached the outskirts around 2 p.m. Rather than being released as promised, they were made to await the arrival of military vehicles from Lice to take the soldiers back. The witness stated that Türeli village was burning at the time, although they did no go into the village and they did not see any villagers. The six of them got into one of the vehicles and set off towards sunset for Lice. According to the witness there were about one hundred soldiers in the truck. When they arrived in Lice, at the “Regiment”, they were made to lie on the ground and were divided into two groups of three. The witness was unable to confirm whether, apart from the six, there were other persons lying on the ground. One group comprised İkram and Servet İpek and Seyithan Yolur. The witness stated that this was the last occasion on which he saw them. Their names were read out. He and his brothers, Mehmet Nuri and Sait, were taken inside the “Regiment” and spent the night in a cell-like room as the soldiers' guests since by that stage it was dark. They were well-treated. There were two other persons in the room whom they did not know. When questioned, the witness was unable to provide any precise description of the building where he spent the night. He confirmed that the cell door was locked and guarded. The following morning they were handed their identity documents and released. He returned to the hamlet where he remained for one or two nights, sleeping in the open. When questioned, the witness stated that he had no explanation as to why İkram and Servet İpek and Seyithan

Yolur had been detained. He had no knowledge of any PKK activity in the area and had never heard of a Major Durmuş.

81. The witness stated that seventeen or eighteen villages might have been burned on 18 May 1994.

6. Turgut Alpı

82. The witness stated that he had been serving in Diyarbakır when he was appointed on 2 February 1996 to investigate the applicant's complaints. He found no records at the Lice District Gendarmes Headquarters to indicate that İkram and Servet İpek had been taken into custody or that an operation had been conducted on 18 May 1994 by the gendarmes or military units. The commander at Lice was interviewed and he confirmed that neither of these persons had been taken into custody. The investigation was closed on the basis of the absence of documentary evidence that the İpek brothers had been detained. According to the witness there was no need to obtain the operational records of the military, given that the Lice District Gendarmes Commander at the time had responsibility for the whole area. When asked about the possibility that the Bolu brigade may have been in the area at the time of the incident, the witness observed that the Lice District Gendarmes Commander would have been aware of this. The witness reaffirmed that he had established through the Lice District Gendarmes Headquarters that no operation had been conducted in or around 18 May 1994. When questioned, the witness stated that he did not find it necessary to ascertain from the Bolu brigade whether it had records of operations which it had conducted in 1994. He repeated that the district gendarmerie commander would have had any such information since he had overall responsibility for the area. It had been established that he did not have any information.

83. The witness told the Delegates that he did not personally visit Dahlezeri hamlet or Türeli village since he knew that the inhabitants had all left. He knew the area, having served there and knew that the villages had been abandoned at some stage. The witness could not confirm whether Dahlezeri hamlet or Türeli village had actually been destroyed by burning. When questioned on this point, the witness observed that the terms of reference of his investigation also extended to the allegation that the hamlet had been burnt down. The Lice District Gendarmerie Headquarters informed him that this matter had been investigated and it was found that the hamlet had not been destroyed as alleged. The witness conceded that the report which was sent to him by the commander of the Lice District Gendarmes Headquarters only mentioned that no military operation had been carried out. The witness further stated that no villages in the area had been destroyed by military units. On the other hand, he had personally witnessed the burning of villages by the PKK.

84. The witness declared that, with the exception of the first name and family name, he had no personal identification details of the applicant Abdürrezzak İpek at the time of his investigation. Thus, when someone of the same name was located and questioned by the Diyarbakır police, there was no reason to believe that the wrong man had been interviewed. No attempts were made to question other members of the applicant's family or inhabitants of the hamlet since they had no addresses for them. Moreover, there had been intense terrorist activity in the area at that time. The witness deposed that Captain Şahap Yaralı had not been questioned since it could not be established that the İpek brothers had been taken into custody and, in addition, Captain Şahap Yaralı had been posted out of the area by the time he undertook his investigation.

7. Şahap Yaralı

85. The witness confirmed that he had been the Lice District Gendarmerie Commander in 1994 and that his responsibilities included overall command of the Tepe gendarme station. His responsibilities had included Türeli village. He deposed that no military operations had been carried out in the area under his jurisdiction on 18 May 1994. Had any such operation been conducted on that day, either by the gendarmes or by the military or jointly, it would have been recorded in the log book of the district gendarmerie headquarters. The witness affirmed that the armed forces, including the Bolu commando brigade, would have notified his command of any operation which was to be undertaken, including on 18 May 1994. Notification of planned military operations was established practice.

86. The witness stated that no purpose would have been served by visiting the Dahlezeri hamlet or Türeli village in the course of his investigation. The area had been the scene of intense terrorist activity and the villagers had been forced to leave by the PKK. The witness observed that there must exist a minute recording that an officer had questioned former inhabitants of the Dahlezeri hamlet. He stressed that the security forces had never engaged in village burning or forcible evacuation of villagers.

87. When questioned, the witness reiterated that the names of all persons who were taken into custody were entered in the custody register. There was no reference in the register to the detention of the İpek brothers. The witness noted that no entries were made in respect of persons who were in the gendarme station under observation, for example for the purposes of simple investigations.

88. The witness, when asked if he had heard of a Major Osman Durmuş, stated that there had been a Major Osman in the region at the time of his service there. He recollected that Major Osman was in the area in an

advisory capacity to one of the battalions which was responsible for overseeing the local elections.

8. Şükrü Günlükçü

89. The witness was the commander of the Tepe gendarme station between October 1993 and July 1994. He was responsible, *inter alia*, for ensuring the security of Türeli village and its inhabitants. He stated, however, that he had never been to Türeli or Dahlezeri during his term of service at the Tepe gendarme station. He explained that at the relevant time they were unable to get to the remote villages since they did not have a vehicle at their disposal. The witness did observe that the soldiers under his command would have visited Türeli village for the purposes of carrying out investigations. The witness deposed that no military operation had been conducted on 18 May 1994 in the region, either by the soldiers under his command or by the armed forces, including the Bolu commando brigade. If any such operation were to be conducted by forces not under his command, he would have been informed twenty-four hours in advance.

90. According to the witness, there had been intense terrorist activity in the area, which forced many people to leave their villages and to move to safer places, such as Diyarbakır. He tried in vain to convince the villagers not to leave their villages. The villagers told him that they were sick of terrorists coming to their villages and forcibly taking their food provisions or abducting their sons. The witness rejected any suggestion that the authorities could have ordered the villagers to leave their villages or that they could have been responsible for the immigration from the region.

91. When questioned about the allegations that Dahlezeri hamlet had been destroyed and that the applicant's two sons had been taken away by soldiers, the witness averred that he had never received any such information during his term of service. Had he ever been informed of such an incident he would have carried out an investigation into the allegations and would have reported the situation to the district gendarmerie command to which his station was attached. No application was ever filed about missing persons either by Abdurrezak İpek or any other person. The witness further deposed that he had never been questioned by the Turkish authorities in relation to the applicant's allegations before the Court. The witness never heard of a Major Osman Duman serving in the area in question. However, he might have served in another division or at the Lice infantry battalion, which was stationed in an unused school.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Constitution

92. Article 125 of the Constitution provides:

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

93. The above provision is not subject to any restrictions even in a state of emergency or war. The latter requirement of the provision does not necessarily require proof of the existence of any fault on the part of the administration, whose responsibility is of an absolute, objective nature, based on a concept of collective liability and referred to as 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.

94. The principle of administrative liability is reflected in the additional section 1 of Law no. 2935 of 25 October 1983 on the State of Emergency, which provides:

> "... actions for compensation in relation to the exercise of the powers conferred by this Law shall be brought against the administration before the administrative courts."

B. Criminal responsibility

95. The Criminal Code makes it a criminal offence

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

(b) to subject an individual to torture or ill-treatment (Articles 243 and 245);

(c) to commit unintentional homicide (Articles 452 and 459), intentional homicide (Article 448) or murder (Article 450);

(d) to oblige an individual through force or threats to commit or not to commit an act (Article 188);

(e) to issue threats (Article 191);

(d) to carry out an unlawful search of an individual's home (Articles 193 and 194);

(f) to commit arson (Articles 369, 370, 371, 372), or in case human life is endangered aggravated arson (Article 382),

(g) to commit arson unintentionally by carelessness, negligence or inexperience (Article 383); or

(h) to damage another's property intentionally (Articles 526 et seq.).

96. For 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.

97. If the suspected authors of the contested acts are military personnel, they may also be prosecuted for causing extensive damage, endangering human lives or damaging property, if they have not followed orders in conformity with Articles 86 and 87 of the Military Code. Proceedings in these circumstances may be initiated by the persons concerned (non-military) before the competent authority under the Code of Criminal Procedure, or before the suspected persons' hierarchical superior (sections 93 and 95 of Law no. 353 on the Constitution and Procedure of Military Courts).

98. If the alleged author of a crime is an agent of the State, permission to prosecute must be obtained from local administrative councils (the Executive Committee of the Provincial Assembly). An appeal against the local council's decisions lies to the Supreme Administrative Court; a refusal to prosecute is subject to an automatic appeal of this kind.

C. Provisions on compensation

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

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

101. Damage caused by terrorist violence may be compensated out of the Aid and Social Solidarity Fund.

D. State of emergency and impact of Decree no. 285

102. Since approximately 1985, serious disturbances have raged in south-east 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.

103. Two principal decrees relating to the south-eastern provinces of Turkey have been made under the Law on the State of Emergency (Law no. 2935 of 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-east Turkey. Under Article 4 (b) and (d) of the decree, all private and public security forces and the Gendarmes' Public Peace Command are at the disposal of the regional governor.

104. 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.

105. 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 41 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 decline jurisdiction and transfer the file to the Administrative Council. These councils are composed 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.

106. 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."

THE LAW

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

A. Arguments of the parties

1. The applicant

107. The applicant argued that the written and oral evidence before the Court proved that Dahlezeri hamlet had been burned down, that his two sons had been taken away by the security forces, that they had died in detention and that the authorities had failed to carry out an adequate investigation into these matters. He requested the Court to find that the Government had violated Articles 2, 3, 5, 13, 14, 18 of the Convention and Article 1 of Protocol No. 1.

2. The Government

108. The Government refuted the applicant's arguments and averred that the evidence given in the fact-finding hearing in Ankara had shown that the applicant's allegations were ill-founded and that there had been no violation of any Article of the Convention.

B. General principles

109. The Court recalls its recent jurisprudence confirming the standard of proof "beyond reasonable doubt" in its assessment of evidence (*Orhan v. Turkey*, no. 25656/94, § 264, ECHR 2002; *Tepe v. Turkey*, no. 27244/95, § 125, 9 May 2003; and *Yöyler v. Turkey*, no. 26973/95, § 52, 24 July 2003). Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. In this context, the conduct of the parties when evidence is being obtained has to be taken into account *(Ireland v. the United Kingdom,* judgment of 18 January 1978, Series A no. 25, p. 65, § 161).

110. The Court is sensitive to the subsidiary nature of its role and recognises that it must be cautious in taking on the role of a first instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case. Nonetheless, where allegations are made in respect of

the disappearance of individuals following their detention and destruction of property by agents of the State, the Court must apply a particularly thorough scrutiny (see, *mutatis mutandis*, *Orhan v. Turkey*, cited above, § 265), even if certain domestic proceedings and investigations have already taken place.

C. The Court's considerations under Article 38 § 1 (a)

111. Article 38 § 1 (a) of the Convention provides:

> "1. If the Court declares the application admissible, it shall
>
> (a) pursue the examination of the case, together with the representatives of the parties, and if need be, undertake an investigation, for the effective conduct of which the States concerned shall furnish all necessary facilities..."

112. The Court reiterates that it is of utmost importance for the effective operation of the system of individual petition instituted under former Article 25 of the Convention (now replaced by Article 34) that States should furnish all necessary facilities to make possible a proper and effective examination of applications (see the *Orhan* judgment, cited above, § 266, and *Tanrıkulu v. Turkey* [GC], no. 23763/94, § 70, ECHR 1999-IV). It is inherent in proceedings relating to cases of this nature, where an individual applicant accuses State agents of violating his rights under the Convention, that in certain instances solely the respondent Government have access to information capable of corroborating or refuting these allegations. A failure on a Government's part to submit such information which is in their hands without a satisfactory explanation may not only give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations, but may also reflect negatively on the level of compliance by a respondent State with its obligations under Article 38 § 1 (a) of the Convention (see *Timurtaş v. Turkey*, no. 23531/94, §§ 66 and 70, ECHR 2000-VI). The same applies to failure of the State to ensure the attendance of witnesses at a fact-finding hearing, which prejudices the establishment of the facts in a case.

113. In the light of the above principles, the Court has examined the Government's conduct in assisting the Court in its task of establishing the facts of this case.

114. In this connection, the Court notes that the applicant's case turns essentially on whether a military operation was conducted in or around 18 May 1994 in the hamlet of Dahlezeri, having regard to the fact that the fate of his complaints in respect of his missing sons and the destruction of his property depends on the establishment of that premise. The Government vigorously deny that their soldiers and gendarmes were active in the vicinity of the hamlet at the relevant time. The reasonableness of that assertion must be tested in the light of the statements which the applicant and his witnesses made to the Court's Delegates. The oral evidence, and in particular the credibility of the deponents, must therefore be the subject of a most careful

scrutiny. It is to be noted in this connection that there is no photographic or other forensic evidence to attest to the destruction of the applicant's property, no independent eye-witness account of the presence of soldiers in the hamlet on the day in question, no recent reported sightings of the applicant's sons in detention, and the documentary evidence which has been laid before the Court by both sides is no more than a reflection of their respective affirmations.

115. The Court, like its Delegates, must also have close regard to the fact that only a limited number of witnesses gave testimony. Furthermore, on the applicant's side, all of the witnesses were either related in some way to the applicant or were part of the same close-knit and very small community. It is to be further observed that the applicant and his witnesses were simple, unsophisticated persons who were testifying in regard to matters of great personal concern and pain, with attendant risks that their interpretation of events might be coloured by emotion.

116. Moreover, the passage of time takes a toll on a witness' capacity to recall events in detail and with accuracy. In the instant case, the witnesses testifying before the Delegates were asked to recollect incidents which occurred many years previously.

117. The Court cannot overlook either that the area in which the applicant and his witnesses lived at the time was part of a wider region which was the scene of fierce fighting between the PKK and the security forces. It cannot be excluded that many inhabitants of that region, including in the applicant's own locality, might have sympathised with the PKK cause and seized on opportunities to discredit the government forces by making unfounded allegations against them.

118. These factors have to be borne in mind when assessing the weight to be given to the evidence heard by the Delegates. Account must also be taken of the fact that the Court's Delegates only heard a limited number of witnesses. The applicant's wife, Fatma, and Şakir Yolur, the father of Seyithan Yolur, were both considered relevant and material witnesses for the applicant's case. However, they both died before they could appear before the Delegates. The Delegates were also informed in advance of the hearing that Sait Yolur, who was allegedly detained along with the applicant's sons, was unable to testify on account of his mental condition.

119. It is a matter of regret for the Court that two of the witnesses summoned to give evidence on behalf of the Government did not appear. The Delegates were informed on the day on which he was due to give evidence (20 November 2002) that Mehmet Sönmez**,** the *muhtar* of Türeli village at the time of the alleged incidents, had changed his mind about giving evidence and had decided to return home to Diyarbakır. The Court requested the Government to secure a sworn affidavit from Mehmet Sönmez, confirming that he had declined at the very last minute to give evidence of his own free will. Following that request, the Government

submitted to the Court a court document recording a statement which the witness gave to Judge Yaşar Turan at a hearing on 6 January 2003. The statement read as follows (translation):

> "WITNESS MEHMET SÖNMEZ, son of Abdullah, born in 1952, resident at 500 Houses Quarter, 23. Street No: 24 Diyarbakır. He knows Abdurrezzak İpek among the parties; he is cited to be a witness. The letters attached to the instruction of the Ministry of Justice General Directorate of International Law and External Relations of Republic of Turkey were read to the witness, the incident was related; he was sworn in; he was asked:
>
> WITNESS IN HIS STATEMENT: He said "It is true that I refused to make a statement at the witness hearing that took place in Ankara between 18 and 20 November 2002. The reason I refused to make a statement is that the distance between where the alleged incident took place and where I resided is around 8 km. Therefore I did not witness the incident. I have no knowledge concerning the incident. Even though I was the *muhtar* (mayor) of the village in question, I did not go out on the day of the incident since there were intense clashes between security forces and terrorists. Thus, I did not go out and I could not see the incident. Intense clashes were in question. I refused to make a statement as I had no knowledge of the incident."

120. The Court considers that there was no justification for this witness' unilateral change of heart in Ankara. He should have communicated any personal reasons that he may have had for not giving evidence at the hearing directly to the Delegates. It should have been for the Delegates to decide on whether the witness had good reason for refusing to testify and, if so, to determine whether arrangements, compatible with the adversarial nature of the Ankara hearing, could have been made in order to accommodate his particular wishes. In the event, the Court has been presented with a statement the details of which have not been subjected to cross-examination. In the circumstances, it will only have regard to the content of that statement to the extent that it is consistent with, or contradicts, other evidence before the Delegates.

121. However, the Court does not consider it appropriate to draw any adverse inferences against the Government on account of the failure of their witness to appear. It notes in this connection that although the witness would have been expected to testify to matters which allegedly occurred when he was exercising official functions, he was no longer an agent of the State at the time of the hearing.

122. Of greater concern to the Court is the non-appearance of General Yavuz Ertürk. The Delegates had made it plain in correspondence with the Government that they considered that General Yavuz Ertürk was a relevant and material witness who could help assist them in ascertaining the level of military activity, if any, in and around the applicant's hamlet on the day in question. The Delegates were aware of the fact that in other applications against Turkey arising out of, more of less, contemporaneous incidents in the area around the applicant's hamlet, both the Court and the former Commission were at pains to establish the nature of the military operations

being conducted, the chain of command and the location of the centres of operations with respect to the scene of the alleged incidents.

123. The Delegates were further aware of the fact that General Yavuz Ertürk had in a previous case given evidence to the Commission's Delegates about the conduct of a major military operation in the Kulp-Lice-Muş region in October 1993 (*Akdeniz and Others v. Turkey*, no. 23954/94, 31 May 2002). Furthermore, the Commission with a view to taking evidence in the above-mentioned *Orhan* case specifically requested the Government to identify and to secure the attendance before its Delegates of the commander of military operations in the region, carried out allegedly by the Bolu regiment. Despite reminders from the Commission it was only during the second day of the hearing of witnesses in the case that the Government indicated that "the responsible officer who carried out the operation in the area is General Yavuz Ertürk". The Government added, during the oral hearing before the Court in May 2001, that General Yavuz Ertürk was the commander of the Bolu regiment and that he had not been called before the Delegates because he had already given evidence to Delegates in the above-cited *Akdeniz and Others* case, and had no further information. According to the Government, there was no point in his repeating before the Delegates, in the *Orhan* case, his previous statements.

124. As in the *Orhan* case, the Court considers that General Yavuz Ertürk's evidence would also have been central to the establishment of the Government's position on the facts of this case. However, the Government have furnished no satisfactory explanation for his non-appearance, confining themselves to a statement in a letter to the Court dated 4 November 2002 that " ... our authorities do not deem it necessary for General Yavuz Ertürk to attend the hearing ... for the reason that there was no military operation carried out at the alleged village on the alleged dates so that General Ertürk does not have any information about the alleged incidents. In this connection, it is clear that the testimony of General Ertürk does not provide any legal utility in the present application. Furthermore, General Ertürk was heard in the Akdeniz and others case concerning the area which he was responsible for." In a letter of reply on 13 November 2002, the Registry informed the Government that the President wished to draw their attention to Article 38 § 1 (a) of the Convention, in particular the obligation of the contracting State concerned to furnish all necessary facilities for the effective conduct of an investigation undertaken by the Court. The President further reminded the Government that, in the *Orhan* judgment, it had been noted that whether and to what extent a witness was relevant for its assessment of facts was a matter for the Court.

125. It is to be noted that the events which formed the background to the instant application occurred in the Lice region in May 1994. When giving evidence in the *Akdeniz and Others* case, General Ertürk was asked to address incidents which took place at a time (October 1993) and place

(Alaca village) different to the alleged operation in the present case. Against this background, the Court would reiterate in the clearest possible terms that it is for the Court to decide whether and to what extent a witness is relevant for its assessment of facts.

126. Accordingly, the Court finds that it can draw inferences from the Government's conduct in respect of the non-attendance of General Ertürk.

127. Under these circumstances and referring to the importance of a respondent Government's co-operation in Convention proceedings and mindful of the difficulties inevitably arising from an evidence-taking exercise of this nature (see the above-cited *Orhan* case, § 70), the Court finds that the Government fell short of their obligations under Article 38 § 1 (a) of the Convention to furnish all necessary facilities to the Court in its task of establishing the facts.

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

1. As to the conduct of a military operation on 18 May 1994 in the hamlet of Dahlezeri

128. Turning to the assessment of the evidence, and with the above considerations in mind, it can be observed that there is a strong degree of consistency in the evidence given by the applicant and his witnesses as to what happened on 18 May 1994 in Dahlezeri hamlet. They all affirmed, broadly in line with the applicant's account of the facts set out in his original application form and in the statements which he made to the domestic authorities (see paragraphs 26-30 above), that two military operations were carried out on that day, one in the morning and one in the afternoon.

129. It is true that the applicant provided the Delegates with a more detailed account of the events than appeared in his statements to the authorities (see paragraphs 62-67 above). However, it is to be noted that the hearing before the Delegates was in fact the first occasion on which the applicant was properly examined as to the factual basis of his complaints. Although the applicant contradicted his initial statement to the Delegates that PKK members had never come to the hamlet, the Court considers that this does not undermine the overall credibility of the applicant as a witness. Understandably, the applicant was placed under a great emotional strain by having to revisit the events for the benefit of the Delegates' establishment of the facts. However, there is no indication that his emotions distorted his recollection of the key events on the day in question.

130. It is to be noted that the applicant placed great emphasis on having obtained the name of the commander of the operation. However, the Court considers that no weight should be given to this assertion, having regard to the facts that the source of the information could not be identified and questioned by the Delegates and that the applicant never brought it to the

attention of the authorities when petitioning them for information about the whereabouts of his sons.

131. Mehmet Nuri Yolur referred in his evidence to the presence of the military in the hamlet on 17 May, while stating that the round-up of the inhabitants, the burning of properties and the taking away of six of the inhabitants took place on 18 May. In their testimony to the Delegates, Hakim İpek and Abdulkerim Yolur both described the events in a convincing and compelling manner and were sure in their own minds that a military operation in the hamlet took place on 18 May. The arrival of soldiers in the village on 18 May was equally confirmed in the testimony of Sevgol İpek**.** The latter's oral statements supported the main thrust of the applicant's own evidence about the manner in which the round-up of the inhabitants was effected and the manner in which six of the inhabitants were singled out and led away from the main group.

132. The Court finds Sevgol İpek to be a truthful witness, who testified with a quiet dignity and had a relatively unimpaired recollection of the events on the day in question. As with the applicant, Sevgol İpek also suffered a great personal loss. However, the Court considers that this fact does not detract from the credibility of her evidence, and there is nothing to suggest that her evidence was only motivated by a wish to discredit the security forces for political motives.

133. Although it was put to the applicant and his witnesses during questioning that the raids on the hamlet and the burning of the inhabitants' properties may have been the work of the PKK, the Court sees no reason to doubt the truth of the witnesses' affirmations that soldiers were involved. The applicant was convinced that soldiers conducted both operations in the hamlet, maintaining in his evidence that the persons involved were dressed as soldiers and were backed up by military apparatus. The statements of Sevgol Ipek, who repeatedly referred in her evidence to Turkish soldiers in the hamlet, and those of the remaining witnesses for the applicant left little room to doubt that the operation was an official one.

134. The Delegates, like the Government, were anxious to test the witnesses on possible PKK responsibility for the destruction of the applicant's and the other inhabitants' property and the abduction of six of the inhabitants. However, while it cannot be excluded that PKK members may have sought food and refuge in the hamlet in the past – and the applicant would have appeared to have confirmed this under cross-questioning from the Government representative at the hearing – there would appear to be no basis in the evidence that the PKK was behind the events of 18 May 1994 in the hamlet. For the Court, any suggestion that the destruction of property and the abduction and subsequent disappearance of the applicant's two sons were acts of reprisals for the hamlet's refusal to assist the PKK can be discounted.

135. It cannot be overlooked that certain of the applicant's witnesses differed in their estimates of the number of soldiers involved in the operation. Hakim İpek mentioned the figure of five thousand. Mehmet Nuri Yolur told the Delegates that there may have been thousands involved, but subsequently stated that up to a hundred may have taken part in the operation in the hamlet. Sevgol İpek was unable to give any indication of the numbers involved**.** The Court would observe in this connection that due allowance must be made for the fact that the witnesses came from a simple and unsophisticated background and may not have been comfortable with making numerical assessments or, it would add, when asked to assess distances (see *Selçuk and Asker v. Turkey*, judgment of 24 April 1998, *Reports of Judgments and Decisions* 1998-II, p. 899, § 26).

136. However, the Court cannot exclude the possibility that these seemingly exaggerated numbers related to a wider military operation being carried out over the entire area, rather than an estimate of the number of soldiers engaged in the operation in the hamlet. It is noteworthy in this connection that Mehmet Nuri Yolur referred in his evidence to having seen smoke rising from villages when he was being taken to Lice in an open-topped military vehicle. Hakim İpek and the applicant also told the Delegates that neighbouring villages had been burned. The Court does find it significant that the applicant and Abdulkerim Yolur both specifically referred to overhead helicopters in the area at the time.

137. For the Court, these accounts are consistent with an, at least low-scale, military operation having been centred on the hamlet within the framework of a larger operation being conducted over the surrounding area.

138. The Court notes that the Government witnesses steadfastly denied that any military operation had been conducted in or in the vicinity of the hamlet. They based themselves on their own recollection of their postings in the area at the time and the absence of any logged reference to a military operation having been conducted in or around 18 May 1994. The Court does not find the statements of Şahap Yaralı and Şükrü Günlükçü persuasive and by no means sufficient to rebut the direct eye-witness testimony of the applicant and his witnesses. Şahap Yaralı and Şükrü Günlükçü were defensive in their response to the questions put to them by the Delegates, refusing to countenance any suggestion that security forces would engage in village burning. In the light of facts which have emerged in other cases against Turkey involving allegations of village destruction, (see *Bilgin v. Turkey*, no. 23819/94, § 64, 16 November 2000; *Dulaş v. Turkey*, no. 25801/94, § 13, 30 January 2001; *Yöyler*, cited above, § 61), the Court must treat these witnesses' declarations with caution.

139. Turgut Alpı was not in the area at the time of the alleged operation. He was appointed to carry out an *ex post facto* investigation into the applicant's complaints about the disappearance of his sons and the destruction of his property. The Court notes that he was content for the

purposes of the investigation to rely on the absence of any documented recording of a military operation having been conducted and the affirmation of the Lice District Gendarmerie Commander that no operation had been conducted. The Court finds it unsatisfactory that Turgut Alpı did not deem it necessary to obtain the records kept by the military, but to rely rather on the assumption that he would have been informed by the Lice District Gendarmerie Commander if there had been any military activity on the day in question.

140. It is to be noted that the Court has already had occasion to conclude that records or logs indicating that no military operation was conducted at a particular time should not necessarily be taken at face value (see *Çiçek v. Turkey*, no. 25704/94, judgment of 27 February 2001, § 128, the above-cited *Orhan* judgment, § 269).

141. The Court also finds it significant that Mehmet Sönmez, the *muhtar* of Türeli village, referred in his sworn affidavit to a clash having taken place on 18 May 1994 involving the security forces and the PKK. The declarations of the Government's witnesses that there was no military operation on that day does not sit comfortably with Mehmet Sönmez's statement.

142. The Court reiterates that it is a matter of great regret that General Ertürk did not appear to give evidence. Both the applicant and Mehmet Nuri Yolur referred in their testimony to the presence of soldiers from the Bolu brigade in the hamlet. The issue of the possible involvement of members of the Bolu brigade was put to the Government's witnesses by the Delegates on several occasions. The matter was therefore relevant and material and General Ertürk should have been present before the Delegates to clarify the operational role of the Bolu brigade. The Court recalls in this connection that it was acknowledged by the Government during the public hearing in the *Orhan* case that General Ertürk had been the commander of the Bolu brigade at the material time.

2. As to the destruction of the applicant's property

143. The Court is satisfied on the evidence which it has assessed that there is a strong basis in fact for the applicant's claim that a military operation was conducted in the hamlet on 18 May 1994. The applicant and his witnesses have testified along consistent lines that the hamlet was set alight when the inhabitants were being held at the school, and that the soldiers returned later that day to prevent them from putting out the fires. There is a striking consistency in the times given for the second raid. Hakim İpek referred to the return of the soldiers around 4 or 5 p.m. The applicant and Sevgol İpek considered that they came back around 6 p.m. Mehmet Nuri Yolur and Abdulkerim Yolur did not testify as to the time of the second raid, since they had been taken away following the morning operation. On the other hand, Mehmet Nuri Yolur and Abdulkerim Yolur

were clear in their testimony that they found the houses in the hamlet burned down when they eventually came back to the hamlet.

144. For the Court, it is also material that the applicant, Sevgol İpek and Hakim İpek were able to confirm that the inhabitants were at one stage led away by the soldiers with orders to kill them, and that those orders were subsequently revoked. It considers that, had the witnesses wished to lie about the destruction of their property, it would have been unnecessary for them to fabricate that sequel. It can be concluded that the evidence in this respect confirms the honesty of the applicant's complaints. It observes in addition that the applicant's testimony that he overheard orders being given on the soldiers' walkie-talkies was tested during cross-examination. The Delegates were satisfied that the applicant was able to understand things said in Turkish and that he was within earshot of the walkie-talkie communications when being led away from the hamlet with the other inhabitants following the second raid.

145. The Court finds that the Government witnesses have not rebutted the applicant's claim that the applicant's property was not destroyed by soldiers. It observes in the first place that it has found it established that a military operation was carried out in the hamlet on 18 May 1994. Secondly, the domestic authorities never conducted any meaningful investigation into the applicant's complaint. On Turgut Alpı's own admission, he never visited the hamlet, relying rather on his belief that the hamlets and villages in the area were uninhabited and that it would have been pointless to travel to the applicant's hamlet. It is also to be observed that all three witnesses heard by the Delegates were convinced in their own minds that the damage caused to the property in the hamlet was probably the work of the PKK. Although there was undoubtedly terrorist activity in the area, the Government have not produced any proof whatsoever that the PKK descended on the hamlet on 18 May 1994 and burned it down.

3. As to the detention and subsequent disappearance of the applicant's sons

146. The Court finds that the applicant's account of the events leading to the removal by soldiers of his sons from the school is corroborated by the evidence of Sevgol İpek and Hakim İpek. Mehmet Nuri Yolur and Abdulkerim Yolur also confirmed the applicant's account of the round-up of the inhabitants, the separation of men from women into two groups outside the school, the handing over of identity cards at the soldiers' request and the removal of six members of the group. The Court does not attach any significance to Mehmet Nuri Yolur's statement to the Delegates that he set off with the soldiers around 9 to 10 a.m. This is an obvious inaccuracy. It is significant for the Court that the applicant and his witnesses never adverted to the use of violence by the security forces to remove the applicant's two sons and the other four inhabitants. They all deposed that six persons were

chosen at random and told to assist the soldiers in taking their gear back to their trucks.

147. Mehmet Nuri Yolur and Abdulkerim Yolur were two of the persons who were led away, and they provided direct testimony as to the sequence of events thereafter. The Court finds the accounts of these witnesses to be consistent. Both witnesses related that they were taken to Lice in a military vehicle along with the applicant's two sons and Sait and Seyithan Yolur. Mehmet Nuri Yolur and Abdulkerim Yolur also spoke along consistent lines about being separated from the applicant's two sons and Seyithan Yolur on arrival at Lice. It is noteworthy that both witnesses shared the same recollection of having been forced to lie down after descending from the military vehicle, and that that was the last occasion on which they saw the applicant's two sons and Seyithan Yolur. For the Court, the credibility of these two witnesses' account is reinforced by their clear statements that they were well-treated during their detention in Lice. They did not seek to make any allegations against the security forces.

148. The Court finds the account given by Mehmet Nuri Yolur and Abdulkerim Yolur to the Delegates truthful. They were tested under cross-examination about their recollection of their removal from the school, their journey to Lice and what happened on arrival there. They remained steadfast in their declarations. Both witnesses were unable to describe in any detail the nature of the establishment where they spent the night before being released. However, it is clear from their testimony that they were in the control and custody of soldiers. Although Abdulkerim Yolur spoke of having been the soldiers' “guests”, the Court finds it significant that, when asked by the Delegates whether he was at liberty to leave the establishment, he replied that he and his brothers Mehmet Nuri and Sait were kept in a cell which was guarded by soldiers. The Court further observes that Mehmet Nuri Yolur stated during questioning by the Delegates that the establishment was the military headquarters in Lice. Abdulkerim Yolur spoke of having been taken inside “the Regiment”.

149. The Court has once again had regard to the evidence given by the Government witnesses to rebut the statements of the applicant and his witnesses. It finds that it rests entirely on the assertion that there was no record of the applicant's sons' detention. However, it is led to observe that the absence of the names of the applicant's two sons from custody records cannot be seen to be conclusive proof that they were not detained. It notes in this connection that it has, in previous cases, recorded deficiencies mainly relating to the “unsatisfactory and arbitrary distinction” drawn by gendarmes between being taken into custody, in which case an entry is made in the custody records, and being detained for observation and/or questioning, in which case there will not necessarily be a custody record entry (*Çakıcı v. Turkey* [GC], no. 23657/94, § 105, ECHR 1999-IV, and the above-cited *Çiçek* case, at §§ 137-138, and the above-cited *Orhan* case,

§ 313). This practice was confirmed by the evidence of Şahap Yaralı in the present case.

E. The Court's findings of facts and conclusion

150. Having regard to the documentary evidence submitted to it by the parties (see paragraphs 37-60 above) and the testimonies of the witnesses heard by the Court's Delegates (see paragraphs 61-91) the Court's conclusions of fact can be summarised as follows.

151. On the morning of 18 May 1994, a military convoy arrived in the hilly area in the vicinity of Dahlezeri hamlet. Armed soldiers, possibly members of the Bolu brigade, left their vehicles and descended to the hamlet on foot. The applicant and the other inhabitants were ordered to leave their homes and were assembled under guard at the school on the outskirts of the hamlet. The men were separated from the women and children. The soldiers took the identity cards of the adult males, including those of the applicant and his sons İkram and Servet İpek.

152. During this time, the soldiers who remained in the hamlet set the houses in the hamlet on fire. Most of the houses were burned down or badly destroyed. The inhabitants assembled at the school were aware of what was happening in the hamlet, being able to see the smoke and the flames rising from the hamlet. They were prevented from returning to the homes at this stage.

153. At some point before noon, the soldiers selected six of the inhabitants gathered at the school. They were all young men: İkram and Servet İpek and Seyithan, Mehmet Nuri, Sait and Abdulkerim Yolur. The six were ostensibly chosen at random to assist the soldiers in carrying their rucksacks and possibly other gear back to a *rendez-vous* point in the hilly area beyond the hamlet. Assurances were given that the six would be able to return when the task was completed. The soldiers returned the identity documents to the inhabitants, but kept those taken from the selected six. The six headed off into the distance in the company of the soldiers.

154. The inhabitants went back to the hamlet and found that their homes had been destroyed. The applicant's house, belongings and livestock were destroyed. Some inhabitants set about salvaging their belongings and extinguishing the flames. At some point in the afternoon of 18 May 1994, the soldiers returned to the hamlet and threatened the inhabitants with violence if they extinguished the fires. The soldiers burned any houses that remained standing. Soldiers led the inhabitants out of the hamlet. At some point, an order was given to release the inhabitants.

155. This operation was not an isolated one. During that period other hamlets and villages suffered the same fate, with soldiers, again possibly from the Bolu brigade, backed up by military helicopters and vehicles, combing the area.

156. The second military raid on the village occurred when the applicant's two sons İkram and Servet were on route to Türeli village. When they arrived, possibly around late afternoon, they waited on the outskirts of the village with the soldiers until the arrival of an open-topped military vehicle. They were then driven to a military establishment in Lice. It was dark when they arrived. Mehmet Nuri Yolur, Sait Yolur and Abdulkerim Yolur were separated from Seyithan Yolur and İkram and Servet İpek. All six were made to lie down. The Court has no reason to doubt the accuracy of Mehmet Nuri Yolur's statement that other civilians also arrived in front of the military establishment in military vehicles at this time and were told to lie down.

157. Mehmet Nuri Yolur, Sait Yolur and Abdulkerim Yolur were detained overnight at the military establishment. They were released unharmed the following morning and their identity cards were returned to them.

158. It is a matter of speculation as to what happened to the applicant's two sons and Seyithan Yolur after they were separated from Mehmet Nuri Yolur, Sait Yolur and Abdulkerim Yolur on arrival at the military establishment. It is also difficult to surmise why those three were not released.

159. On the basis of the above findings, the Court will proceed to examine the applicant's complaints under the various Articles of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

160. The applicant alleged that his two sons had been taken away by the security forces and that it must be presumed that they were now dead in circumstances for which the authorities were responsible. He complained that no meaningful investigation had been carried out into the disappearance and subsequent death of his sons. He invoked 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."

A. Submissions of the parties

1. The applicant

161. The applicant argued that the evidence given by the witnesses, in particular the Yolur brothers, had confirmed that six young men, including his two sons, had been taken away to help carry the soldiers' rucksacks to their vehicles and that they had been held in the unacknowledged detention of the security forces. With reference to the earlier findings of the former Commission and the Court in the cases of *Çakıcı v. Turkey* (cited above, § 105) and *Aydın v. Turkey* (judgment of 25 September 1997, *Reports* 1997-VI, p. 1897, § 106; and the Commission's opinion of 7 March 1996, p. 1941, § 172) the applicant contended that the custody records submitted by the Government were inadequate and unreliable. He further claimed that, given that no information has come to light concerning the whereabouts of his two sons for more than nine years, they must be presumed dead and that the Turkish Government should be held responsible for their deaths. The applicant referred in this connection to the Court's considerations in its *Çiçek v. Turkey* judgment (cited above, § 147). The applicant finally invited the Court to find that the authorities had failed to carry out an adequate investigation into the circumstances surrounding the death of his two sons, İkram and Servet İpek.

2. The Government

162. The Government denied the factual basis of the applicant's allegations. They claimed that all activities of the security forces in the region were entered into a logbook kept at the Lice gendarmerie. A copy of the relevant page of the logbook, which was provided to the Court, clearly proved that the security forces had not carried out any operation in the applicant's hamlet on 18 May 1994 and that neither the applicant's sons nor any other villager had been taken into custody. The Government maintained that the *ex officio* investigation conducted by the authorities into the applicant's complaints was adequate and efficient.

B. The Court's assessment

1. General considerations

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

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

165. Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in detention, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (*Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII; *Çakıcı*, cited above, § 85; *Ertak v. Turkey,* no. 20764/92, § 32, ECHR 2000-V, and *Timurtaş v. Turkey,* no. 23531/94, § 82, ECHR 2000-VI, and *Orhan*, cited above, § 327).

2. Whether İkram and Servet İpek can be presumed dead

166. The Court reiterates its considerations in the above-cited *Timurtaş* judgment, where it held (at §§ 82-83):

> (...) 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 (...)."

167. The Court considers that there are a number of elements distinguishing the present case from cases such as *Kurt v. Turkey* (judgment of 25 May 1998, *Reports* 1998-III, § 108), in which the Court held that there were insufficient persuasive indications that the applicant's son had met his death in detention. The Court notes that in the aforementioned Kurt case, the applicant's son Üzeyir Kurt was last seen surrounded by soldiers and village guards in his own village. In the instant case, however, the applicant's two sons and four other villagers were seen being taken away by soldiers (see paragraph 153 above). It has also been established that the İpek brothers were last seen in the hands of the security forces in an unidentified military establishment (see paragraph 156). Although the Court is unable to determine the fate of the applicant's two sons, given the general context of the situation in south-east Turkey in 1994, there are strong grounds for believing that their unacknowledged detention would be life-threatening (*Orhan,* cited above, § 330; *Timurtaş,* cited above, § 85 and the *Çiçek,* cited above, § 146). It would recall in this connection that it has held in earlier judgments that defects undermining the effectiveness of criminal law protection in the south-east during the relevant period, permitted or fostered a lack of accountability of members of the security forces for their actions (*Cemil Kılıç v. Turkey*, no. 22492/93, § 75, ECHR 2000, and *Mahmut Kaya v. Turkey*, no. 22535/93, § 98, ECHR 2000).

168. For the above reasons, and taking into account that no information has come to light concerning the whereabouts of the applicant's sons for almost nine and a half years, the Court is satisfied that Servet and İkram İpek must be presumed dead following their unacknowledged detention by the security forces. Consequently, the responsibility of the respondent State for their death is engaged. Noting that the authorities have not provided any explanation as to what occurred following the İpek brothers' 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 (*Timurtaş*, § 86, and *Çiçek*, at § 147, *Orhan*, § 331, judgments cited above). Accordingly, there has been a violation of Article 2 on that account.

3. The alleged inadequacy of the investigation

169. The Court recalls that the obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see, the *McCann and Others* judgment, cited above, § 161, and the *Kaya v. Turkey* judgment of 19 February 1998, *Reports* 1998-I, § 105). The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving state agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigatory procedures (see, for example, *mutatis mutandis*, *İlhan v. Turkey* [GC], no. 22277/93, § 63, ECHR 2000-VII).

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

171. There is also a requirement of promptness and reasonable expedition implicit in this context (*Yaşa v. Turkey* judgment of 2 September 1998, *Reports* 1998-IV, § 102-104; *Çakıcı,* cited above, §§ 80, 87, 106;

Tanrıkul, cited above, § 109, *Mahmut Kaya*, cited above, §§ 106-107). It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating a use of lethal force or disappearance may generally be regarded as essential in maintaining public confidence in their maintenance of the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts (see, in general, *McKerr v. the United Kingdom*, no. 28883/95, §§ 108-115, ECHR 2001-III and *Avşar*, cited above, §§ 390-395). The need for promptness is especially important when allegations are made of a disappearance in detention (*Orhan*, cited above, § 336).

172. Turning to the particular circumstances of the case, the Court notes that following the apprehension by the security forces and subsequent disappearance of İkram and Servet, the applicant petitioned various judicial and administrative authorities to find out the whereabouts of his two sons (see paragraphs 26-30). However, despite the applicant's serious and detailed allegations, the responses given by the authorities were limited to denials that the security forces had ever conducted an operation in the region and that the applicant's sons had ever been taken into custody (see paragraphs 27 and 31). The investigations carried out by the Diyarbakır and Lice public prosecutors and later by Lieutenant-Colonel Turgut Alpı did not go beyond the acceptance of the confirmations received by them that the applicant's sons did not appear in the custody records or wanted lists of the Diyarbakır DGM, the Diyarbakır Public Order Command, the Lice District gendarmerie command and other security forces in the region (see paragraphs 32 and 52).

173. The Court also notes that, following the communication of the application to the respondent Government on 27 February 1995, the authorities indeed commenced an investigation into the applicant's allegations. However, there were striking omissions and defects in the conduct of the investigation. It would observe in this connection that no serious attempts were made by the prosecuting authorities to question the applicant in relation to his complaints (see paragraph 36 above). The first attempt was made by the Diyarbakır chief public prosecutor who gave police officers from the Diyarbakır police headquarters the address of the applicant which appeared on the application form, and instructed them to summon the applicant to his office. However, the officers were unable to find the applicant since the public prosecutor wrongly recorded in his letter the name of the block of flats where the applicant lived (see paragraphs 39 and 40). In a further attempt on 8 March 1996, another person with a name similar to that of the applicant was questioned by Lieutenant-Colonel Alpı. However, this person was seventeen years younger than the applicant and had no children. The Court finds it unsatisfactory that this person's statements were partly relied upon by Lieutenant-Colonel Turgut Alpı in his

decision to discontinue the investigation (see paragraph 54 above). It is also noteworthy that the Lice Governor ordered the publication in a newspaper of the decision of 16 December 1996 to discontinue the investigation on the ground that the authorities were unable to find the applicant (see paragraph 34 above). However, this contradicts the Government's assertion that they took a statement from the applicant on 8 March 1996, i.e. two months previously. In the Court's opinion, these facts are demonstrative of a lack of due diligence and vigour in this investigation. Finally, on 26 December 1999 the applicant was called to the Kulp gendarmerie station and his statements were taken in regard to his allegations (see paragraph 36 above). However, no follow-up was given to this interview.

174. The Court would also point out that, subsequent to the Lice public prosecutor's decision of non-jurisdiction, an investigation was pursued by the Lice District Administrative Council in order to establish the role of the security forces in the matter. However, the Court has already found in previous cases against Turkey that this body cannot be regarded as independent as it is made up of civil servants hierarchically dependent on the governor, an executive officer linked to the very security forces under investigation (see, among others, *Orhan*, cited above § 342, *Güleç*, cited above, §§ 77-82, and *Oğur*, cited above, §§ 855-93). It considers that, in the circumstances of the present case, that Council's appointment of a lieutenant-colonel, Mr Turgut Alpı, as investigator was inappropriate given that the allegations were directed against the security forces of which he was a member. In this regard, the willingness of Lieutenant-Colonel Alpı to give credence to the accounts offered by the security forces confirms the Court's above findings (see paragraph 139 above).

175. The Court further notes that the prosecuting authorities failed to broaden the investigation by using the leads given by the applicant. No attempts were made to take statements from members of the security forces in the course of the investigation although the applicant made it clear to the authorities that his sons had been taken away by soldiers.

176. Incomprehensibly, no steps were taken to seek any evidence from eye-witnesses, such as the applicant's family members and his fellow villagers, in particular the Yolur brothers, despite the fact that the applicant brought it to the attention of the authorities that Abdülkerim, Sait and Nuri Yolur had been taken away and held in detention by soldiers along with his two sons (see paragraph 36 above). More importantly, the authorities did not consider it necessary to visit the hamlet with a view to verifying the applicant's allegations and to collecting evidence (see paragraph 83). For the Court, this omission is sufficient, of itself, to warrant the conclusion that the investigation was seriously deficient.

177. In the light of the above, the Court considers that the investigations carried out into the disappearance of the applicant's two sons were seriously

inadequate and deficient. It concludes therefore that there has also been a violation of Article 2 of the Convention under its procedural limb.

III. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION IN RESPECT OF THE APPLICANT

178. The applicant complained that the disappearance of his two sons constituted inhuman treatment in relation to himself. He alleged a violation of Article 3 of the Convention, which provides:

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

179. The applicant maintained that he had suffered acute distress and anguish as a result of his inability to find out what had happened to his sons and of the way in which the authorities responded and treated him in relation to his enquiries.

180. The Government denied the factual basis of the applicant's allegations under Article 3.

181. The Court reiterates that the question whether a family member of a "disappeared person" is a victim of treatment contrary to Article 3 will depend on the existence of special factors which gives the suffering of the applicant a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human-rights violation. Relevant elements will include the proximity of the family tie – in that context, a certain weight will attach to the parent-child bond –, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person and the way in which the authorities responded to those enquiries (*Orhan*, § 358, *Çakıcı*, § 98, and *Timurtaş*, § 95 - all cited above). The Court would further emphasise that the essence of such a violation does not so much lie in the fact of the "disappearance" of the family member but rather concerns the authorities' reactions and attitudes to the situation when it is brought to their attention. It is especially in respect of the latter that a relative may claim directly to be a victim of the authorities' conduct (see *Çakıcı*, cited above, § 98).

182. In the present case, the Court notes that the applicant is the father of the disappeared İpek brothers. The applicant witnessed the impugned events and his sons being taken away by soldiers almost nine years ago and he has never heard from them since (see paragraph 153). It further appears from the documents submitted by him that the applicant bore the weight of having to make numerous futile enquiries in order to find out what had happened to his two sons (see paragraphs 26-29). Despite his tireless endeavours to discover the fate of his sons, the applicant has never received

any plausible explanation or information from the authorities as to what became of his sons following their apprehension by the soldiers. Conversely, the authorities' reaction to the applicant's grave concerns was limited to denials that the İpek brothers had ever been detained by the security forces (see paragraphs 38 and 45). It is to be noted that the applicant was not even informed of the outcome of the investigations pursued in respect of his complaints. Furthermore, the Court considers that the applicant's anguish about the fate of his sons must have been exacerbated by the destruction of his family home.

183. In view of the above, the Court finds that the applicant suffered, and continues to suffer, distress and anguish as a result of the disappearance of his two sons and of his inability to find out what had happened to them. The manner in which his complaints have been dealt with by the authorities must be considered to constitute inhuman treatment contrary to Article 3.

The Court concludes therefore that there has been a violation of Article 3 of the Convention in respect of the applicant.

IV. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

184. The applicant submitted that the disappearance of his sons gave rise to multiple violations of Article 5 of the Convention, which 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;
>
> (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
>
> (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

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."

185. The applicant argued that this provision had been violated on account of the unlawful detention of his sons, the failure of the authorities to inform his sons of the reasons for their detention and to bring them before a judicial authority within a reasonable time, as well as their inability to bring proceedings to have the lawfulness of their detention determined.

186. The Government submitted that there was no basis for finding that the applicant's sons had been taken into custody and it was therefore impossible to find any violation of Article 5 of the Convention.

187. The Court's stresses the fundamental importance of the guarantees contained in Article 5 for securing the rights of individuals in a democracy to be free from arbitrary detention at the hands of the authorities. It has stressed in that connection 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 arbitrary detention. In order to minimise the risks of arbitrary detention, Article 5 provides a corpus of substantive rights intended to ensure that the act of deprivation of liberty be amenable to independent judicial scrutiny and secures the accountability of the authorities for that measure. The unacknowledged detention of an individual is a complete negation of these guarantees and discloses a most grave violation of Article 5. Bearing in mind the responsibility of the authorities to account for individuals under their control, Article 5 requires them to take effective measures to safeguard against the risk of disappearance and to conduct a prompt and effective investigation into an arguable claim that a person has been taken into custody and has not been seen since (*Kurt,* §§ 122-125, cited above, and, also cited above, *Çakici*, § 104, *Akdeniz and Others*, § 106, *Çiçek*, § 164, *Orhan*, §§ 367-369).

188. The Court has already found that the applicant's two sons were apprehended and taken away by security forces on 18 May 1994 from the hamlet of Dahlezeri and were last seen in the hands of those forces at a military establishment in Lice (see paragraph 156 above). Their detention

there was not logged in the relevant custody records and there exists no official trace of their subsequent whereabouts or fate. In the view of the Court, this fact in itself must be considered a most serious failing since it enables those responsible for an act of deprivation of liberty to conceal their involvement in a crime, to cover their tracks and to escape accountability for the fate of a detainee. Furthermore, 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 above-cited judgments of *Kurt*, § 125; *Timurtaş*, § 105; *Çakıcı*, § 105; *Çiçek*, § 165 and *Orhan*, § 371).

189. The Court further considers that the authorities should have been alert to the need to investigate more thoroughly and promptly the applicant's complaints that his two sons were taken away in life-threatening circumstances and held in detention by the security forces. However, its reasoning and findings in relation to Article 2 above leave no doubt that the authorities failed to take effective measures to safeguard the İpek brothers against the risk of disappearance (see paragraph 177).

190. In view of these considerations, the Court concludes that the authorities failed to provide a plausible explanation for the whereabouts and fate of the İpek brothers after they had been taken away from the hamlet of Dahlezeri and that the investigation carried out into their disappearance was neither prompt nor effective. It considers that it is confirmed in its conclusion by the prosecuting authorities' failure to take statements from members of the security forces and eye-witnesses and by their unwillingness to go beyond the military authorities' assertion that the custody records showed that the İpek brothers had neither been apprehended nor held in detention. The unreliability and inaccuracy of custody records must also be considered of relevance in this connection (see paragraphs 172, 175-176 and 149 respectively).

191. Accordingly, the Court finds that the İpek brothers were held in unacknowledged detention in the complete absence of the safeguards contained in Article 5 and that there has been a violation of the right to liberty and security of person guaranteed by that provision.

V. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

192. The applicant asserted that the destruction of his family home and possessions constituted a serious violation of his right to peaceful enjoyment of his possessions within the meaning of Article 1 of Protocol No. 1, which provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest

and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

193. The Government denied the factual basis of the applicant's assertions and averred that the applicant's house, along with other houses in the hamlet, had been damaged due to lack of good care and the harsh winter conditions in the region.

194. The Court reiterates its finding that the security forces deliberately destroyed the applicant's family home and possessions, obliging his family to leave their village (see paragraphs 152 and 154 above). There is no doubt that these acts constituted a grave and unjustified interference with the applicant's right to the peaceful enjoyment of his possessions (see the above cited judgments of *Akdivar and Others*, § 88; *Menteş and Others*, § 73, *Selçuk and Asker*, § 86; *Bilgin,* § 108; *Dulaş*, § 13; *Yöyler*, § 79).

195. Accordingly, the Court concludes that there has been a violation of Article 1 of Protocol No. 1.

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

196. The applicant submitted that the failure of the authorities to conduct an effective investigation into the disappearance of his sons and the destruction of his property gave rise to a breach of Article 13 of the Convention. The Government challenged this submission.

Article 13 reads:

"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."

A. The general principles

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

Convention obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or the omissions of the authorities of the respondent State (*Aksoy v. Turkey* judgment of 18 December 1996, *Reports* 1996-VI, § 95, and the above-cited *Aydın* judgment, § 103, and the above-cited *Kaya* judgment, § 89).

198. In addition, where the relatives of a person have an arguable claim that the latter has disappeared at the hands of the authorities, the notion of an effective remedy for the purposes of Article 13 entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure (*mutatis mutandis,* the above-mentioned *Aksoy*, *Aydın and Kaya* judgments at § 98, § 103 and §§ 106-107, respectively). The Court further recalls that, the requirements of Article 13 are broader than a Contracting State's obligation under Article 2 to conduct an effective investigation into the disappearance of a person last seen in the hands of the authorities (*Kılıç v. Turkey*, no 22492/93, § 93, ECHR 2000-III).

199. The above considerations equally apply where an individual has an arguable claim that his home and belongings have been purposely destroyed by agents of the State (*Orhan*, cited above, § 385).

B. The Court's assessment

1. As to the detention and subsequent disappearance of the applicant's sons

200. The Court has found that the applicant's sons were taken away from their hamlet and held in unacknowledged detention at a military establishment in Lice by the security forces, that no record of their detention has been produced by the authorities and that they can be presumed to be dead (see paragraphs 167-168 above). It has also established that the distress and anguish suffered by the applicant on account of the disappearance of his sons and the manner in which the authorities dealt with his complaint constituted inhuman treatment (see paragraph 183). The complaints under Articles 2, 3 and 5 in these respects are therefore clearly arguable for the purposes of Article 13 of the Convention (see *Boyle and Rice v. the United Kingdom* judgment of 27 April 1988, Series A no. 131, § 52, together with the above-cited *Kaya* and *Yaşa* judgments, § 107 and 113, respectively).

201. The authorities thus had an obligation to carry out an effective investigation into the disappearance of the İpek brothers. Having regard to its findings under Article 2 (see paragraph 177 above), the Court concludes

that no effective investigation was conducted into the applicant's complaints in accordance with Article 13.

2. As to the destruction of the applicant's property

202. The Court reiterates its finding that the destruction of the applicant's family home and possessions in Dahlezeri was in violation of Article 1 of Protocol No. 1 (see paragraph 195). The applicant's complaints in this regard are therefore also "arguable" for the purposes of Article 13 (see *Boyle and Rice*, § 52; *Dulaş*, § 67; and *Yöyler*, § 89).

203. The Court has previously held that the implementation of the criminal law in respect of unlawful acts allegedly carried out with the involvement of the security forces discloses particular characteristics in south-east Turkey in the first half of the 1990s and that the defects found in the investigatory system in force in that region undermined the effectiveness of criminal law protection during this period. This practice permitted or fostered a lack of accountability of members of the security forces for their actions which was not compatible with the rule of law in a democratic society respecting the fundamental rights and freedoms guaranteed under the Convention (see *Bilgin v. Turkey*, no. 23819/94, § 119, 16 November 2000).

204. Turning to the particular circumstances of the case, the Court notes that the applicant filed petitions of complaints with various authorities shortly after the destruction of his home and possessions in Dahlezeri. Although the applicant's primary concern in his petitions was the disappearance of his sons, he did indicate in detail to the authorities that his hamlet was burned down in the course of a military operation conducted on 18 May 1994 (see paragraph 36 above).

205. However, the responses given to the applicant were limited to informing him that the security forces had not conducted any operation on that date in the region (see paragraphs 38 and 59 above). The Court finds it striking that, before giving swift answers to the applicant, the authorities made no attempts to interview members of the security forces during the course of their investigation, despite the fact that the applicant had complained that the soldiers were the perpetrators of the burning of his hamlet. Furthermore, apart from the statements taken from the applicant, it does not appear that any attempt was made to establish the truth through questioning other villagers who might have witnessed the impugned incidents. Moreover, the authorities did not consider visiting the scene of the incident in order to verify the applicant's allegations. Rather, they were content to rely on the information given by the security forces in order to form their conclusion (see paragraphs 32, 43 and 54 above).

206. It is noteworthy in this connection that the Court has consistently found a general reluctance on the part of the authorities to admit that this

type of practice by members of the security forces had occurred (see the above-mentioned judgments of *Selçuk and Asker*, § 68, *Orhan*, § 394; *Yöyler*, § 92). Indeed, the evidence given by the gendarmerie commanders in the instant case confirms the Court's previous findings (see paragraph 138 above).

207. Finally, it is to be noted that, on 21 June 1995, the jurisdiction over the investigation was transferred to the Lice Administrative Council, which decided not to grant authorisation for the prosecution of members of the security forces (see paragraph 55 above). However, it recalls that the Court has already found in a number of cases that the investigation carried out by this body cannot be regarded as independent since it is composed of civil servants, who are hierarchically dependent on the governor, and an executive officer is linked to the security forces under investigation, (see *Güleç v. Turkey*, no. 21593/93, § 80, ECHR, *Reports* 1998-IV; and *Yöyler*, § 93*,* cited above). The appointment of Lieutenant-Colonel Turgut Alpı as the investigator and the serious defects identified in his investigation does not permit the Court to reach a different conclusion in the present case (see paragraph 174 above).

208. In these circumstances, it cannot be said that the authorities have carried out a thorough and effective investigation into the applicant's allegations of destruction of his property in Dahlezeri either.

209. In sum, the Court concludes that there was no available effective remedy in respect of the disappearance and presumed death of the applicant's sons and the destruction of the applicant's property in Dahlezeri hamlet. Accordingly, there has been a violation of Article 13 of the Convention in conjunction with Articles 2, 3 and 5 of the Convention and Article 1 of Protocol No. 1.

VII. ALLEGED VIOLATION OF ARTICLE 14 IN CONJUNCTION WITH ARTICLES 2, 3 AND 5 OF THE CONVENTION AND ARTICLE 1 OF PROTOCOL NO. 1

210. The applicant complained that he and his sons had been discriminated against on the ground of their Kurdish origin in violation 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."

211. The applicant argued that there was an administrative practice of discrimination on the grounds of race and ethnic origin in relation to all such matters.

212. The Government did not address these issues beyond denying the factual basis of the substantive complaints.

213. The Court has examined the applicant's allegation. However, it finds that no violation of this provision can be established on the basis of the evidence before it.

VIII. ALLEGED VIOLATION OF ARTICLE 18 OF THE CONVENTION

214. The applicant submitted that the interferences referred to above with the exercise of his and his sons' Convention rights were not designed to secure ends permitted under the Convention. He relied on Article 18 of the Convention, which provides:

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

215. The Government did not comment on this complaint.

216. The Court finds that no violation of this provision can be established on the basis of the evidence before it.

IX. APPLICATION OF ARTICLE 41 OF THE CONVENTION

217. 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."

218. The applicant claimed 141,529.01 pounds sterling (GBP) in respect of his pecuniary loss resulting from the presumed death of his two sons and the destruction of his property. He also claimed GBP 50,000 for non-pecuniary damage. Finally, reimbursement of legal costs and expenses in the sum of GBP 27,635.08 was also requested.

219. The Government submitted that no just satisfaction should be paid to the applicant since there had been no violation of the Convention. They contended, in the alternative, that should the Court find a violation of any of the provisions of the Convention the amounts claimed by the applicant were speculative and did not reflect the economic realities of the region.

A. Pecuniary damage

220. The applicant claimed compensation for the material damage suffered by him on account of the death of his sons and the destruction of his property in Dahlezeri hamlet.

1. Pecuniary losses flowing from the disappearance and presumed death of the applicant's sons

221. The applicant claimed a total of GBP 106,393.08 for loss of income in respect of his two sons, İkram and Servet İpek, for whose deaths the responsibility of the Government was engaged. He explained that each of his sons, who were 19 and 15 years old respectively at the time of the incident, worked on building sites and each of them earned about GBP 2,343.46 per year. The applicant also noted that as the average life expectancy for Turkish men is 65.1 years, his sons' expected retirement age might be taken as 65. Furthermore, İkram İpek was married but had no children at that time. In calculating the above amounts the applicant relied on the Ogden Actuarial Tables that are used to calculate personal injury and fatal accidents in the United Kingdom. He reasoned that, in the absence of a Turkish equivalent and in order to avoid complications caused by the high rate of inflation of Turkey, these tables were a professionally sound method of calculation.

222. The Government argued that there was no clear connection between the damage claimed by the applicant and the alleged violation of the Convention. Thus, the applicant should not be awarded any compensation in respect of his allegations.

223. The Court reiterates 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 *Çakıcı v. Turkey* judgment cited above, § 127). The Court has found that the applicant's sons disappeared following an unacknowledged detention and that the State's responsibility was engaged under Articles 2 and 5 of the Convention (see paragraphs 168 and 191 above). In such circumstances, there was a direct causal link between the violation of Articles 2 and 5 of the Convention and the loss suffered by the heirs of the İpek brothers on account of the cessation of the financial support which they provided for them.

224. Having regard to the applicant's detailed actuarial submissions and calculations for the past and future incomes of his sons and deciding on an equitable basis (see the above-cited *Çiçek* and *Orhan* judgments, at § 201 and § 434 respectively), the Court awards the sum of 7,000 euros (“EUR”) for each of the applicant's sons, which amount is to be held by the applicant for his sons' heirs.

2. Pecuniary losses flowing from the destruction of the applicant's house and belongings

225. The applicant claimed compensation for the damage he sustained on account of the destruction of his family home and household goods and the killing of his animals. He also requested the reimbursement of his loss of income and the costs incurred in finding alternative accommodation.

226. The Government contended that the applicant should not be awarded any compensation since he had failed to substantiate his claims.

227. The Court has found that the applicant's family and home and belongings were deliberately destroyed by the security forces. It is therefore necessary to award compensation for pecuniary damage suffered by the applicant. However, having regard to the failure of the applicant to substantiate his claims as to the quantity and value of his lost property with reference to any documentary evidence and in the absence of any independent evidence concerning the size of the holding and the number of livestock and the applicant's income therefrom, the Court will make its assessment, by necessity, on the basis of principles of equity (see *Bilgin*, § 140; *Dulaş*, § 86; *Selçuk and Asker*, § 106; and *Yöyler*, § 106; judgments cited above).

(a) House and other property

228. The applicant claimed compensation in respect of a house which he valued at 23,000,000,000 Turkish liras ("TRL"), one hundred and thirty-five animals (thirty sheep, 80 goats, 15 cows and 20 chickens) with an estimated value of TRL 25,810,000,000, household property (kitchen appliances, curtains, twelve mattresses, one hundred kilos of butter and one hundred litres of milk) with a stated value of TRL 10,250,000,000 and one lorry-load of wood valued at TRL 150,000,000.

229. In the absence of any independent and decisive evidence and making its assessment on an equitable basis, the Court awards an amount of EUR 15,000 in respect of the destroyed building and other property.

(b) Loss of income

230. The applicant claimed the amount of GBP 5,272.74 in compensation for loss of income from farming since 1994.

231. In the absence of independent evidence on the size of the applicant's landholdings and income derived therefrom, and having regard to equitable considerations, the Court awards under this head an amount of EUR 9,000.

(c) Alternative accommodation

232. The applicant claimed the reimbursement of GBP 6,735.11 in respect of his expenditures on rent, water, electricity and telephone for nine years.

233. In the absence of any substantiation of this part of the applicant's claim and having regard to equitable considerations, the Court awards the applicant for costs of alternative housing the sum of EUR 5,400.

3. Summary

234. Consequently, in respect of the destruction of the applicant's property, the Court awards a total sum of EUR 29,400 by way of compensation for pecuniary damage. It also awards the applicant a total sum of EUR 14,000, to be held for his sons' heirs, by way of compensation for pecuniary damage as a result of the violations of the Convention to which his sons' presumed deaths gave rise. These sums, totalling EUR 43,400, shall be converted into Turkish liras at the rate applicable at the date of the settlement.

B. Non-pecuniary damage

235. The applicant claimed GBP 50,000 in respect of non-pecuniary damage. He referred in this regard to the multiple and serious violations of the Convention which caused torment and suffering to him.

236. The Government disputed the factual basis of these claims and submitted that there was no causal link between the damage claimed and the alleged violations of the Convention. They therefore asked the Court not to accede to the applicant's claims.

237. The Court has found a violation of Articles 2, 5 and 13 of the Convention on account of the unacknowledged detention and presumed death of the applicants' sons in the hands of the security forces (see paragraphs 168, 191 and 201 above). Accordingly, it considers that an award of compensation should be made in favour of the İpek brothers given the gravity of the breaches in question. Thus, the Court awards the sum of EUR 10,000 each in respect of İkram and Servet İpek, these sums to be held by the applicant for his sons' heirs and to be converted into Turkish liras at the rate applicable at the date of payment.

238. Furthermore, the distress and anguish suffered by the applicant on account of the disappearance of his sons and the manner in which the authorities dealt with his complaints has been found to constitute a violation of Articles 3 and 13 in respect of the applicant (see paragraphs 183 and 201 above). In this connection, the Court considers that an award of compensation in his favour is also justified (see the above-cited judgments

of *Çiçek*, § 205; and *Orhan*, § 443). Accordingly, it awards the applicant the sum of EUR 8,000, to be converted into Turkish liras at the rate applicable at the date of payment.

239. The Court has also found that the destruction of the applicant's house and belongings constituted serious violations of Articles 13 of the Convention and Article 1 of Protocol No. 1 (see paragraphs 195 and 209 above). It therefore awards the applicant the sum of EUR 7,000, to be converted into Turkish liras at the rate applicable at the date of payment.

C. Costs and expenses

240. The applicant claimed a total of GBP 27,635.08 for fees and costs in the presentation of his case before the Convention institutions. This included administrative costs incurred between December 1999 and December 2002 (1) by his British representatives Professor William Bowring (GBP 500 for 5 hours' work) (2) by Mr Kerim Yıldız, Mr Philip Leach, Ms Anke Stock and others attached to the Kurdish Human Rights Project in London (GBP 6,149.99 for 61 hours' legal work, and GBP 858,33 for translations and summaries from English into Turkish and from Turkish into English); and (3) in respect of expenses such as telephone calls, postage, photocopying and stationery (GBP 285). The applicant also claimed GBP 6,000 for sixty hours' work carried out from December 1994 to December 1999. He noted that these fees had been incurred for the preparation of the case and clarification and analysis of evidence and other materials in connection with the applicant as well as researching issues of Turkish law in relation to the case and having translations made.

241. The Government submitted that the claims for costs and fees were excessive and unsubstantiated. They argued that no receipt or any other document had been produced by the applicant to prove his claims.

242. The Court reiterates that only legal costs and expenses necessarily and actually incurred can be reimbursed under Article 41 of the Convention. Furthermore, the amounts claimed must be reasonable as to quantum. It notes in this connection that the present case involved complex issues of fact and law requiring detailed examination, including the taking of evidence from witnesses in Ankara. However, the Court is not satisfied that in the instant case all the costs and expenses were necessarily and actually incurred. It notes that no details were given in respect of the fees allegedly incurred between from December 1994 to December 1999. Furthermore, as regards the work carried out from December 1999 to December 2002, it considers excessive the total number of hours of legal work (126 hours) charged. It finds that it has not been proved that all those legal costs were necessarily and reasonably incurred. Finally, the Court considers that claims for translations, summaries and administrative costs may be regarded as necessarily and actually incurred.

243. In the light of the foregoing, the Court awards the sum of EUR 13,130 exclusive of any value-added tax that may be chargeable and less the sum of EUR 1,050 received in legal aid from the Council of Europe, this amount to be converted into pounds sterling and paid into the applicant's representative's bank account in the United Kingdom as set out in his just satisfaction claim.

D. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 2 of the Convention on account of the presumed death of the applicant's two sons;

2. *Holds* that there has been a violation of Article 2 of the Convention on account of the domestic authorities' failure to carry out an adequate and effective investigation into the disappearance of the applicant's two sons and their subsequent presumed death;

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

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

5. *Holds* that there has been a violation of Article 1 of Protocol No. 1 to the Convention in respect of the applicant;

6. *Holds* that there has been a violation of Article 13 of the Convention in conjunction with Articles 2, 3 and 5 of the Convention together with Article 1 of Protocol No. 1 to the Convention in respect of the applicant and his two sons;

7. *Holds* that there has been no violation of Article 14 of the Convention in conjunction with Articles 2, 3 and 5 of the Convention together with Article 1 of Protocol No. 1 to the Convention in respect of the applicant and his two sons;

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

9. *Holds* that the Government have failed to fulfil their obligation under Article 38 § 1 (a) of the Convention;

10. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement and to be paid into the applicant's bank account in Turkey:

(i) EUR 7,000 (seven thousand euros) for each of the applicant's sons in respect of pecuniary damage, which amount to be held by the applicant for his two sons' heirs;

(ii) EUR 29,400 (twenty-nine thousand four hundred euros) in respect of pecuniary damage for the applicant;

(iii) EUR 15,000 (fifteen thousand euros) in respect of non-pecuniary damage for the applicant;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

11. *Holds*

(a) that the respondent State is to pay the applicant's representatives, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 13,130 (thirteen thousand one hundred and thirty euros), in respect of costs and expenses, exclusive of any value-added tax that may be chargeable, less EUR 1,050 (one thousand and fifty euros) granted by way of legal aid, to be converted into pounds sterling at the rate applicable at the date of settlement and paid into the representatives' sterling bank account in the United Kingdom;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 17 February 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

T.L. EARLY
Deputy Registrar

J.-P. COSTA
President