CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

CASE OF ÇELİKBİLEK v. TURKEY

(Application no. 27693/95)

JUDGMENT

STRASBOURG

31 May 2005

FINAL

31/08/2005

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

In the case of Çelikbilek v. Turkey,

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

Mr J.-P. COSTA, *President*,
Mr I. CABRAL BARRETO,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mr M. UGREKHELIDZE,
Mrs E. FURA-SANDSTRÖM, *judges*,
Mr F. GÖLCÜKLÜ, ad hoc *judge*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 10 May 2005,

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

PROCEDURE

1. The case originated in an application (no. 27693/95) against the Republic of Turkey lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Mr Abdurrahman Çelikbilek ("the applicant"), on 13 June 1995.

2. The applicant was represented by Dr Anke Stock, a lawyer practising in London. The Turkish Government ("the Government") did not designate an agent for the purposes of the proceedings before the Court.

3. The applicant alleged that his brother had been abducted and murdered by State officials in 1994. He invoked Articles 2, 3, 6 and 14 of the Convention.

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

5. The application was allocated to the 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. Mr Rıza Türmen, the judge elected in respect of Turkey, withdrew from sitting in the case (Rule 28). The Government accordingly appointed Professor Feyyaz Gölcüklü to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

6. By a decision of 22 June 1999, the Court declared the application admissible.

7. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The Chamber having decided, after consulting the

parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*), the parties replied in writing to each other's observations.

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

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant, a Turkish citizen of Kurdish origin, was born in 1951 and lives in Diyarbakır.

A. Introduction

10. The facts surrounding the killing of the applicant's brother, Abdulkadir Çelikbilek, are disputed by the parties.

11. The facts as presented by the applicant are set out in Section B below (see paragraphs 12-23). The Government's submissions concerning the facts are summarised in Section C below (see paragraphs 24-28). Documentary evidence submitted by the Government is summarised in Part D (see paragraphs 29-46 below).

B. The applicant's submissions on the facts

12. On 9 June 1994, the applicant's brother, Abdulkadir Çelikbilek, gave a statement to the Prosecutor at the Diyarbakır State Security Court (hereinafter "the Diyarbakır Court"). He stated that he had heard that a certain Ms Amber Yılmaz had fallen from the roof of a three-storey house in the course of a military operation conducted at about 9.30 p.m. on 8 June 1994. He had further heard that Ms Yılmaz' husband, Fethi Yaşar, had been a PKK member and that Mr Yaşar was currently serving a 36 year prison sentence for PKK[1] membership. He finally stated that he was not aware of any links between Ms Yılmaz and the PKK (see paragraph 30 below).

13. After having given this statement, Abdulkadir was followed on a number of occasions. In November 1994 Aynur Çelikbilek, the wife of Abdulkadir Çelikbilek, was visited by two policemen who asked her questions about her husband's whereabouts.

1 The Kurdistan Workers' Party

14. At about 11.00 a.m. on 14 December 1994, Abdulkadir went to the Esnaflar Café in the centre of Diyarbakır. About ten minutes after his arrival, a white Renault car with four plain-clothes policemen stopped in front of the café. It is common knowledge in south-east Turkey that this kind of car is used by plain-clothes police officers. Two policemen stayed in the car while the other two entered the café. The latter two policemen were the same as the ones who had previously questioned Aynur Çelikbilek about her husband's whereabouts. It was obvious that the two persons were policemen, as they were armed. Only members of the security forces could have entered a café in Diyarbakır carrying firearms. When the applicant's brother was leaving the café, the two policemen also left the café. Outside the café the two policemen took Abdulkadir by the arms and forced him into the waiting white Renault. This was seen by all the persons present in the café. The car left in the direction of the Diyarbakır Police Headquarters. Two persons, who were present in the café when the plain-clothes police officers took Abdulkadir away, told the applicant at a later stage about this incident and added that the persons who had abducted his brother were certainly police officers.

15. On 15 December 1994, the applicant went to the Diyarbakır Branch of the Human Rights Association in order to inform them of the incident. He was advised to file a petition with the office of the Prosecutor at the Diyarbakır Court. The applicant then went to the Diyarbakır Court to file a petition. However, the police at the door of the Court building told him that his brother's name was not on their list. The applicant returned to the Diyarbakır Court several times in the course of the following days and unsuccessfully tried to obtain information about his brother.

16. At around 7.30 a.m. on 21 December 1994, three police officers came to the applicant's home and told him that his brother had been wounded and admitted to the hospital. When the police officers took the applicant to their car, they told him that his brother's body had been found outside the Mardinkapı cemetery in Diyarbakır. The applicant went with the police officers to the place where his brother's body had been found. There, the police searched him. They took his petition which was addressed to the Prosecutor at the Diyarbakır Court from the pocket of his jacket. Despite his request, the police officers refused to give it back to him. The applicant is of the opinion that the police refused to return his petition in order to weaken any case he might bring against the Turkish authorities.

17. The body of the applicant's brother was lying on top of a rubbish heap near the Mardinkapı cemetery. Marks of torture could be seen all over his body. It looked as if the skin on the soles of his feet had been pulled off with pincers. His arms, legs and head looked as if they had been skewered on a thick skewer. His whole body was black and blue and there were marks on his throat.

18. After the police had shown the applicant the body of his brother, they took him in their car to his brother's house, where the police conducted a house search. During this search, the applicant heard on the police radio that the Prosecutor was about to go and see the body of his brother. The police interrupted their search in order to join the Prosecutor. They took the applicant with them. The Prosecutor did not put any questions to the applicant. The police recorded the location of the body and subsequently took the body to the State Hospital morgue. The applicant was also taken to the morgue in a police car. On the way to the morgue, a police officer in the car told the applicant that all the villagers of Tepecik would die on the streets in the same manner.

19. In the morgue, some other police officers told the applicant that village guards had burned the village of Tepecik and that these same village guards had probably killed his brother. The applicant replied that he did not believe that village guards had killed his brother and added that, if village guards had killed his brother, they must have been helped by the police. The police officers replied that Leyla, the daughter of the applicant's deceased brother, was of the opinion that the police had killed her father. When the applicant was asked whether he shared Leyla's opinion, he said that he did.

20. In the morgue, an autopsy of the body of the applicant's brother was conducted. The applicant asked the doctor about the marks around his brother's throat. The doctor told him that something must have been passed around his brother's neck after his death and that his body must have been dragged along by it. After the autopsy, the body was released for burial.

21. While the applicant was at the morgue, another group of police officers had returned to the house of the applicant's brother in order to finish the house search. These policemen told Leyla that her father had told the police that he had a package, which was likely to contain a firearm, and they asked her to give this package to them. According to the applicant, this question indicated that the security forces had in fact apprehended his brother and that they had interrogated, tortured and killed him. On the same day, a statement was taken from the applicant at the Mardinkapı Police Station (see paragraph 37 below).

22. Some time before the events at issue, the applicant's oldest son Fesih had joined the PKK. The applicant had managed to keep this a secret. However, ten days after the death of his brother, a person, who introduced himself as Cevat from the anti-terrorism branch of the police, came to the applicant's home. Cevat told the applicant that his son had joined the PKK and asked the applicant to inform the security forces when his son came home. The applicant thus became convinced that his brother must have told the security forces about Fesih while he was under torture.

23. In June 1996 the applicant was himself abducted by State agents while walking in the street in Diyarbakır. He was put in a car and prevented from seeing and speaking. He was taken into the countryside where State

agents wanted to shoot him but they then changed their minds and took the applicant to the rapid response force building in Diyarbakır where he was detained for a period of 31 days before being jailed for 14 months. While in detention he was threatened a number of times. The content of the threats was, "Do not follow your son's or your brother's way. If you do, we will kill you too". These threats made the applicant all the more convinced that the Government were directly responsible for the abduction and killing of his brother.

C. The Government's submissions on the facts

24. At around 7.30 a.m. on 21 December 1994, the Mardin Kapı Police Station was informed by passers-by that a person was lying near the Mardinkapı cemetery in Diyarbakır. Acting on that information, police officers found a body, with its hands tied behind its back. It was lying on top of a rubbish heap near the cemetery. The police found an identity card on the body in the name of Abdulkadir Çelikbilek.

25. After being informed by the police, the Prosecutor in charge, Mr Mehmet Tiftikçi, and Dr Lokman Yavuz arrived at the scene. Footprints were found which could not be analysed as they were indistinguishable. There were no traces of any fight. Wheel traces were examined but were found to have been made after the discovery of the body. After an incident report had been compiled and a sketch map had been drawn up showing the location of the body, the corpse was taken to the morgue.

26. On the basis of the identity card found on the body, the victim's family was contacted. The victim's brother, Abdurrahman Çelikbilek, was brought to the morgue where he identified the body as that of his brother Abdulkadir. Subsequently an autopsy was carried out.

27. According to their statements taken on 21 December 1994, the applicant and the victim's wife, Aynur, did not know who might have killed Abdulkadir. They stated that they had no enemies at all. The applicant further declared that, in so far as he knew, his brother had been detained for firearms trafficking after the *coup d'Etat* of 12 September 1980. The victim's widow also stated that she wished to file a complaint against the person or persons who had killed her husband. Her criminal complaint was formally registered on 28 December 1994.

28. The Prosecutor opened an investigation under file no. 1994/9249, which is currently still pending. The Prosecutor has requested the police authorities to keep him informed on a regular basis about this investigation.

D. Documentary evidence submitted by the Government

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

30. On 9 June 1994 a statement was taken from Abdulkadir Çelikbilek, the applicant's brother, by the Prosecutor at the Diyarbakır Court. Mr Çelikbilek stated that he had heard that a female by the name of Amber Yılmaz had fallen from the top of a three-storey building during a military operation which had taken place at 9.30 p.m. the previous day. He further stated that he had heard that Anbara's husband was serving a 36-year prison sentence because of his PKK membership. As far as he knew, Anbara was not a PKK member.

31. At 7.45 a.m. on 21 December 1994, a deputy police chief and a police officer drew up an on-site report. According to this report, a number of persons had informed the police at 7.30 a.m. the same morning that they had seen a person lying on the side of the road, near the Mardinkapı cemetery. When the police arrived at the scene, they found the frozen body of a male, lying on its right side between the road and the wall of the cemetery. It was lying at an approximate distance of 150-200 metres from the entrance to the cemetery. Its hands had been tied at the back with the belt of the coat the deceased was wearing. According to the identity card found on the body, the deceased was Abdulkadir Çelikbilek. No evidence was found at the scene.

32. It was recorded in a sketch, drawn up by a police officer at 9 a.m. the same day to show the location of the body, that the cause of death was strangulation.

33. According to another on-site report drawn up the same day, the duty Prosecutor and a pathologist attended to the body of the person, "who had been strangled by a length of wire". They observed a large number of footprints near the body. However, casts of these footprints were not made because there were too many of them and also because they were all mixed up. Similarly, no casts of the tyre marks observed near the body were made because it was concluded that these marks had been made by vehicles "which had nothing to do with the incident". There was no sign of a struggle at the scene and there was also no evidence capable of providing clues about the perpetrator(s) of the killing. It was also noted in this report that the body had already been photographed by the police. The Prosecutor ordered the transfer of the body to the morgue at the Diyarbakır State Hospital for an autopsy.

34. According to the autopsy report, the body was taken to the hospital at around 9.30 a.m. the same morning. The applicant was already at the hospital when his brother's body arrived. He identified his brother and stated that he had been missing for eight days, during which time the family had been unsuccessfully searching for him. He added that he did not know who might have killed his brother.

35. It was observed by the Prosecutor that rigor mortis had already set in. Also, a very large number of injuries and ecchymoses were observed on the face and on the trunk of the body. The doctor concluded that some of

these injuries had been caused three days previously and some of them between six to twelve days previously.

36. According to a full autopsy carried out by the doctor, the cause of death was established as mechanical asphyxiation and it was concluded that the killing had been intentional. Taking into account the fact that rigor mortis had already set in, the doctor concluded that the death had occurred approximately 10-15 hours earlier. At the end of the autopsy, the body was photographed once more. The Prosecutor issued a burial licence and instructed the police officers to carry out a comprehensive investigation.

37. Also on 21 December 1994, at 3.30 p.m., a statement was taken from the applicant by the police chief at the Mardinkapı police station. The applicant stated that his brother had not returned to his house in the evening of 14 December 1994. The following day he had gone to the café which his brother used to frequent and asked the people there whether they had seen him. He was told by the people there that four persons had come into the café the previous day and gone straight up to Abdulkadir who had been sitting in the café. The four men and Abdulkadir had then left the café together and got into a white Renault estate car and driven away. The number plate of the car had not been "obvious". The applicant stated that he did not know to what extent this sequence of events, which had been relayed to him by the people in the café, represented the truth. He also stated that he had tried to submit a petition to the Prosecutor at the Diyarbakır Court but that it was not accepted. He added that he did not suspect anyone in particular and that the family did not have any enemies. He finally stated that his brother had served a prison sentence after 1980 for an arms dealing offence.

38. On the same day, the police chief at the Mardinkapı police station took a statement from Aynur Çelikbilek, the widow of the applicant's deceased brother Abdulkadir. Mrs Çelikbilek stated that her husband had left their family home at around 11 a.m. on 14 December 1994. When he had failed to return home in the evening, she had informed her brother-in-law, the applicant, and asked him to make the necessary enquiries in order to find her husband. Despite all their efforts, they had not been able to find her husband. She did not suspect anyone in particular and the family did not have any enemies. She had been told by the applicant that her husband had been taken away from the café in a white Renault car. She asked the Prosecutor to prosecute the persons who killed her husband.

39. Finally, on 21 December 1994 the police chief of the Mardinkapı police station forwarded to the Diyarbakır Police Headquarters his report in which he informed the latter about the body found in his area. He also appended to his report the two statements (see paragraph 37-38 above), the on-site reports and the sketch prepared the same morning (see paragraphs 31-33 above).

40. It appears that this report and its appendices were transferred to the Prosecutor's office in Diyarbakır who opened an investigation into the killing the same day. The investigation was given the number 1994/9249.

41. On 23 December 1994 the Prosecutor instructed the Diyarbakır Police Headquarters to search for the perpetrator(s) of the killing.

42. On 6 January 1995 the Prosecutor repeated his instructions to the Diyarbakır Police Headquarters and asked to be kept informed every three months of any possible developments until the expiry of the statutory limitation period on 20 December 2014. The Prosecutor repeated his instructions to the Diyarbakır Police Headquarters on 1 January 1996, 28 February 1996 and 29 March 1996.

43. On 20 June 1996 the General Security Headquarters in Ankara sent a letter to the Ministry of Foreign Affairs in an apparent response to a request made by the latter on 10 June 1996, pursuant to which the former had been asked to "forward to the Ministry of Foreign Affairs the criminal records showing that the deceased brother of Abdurrahman Çelikbilek, who had made an application to the European Commission of Human Rights, had been involved in counterfeit and drugs dealing". According to the letter sent to the Ministry of Foreign Affairs, Abdulkadir Çelikbilek had been prosecuted in 1985 and 1986 for drug dealing and counterfeit offences and imprisoned.

44. On 1 December 1996 the Diyarbakır Prosecutor's office was informed by the chief of the Mardinkapı police station that they had been searching for the perpetrators of the killing but had not yet managed to find them.

45. On 6 December 1996 a police officer reported to the Mardinkapı police station that he had searched for the perpetrators of the killing but could not find them.

46. The Prosecutor in Diyarbakır repeated his instructions to the Diyarbakır Police Headquarters on 6 December 1996, 6 January 1997, 13 August 1997 and, finally, on 15 March 1999.

II. RELEVANT DOMESTIC LAW AND PRACTICE

47. The relevant domestic law and practice are set out in the judgment of *Tepe v. Turkey* (no. 27244/95, §§115-122, 9 May 2003).

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

48. The Court recalls that, in its decision of 22 June 1999, it considered that the question whether the criminal investigation at issue could be regarded as effective under the Convention was closely linked to the substance of the applicant's complaints and that it should be joined to the merits. Noting the arguments presented by the parties on this question, the Court considers it appropriate to address this point in its examination of the substance of the applicant's complaint under Article 2 of the Convention (see paragraphs 79-94 below).

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

A. Arguments of the parties

1. The applicant

49. The applicant submitted that there was sufficient evidence for the Court to conclude beyond reasonable doubt that his brother had been intentionally killed by the police. The applicant drew the Court's attention to the domestic authorities' failure to carry out a proper investigation and also to the Government's failure to produce certain key documents requested by the Court. These failures, in the opinion of the applicant, pointed to a cover-up to protect the identity of the killers.

50. The applicant argued that, in case the Court was not satisfied beyond reasonable doubt that his brother had been killed in police custody, this had to be considered established on the balance of probabilities, which, he suggested, was the appropriate test in cases of deaths in custody. The duties and resources of the authorities were such that they alone, and not the family of his brother, were in a position to obtain evidence of the cause of his death. The family was reliant upon the authorities to carry out an effective investigation. However, the investigation had been utterly inadequate and therefore, as a result of the failings of the responsible authorities, the family were not in a position to produce further evidence.

2. The Government

51. The Government submitted that there was no evidence that Abdulkadir Çelikbilek was killed by members of the security forces. In

support of their submissions, the Government argued that there were serious contradictions between the statements given by the applicant to the Prosecutor and the allegations he had made in his application form submitted to the European Commission of Human Rights. In particular, the applicant had never brought to the attention of the Prosecutor the allegations set out in the application form. The authorities only became aware of those allegations when the Commission gave notice of the application to the Government.

52. Furthermore, the information allegedly received by the applicant from the people in the café was second hand and could not be taken as conclusive. When the applicant went to apply to the Diyarbakır Court, he was informed there that his brother had not been detained.

53. The criminal record of the applicant's brother disclosed that several criminal investigations had been opened against him in the past for narcotics and counterfeit offences. On 5 November 1986, he had been arrested and detained in relation to his alleged involvement in the setting up of a drug-trafficking organisation and the possession of heroin. It was possible, therefore, that the killing of the applicant's brother had resulted from a mafia-type vendetta.

54. The Government further submitted that, according to information supplied by the Ministry of the Interior, investigations had been opened against the applicant himself for membership of the PKK, and that it had been established that his son, Fetih, was an active member of that organisation.

55. Moreover, the applicant had been questioned and detained on remand in the course of an operation conducted against the PKK in 1996. Criminal proceedings had been brought against him for membership of the PKK. The Diyarbakır Court had ordered his detention during those proceedings.

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

56. Before proceeding to assess the evidence, the Court reiterates that it is of the utmost importance for the effective operation of the system of individual petition instituted under Article 34 of the Convention that States should furnish all necessary facilities to make possible a proper and effective examination of applications (see *Tanrıkulu v. Turkey* [GC], no. 23763/94, § 70, ECHR 1999–IV). It is inherent in proceedings relating to cases of this nature, where an individual applicant accuses State agents of violating his rights under the Convention, that in certain instances solely the respondent Government have access to information capable of corroborating or refuting these allegations. A failure on a Government's part to submit such information which is in their hands without a satisfactory explanation may not only give rise to the drawing of inferences as to the

well-foundedness of the applicant's allegations, but may also reflect negatively on the level of compliance by a respondent State with its obligations under Article 38 § 1 (a) of the Convention (see *Timurtaş v. Turkey*, no. 23531/94, §§ 66 and 70, ECHR 2000-VI).

57. In this context, the Court has noted with concern a number of matters relating to the Government's response to the Court's requests for documents and information. Apart from individual requests for specific documents, the Government were also requested on a number of occasions to submit the entire investigation file.

58. As regards the domestic investigation file, the Court observes that the Government were requested by the Court on 2 July 1999 to submit the entire investigation file. In reply, the Government sent to the Court "a number of documents from the file, requested by the Court, which had not been enclosed with their observations". The Court then asked the Government to confirm whether the documents submitted by them to date constituted the full and complete case file on the investigation of the death of the applicant's brother. No reply to this question has ever been received.

59. In any event, the Court observes that the documents submitted by the Government do not constitute the entire investigation file. It appears from the documents summarised above that a number of documents from the domestic investigation file were sent neither to the Commission nor to the Court.

60. First, the above mentioned on-site report of 21 December 1994 and also the full autopsy report made it clear (see paragraphs 33 and 36 above) that the body of the applicant's brother had been photographed both at the place where it was found and also during the autopsy. None of these photographs was submitted to the Convention bodies.

61. Secondly, the letter sent to the General Security Headquarters in Ankara by the Ministry of Foreign Affairs on 10 June 1996 (see paragraph 43 above), inquiring about the past criminal activities of the applicant's deceased brother, was not submitted to the Convention bodies.

62. Finally and more importantly, the Court observes that on 2 July 1999 the Government were specifically requested by the Court to submit to it the records of all the detention facilities in the Diyarbakır district for December 1994. Despite a subsequent reminder by the Court on 17 September 1999 to submit these custody records, the Government did not do so. However, in their observations submitted to the Court on 23 February 2000 the Government stated that, pursuant to the Court's request of 17 September 1999, the competent authorities had examined the custody records of the places of detention in Diyarbakır and established that Abdulkadir Çelikbilek had not been detained in December 1994. The Government did not, however, append the custody records to their observations.

63. The Court observes that the Government have not advanced any explanation for their omissions in response to the Court's requests for

relevant documents and information. Accordingly, it finds that it can draw inferences from the Government's conduct in this respect. Furthermore, and referring to the importance of a respondent Government's cooperation in Convention proceedings (see paragraph 56 above), the Court finds that the Government have fallen 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.

C. The Court's evaluation of the facts

64. The applicant maintained that his brother was taken away by plain clothes police officers on 14 December 1994 and was subsequently killed by them.

65. The Government denied the involvement of any State agents in the kidnap and subsequent killing of the applicant's brother, and argued that the killing had resulted from a mafia-type vendetta.

66. In assessing evidence, the Court has generally applied the standard of proof "beyond reasonable doubt" (see *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, pp. 64-65, § 161). Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. 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 custody, strong presumptions of fact will arise in respect of injuries and death occurring during such detention. Indeed, in that case the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (see *Salman v. Turkey* [GC], no. 21986/93, ECHR 2000-VII, § 100).

67. The Court has already noted the Government's failure to submit to the Court the relevant custody records (see paragraph 62 above). In the Court's opinion, these records would have been crucial in the verification of the accuracy of the applicant's allegations (cf. *Tepe* case, cited above, §§ 48 and 163).

68. The Court further points out that the Government have not submitted any information or documents which would suggest that the custody records were brought to the attention of the investigating authorities. In particular, there is no evidence to suggest that these reports were consulted by either the police officer who informed the applicant at the Diyarbakır Court that his brother had not been detained by the police (see paragraphs 15 and 52 above), or by the Prosecutor in charge of the investigation (see paragraph 40 above). In these circumstances, neither the applicant, nor indeed the Convention institutions, had any means of access to these documents without the Government's cooperation.

69. The Court considers that, in order to prove his allegations, the applicant has done everything that could reasonably and realistically be expected of him. In the circumstances of the present case, the Court finds it inappropriate to conclude that the applicant has failed to submit sufficient evidence in support of his allegations, given that such evidence was in the hands of the respondent Government. At this stage the Court would once more reiterate (see paragraph 56 above) that, where it is solely the respondent Government who have access to information capable of corroborating or refuting allegations made by an individual applicant, a failure on that Government's part – without a satisfactory explanation – to submit such information may give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations.

70. It is appropriate, therefore, that in cases such as the present – where it is the non-disclosure by the Government of crucial documents in their exclusive possession which puts obstacles in the way of the Court's establishment of the facts –, it is for the Government to argue conclusively why the documents in question cannot serve to corroborate the allegation made by the applicant (see *Akkum and Others v. Turkey*, no. 21894/93, § 211, 24 March 2005).

71. The Court observes in this regard the Government's submission that the competent authorities examined the relevant custody records at some stage between 17 September 1999 and 23 February 2000, and established that Abdulkadir Çelikbilek had not been taken into detention in December 1994. However, the Court would stress that the evaluation of the evidence and the establishment of the facts is a matter for the Court, and it is for the Court to decide on the evidential value of the documents submitted to it. The fact remains that the Government, despite having been given ample opportunity to do so, failed to submit the custody records and also failed to explain their refusal to comply with the Court's requests.

72. In the light of the foregoing, the Court finds that the Government's submission that the custody records were examined by their authorities is insufficient to consider them discharged of their above mentioned burden of proving that the custody records in question cannot serve to corroborate the allegation made by the applicant. It can only conclude, therefore, that the applicant's brother was indeed arrested and detained by agents of the State, as alleged by the applicant. It follows that the Government's obligation is engaged to explain how Abdulkadir Çelikbilek was killed while still in the hands of State agents. Given that no such explanation has been put forward by the Government, the Court concludes that the Government have failed to account for the killing of Abdulkadir Çelikbilek.

III. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

73. Article 2 of the Convention provides as follows:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

A. The killing of Abdulkadir Çelikbilek

1. Submissions of the parties

74. The applicant submitted that his brother had been killed by agents of the State, in violation of Article 2 of the Convention.

75. The Government denied the allegation.

2. The Court's assessment

76. 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 a 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 (see *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, Series A no. 324, pp. 45-46, §§ 146-147).

77. The text of Article 2, read as a whole, demonstrates that it covers not only intentional killing but also the situations where it is permitted to "use force" which may result, as an unintended outcome, in the deprivation of life. The deliberate or intended use of lethal force is only one factor, however, to be taken into account in assessing its necessity. Any use of force must be no more than "absolutely necessary" for the achievement of one or more of the purposes set out in sub-paragraphs (a) to (c). This term

indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is "necessary in a democratic society" under paragraphs 2 of Articles 8 to 11 of the Convention. Consequently, the force used must be strictly proportionate to the achievement of the permitted aims (ibid., p. 46, §§ 148-149).

78. 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. The use of force by State agents in pursuit of one of the aims delineated in paragraph 2 of Article 2 may be justified where it is based on an honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken (ibid., pp.58-59, § 200).

79. The Court has already established that the Government have failed to account for the death of Abdulkadir Çelikbilek (see paragraph 71 above). It follows that there has been a violation of Article 2 of the Convention in respect of the killing of Abdulkadir Çelikbilek.

B. Alleged inadequacy of the investigation

80. The applicant submitted that there had been a violation of Article 2 of the Convention on account of the authorities' failure to carry out an adequate and effective investigation into the killing of his brother. The applicant identified, *inter alia*, the following shortcomings in the investigation:

(a) there was a failure to preserve the scene where the body was found, notably in relation to footprints and car-tyre marks, samples of which by the Government's own admission were not taken;

(b) there was no evidence of any tests for fingerprints having been carried out, despite the finding that the victim was strangled;

(c) the Prosecutor failed to take statements from the owner and the customers of the café, from local residents, from the officers in charge of the police establishments in the vicinity of Diyarbakır and the members of the public who informed the police on 21 November 1994 when the body was found;

(d) the photographs of the body and also the records of the detention places in the district of Diyarbakır have never been disclosed to the applicant; and, finally,

(e) the length of time taken to investigate the killing.

81. The Government submitted that no evidence was found next to the body of Abdulkadir Çelikbilek capable of shedding light on the perpetrators of the killing. The Prosecutor instigated an investigation by carrying out an autopsy and by questioning the wife and the brother of the deceased man.

This investigation would continue until 20 December 2014 and the Prosecutor would be kept informed, every three months, of any possible developments in the investigation.

82. The Court reiterates that the obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see, *mutatis mutandis*, *McCann and Others*, cited above, § 161; see also *Kaya v. Turkey*, judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I, § 105). In that connection, the Court points out that this obligation is not confined to cases where it is apparent that the killing was caused by an agent of the State (see *Salman,* cited above, § 105).

83. The Court observes at the outset that the applicant submitted that he had gone to the office of the Prosecutor at the Diyarbakır Court on 15 December 1994 in order to file a petition but that the policeman at the door of the Court building had told him that his brother's name was not on their list (see paragraph 15 above). The Court also observes that the applicant gave a statement to this effect before the Prosecutor on 21 December 1994 (see paragraph 37 above).

84. The applicant's submission that he had gone to the Diyarbakır Court was largely confirmed by the respondent Government when they submitted that the applicant had applied to the Diyarbakır Court where he had been informed by police officers that his brother had not been detained.

85. The Government's claim, to the effect that the applicant never brought the allegation of his brother having been detained by police officers to the attention of the investigating authorities (see paragraph 51 above), therefore sits ill with their above concession that the applicant was in fact told at the Diyarbakır Court that his brother had not been detained (see paragraph 52 above). Such an answer could only have been given in response to an inquiry whether a person had been detained by the police.

86. According to Article 153 of the Code of Criminal Procedure in force at the time of the events, a public prosecutor who is informed by any means whatsoever of a situation that gives rise to the suspicion that an offence has been committed is obliged to investigate the facts in order to decide whether or not there should be a prosecution. Furthermore, Article 179 of the Criminal Code in force at the time of the events made it an offence to deprive an individual unlawfully of his or her liberty. The Court finds it established that the applicant promptly and adequately informed the competent judicial authorities. It follows that, from that moment, these authorities had a duty to carry out an effective investigation into the disappearance of Abdulkadir Çelikbilek.

87. No documents were submitted by the Government to indicate that steps were taken by these authorities in the crucial days immediately after the disappearance. In particular, as the applicant pointed out, there were no documents to indicate that either the owner or customers of the café or any members of the police were questioned by the Prosecutor. Furthermore, there is no evidence showing that the relevant custody records were examined by the Prosecutor to verify the accuracy of the allegations. Similarly, no statements were taken from the applicant or from his brother's wife.

88. The Court concludes that the investigating authorities remained completely inactive in the course of those crucial days, during a period in which a large number of persons were being killed in the south-east region of Turkey.

89. As regards the investigation into the killing of the applicant's brother, the Court finds that the discovery of Abdulkadir Çelikbilek's body gave rise *ipso facto* to an obligation under Article 2 of the Convention to carry out an effective investigation into the circumstances surrounding the death (see mutatis mutandis, *Ergi v. Turkey*, judgment of 28 July 1998, *Reports* 1998-IV § 82; *Yaşa v. Turkey*, judgment of 2 September 1998, *Reports* 1998-VI § 100).

90. It appears from the on-site reports (see paragraphs 31-33 above) that there was no meaningful examination of the scene where the body was found. In this regards the Court refers to the defects and omissions as emphasised by the applicant (see paragraph 79 above).

91. Furthermore, although it was stated in the on-site report, drawn up in the presence of the local Prosecutor, that Abdulkadir Çelikbilek had been strangled by a length of wire, the Government have provided no information from which it can be deduced that a search for this wire or any other related evidence was carried out, such as forensic tests for finger prints or DNA.

92. As regards the subsequent investigation carried out by the Prosecutor, the Court observes that no meaningful steps were taken, according to the documents submitted to the Convention bodies. The investigation consisted of, and was limited to, the autopsy and the taking of statements from the applicant and the wife of the deceased.

93. The Court notes that the investigation will be ongoing until the expiry of the statutory limitation period in 2014. However, so far, this part of the investigation seems to have been limited to a number of letters exchanged between the Prosecutor and the police, with the latter regularly stating, in standard terms, that they are still searching for the perpetrators (see paragraphs 41-42 and 44-46 above). In the absence of any information in these letters about the actual steps which have been or are being taken, the Court finds that they cannot be taken as proof of any meaningful investigation.

94. In the light of the very serious shortcomings identified above, the Court concludes that the domestic authorities have failed to carry out an adequate or effective investigation into the killing of the applicant's brother, as required by Article 2 of the Convention.

95. It accordingly dismisses the Government's preliminary objection based on non-exhaustion of domestic remedies (see paragraph 48 above) and holds that there has been a violation of Article 2 of the Convention under its procedural limb.

IV. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

96. The applicant complained under Article 3 of the Convention that the abduction and murder of his brother, and the indifference displayed by the authorities, have caused him grief and torment amounting to inhuman treatment. Article 3 of the Convention provides as follows:

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

97. The Government, beyond denying the factual basis of the applicant's allegations, did not specifically deal with the complaint under Article 3 of the Convention.

98. While the Court does not doubt that the death of his brother caused the applicant profound suffering, it nevertheless finds no basis for finding a violation of Article 3 in this context (see, *a contrario,* disappearance cases; *Tanlı v. Turkey*, no. 26129/95, § 159, ECHR 2001-III (extracts)).

99. Consequently, the Court concludes that there has been no violation of Article 3 of the Convention.

V. ALLEGED VIOLATIONS OF ARTICLES 6 AND 13 OF THE CONVENTION

100. The applicant complained under Article 6 of the Convention that, as a result of the inadequate criminal investigation into the murder of his brother, he had no access to court to bring civil proceedings against the perpetrators who have remained unidentified.

101. In his observations submitted to the Commission and subsequently to the Court, the applicant argued that the failures in the investigation also constituted a violation of Article 13 of the Convention.

102. The Government did not specifically comment on the applicant's submissions.

103. The Court observes at the outset that the applicant did not invoke Article 13 of the Convention in his application form; this Article was invoked for the first time in the applicant's observations of 27 November 1996.

104. However, the Court recalls that since it is the master of the characterisation to be given in law to the facts of a case, it does not consider itself bound by the characterisation given by an applicant, a government or the Commission. By virtue of the *jura novit curia* principle, it has, for example, considered of its own motion complaints under Articles or paragraphs not relied on by those appearing before it. A complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on (see *Guerra and Others v. Italy*, judgment of 19 February 1998, *Reports* 1998-I, § 44; *Powell and Rayner v. the United Kingdom* judgment of 21 February 1990, Series A no. 172, p. 13, § 29; see also *Assenov and others v. Bulgaria*, judgment of 28 October 1998, *Reports* 1998-VIII, § 132).

105. In any event, the Court observes that it has examined similar complaints under Article 13 of the Convention instead of Article 6 because it held that such grievances were inextricably bound up with the applicants' more general complaints concerning the manner in which the authorities had conducted investigations. Article 13 was deemed to be the pertinent provision, particularly as a violation of Article 2 of the Convention cannot be remedied exclusively through an award of compensation to the relatives of the victim (see, *mutatis mutandis*, *Kaya*, cited above, §§ 104-105).

106. In the present case the Court notes that the applicant's complaint is entirely directed against the investigation carried out by the Prosecutor into the killing of his brother, and that he did not attempt to bring any civil proceedings himself. The complaint is therefore to be examined under Article 13 of the Convention alone, which provides as follows:

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

107. The Court reiterates that Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State (see *Aksoy v. Turkey*, judgment of 18 December 1996, *Reports* 1996-VI, p. 2286, § 95; *Aydın v. Turkey*, judgment of 25 September 1997, *Reports* 1997-VI, pp. 1895-96, § 103; *Kaya*, cited above, § 106).

108. Given the fundamental importance of the right to life, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life, including effective access for the complainant to the investigation procedure (see *Kaya*, cited above, § 107).

109. On the basis of the evidence adduced in the present case, the Court has found that the respondent State is responsible under Article 2 of the Convention for the death of the applicant's brother. The applicant's complaints in this regard are therefore "arguable" for the purposes of Article 13 (see *Salman*, cited above, § 122, and the authorities cited therein).

110. The authorities thus had an obligation to carry out an effective investigation into the circumstances of the death of the applicant's brother. For the reasons set out above (see paragraphs 86-93), no effective criminal investigation can be considered to have been conducted in accordance with Article 13, the requirements of which may be broader than the obligation to investigate imposed by Article 2 (see *Kaya*, cited above, § 107). The Court finds, therefore, that the applicant has been denied an effective remedy in respect of the death of his brother, and has thereby been denied access to any other available remedies at his disposal, including a claim for compensation.

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

VI. ALLEGED VIOLATION OF ARTICLE 14 IN CONJUNCTION WITH ARTICLES 2, 3 AND 6 OF THE CONVENTION

112. The applicant maintained that, because of their Kurdish origin, he and his deceased brother had been subjected to discrimination in breach of Article 14 of the Convention, in conjunction with Articles 2, 3 and 6 of the Convention. Article 14 provides as follows:

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

113. The Court notes its findings of a violation of Articles 2 and 13 of the Convention and does not consider that it is necessary also to consider these complaints in conjunction with Article 14 of the Convention.

VII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

114. Article 41 of the Convention provides:

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

A. Pecuniary damage

115. The applicant submitted that his deceased brother, who was 38 years old at the time of his death, was married with one-year old twin daughters. He worked as a broker between sellers and buyers at the cattle market in Diyarbakır, earning 6,672.88 pounds sterling (GBP) per year. Taking into account the average life expectancy in Turkey at the time, the applicant calculated his brother's total loss of earnings as GBP 111,437.09 on the basis of the actuarial tables. The applicant also claimed the sum of GBP 12,710.28 in respect of the expenses he had incurred in educating his brother's twins.

116. The Government submitted that no compensation should be awarded to the applicant as he had failed to prove his allegations. They also disputed the applicability of the actuarial tables used by the applicant which were designed for use in the United Kingdom. The Government finally argued that the amounts awarded by the Court should not lead to unjust enrichment.

117. As regards the applicant's claim for loss of earnings, the Court's case-law has established that there must be a clear causal connection between the damage claimed by the applicant and the violation of the Convention, and that this may, in appropriate cases, include compensation in respect of loss of earnings (see, among other authorities, *Barberà, Messegué and Jabardo v. Spain* (Article 50), judgment of 13 June 1994, Series A no. 285-C, pp. 57-58, §§ 16-20).

118. The Court notes the family situation and age of the applicant's deceased brother Abdulkadir Çelikbilek. The Court also recalls its finding that the authorities were liable under Article 2 of the Convention for the death (see paragraph 78 above). In these circumstances, there was a direct causal link between the violation of Article 2 and the loss suffered by Abdulkadir Çelikbilek's family of the financial support provided by him.

119. In the light of the foregoing the Court, deciding on an equitable basis, awards the applicant the sum of 60,000 euros (EUR), to be held by him for the widow and children of Abdulkadir Çelikbilek.

B. Non-pecuniary damage

120. The applicant claimed the sum of GBP 40,000 in relation to the killing of his brother and the sum of GBP 10,000 for himself in relation to the violations of Article 3 and 13 of the Convention.

121. The Government submitted that no compensation should be awarded to the applicant as he had failed to prove his allegations.

122. The Court observes that it has found that the authorities were accountable for the death of Abdulkadir Çelikbilek. In addition to the violation of Article 2 in that respect, it has further found that the authorities failed to provide an effective investigation and remedy in respect of that violation, contrary to the procedural obligation under Article 2 of the Convention and in breach of Article 13 of the Convention. In these circumstances, and having regard to the awards made in comparable cases, the Court, on an equitable basis, awards the applicant the sum of EUR 20,000 for non-pecuniary damage, to be held by him for the widow and children of Abdulkadir Çelikbilek. It also awards the applicant the sum of EUR 3,500 for the non-pecuniary damage sustained by him in his personal capacity.

C. Costs and expenses

123. The applicant claimed a total of GBP 11,966.90 for the fees and costs incurred in bringing the application. His claim comprised:

(a) GBP 3,080 for the fees of his United Kingdom-based lawyers;

(b) GBP 2,970 for the fees of his lawyers based in Turkey;

(c) GBP 510 for translation costs incurred by the United Kingdom-based lawyers;

(d) GBP 156.90 for administrative costs incurred by the United Kingdom-based lawyers;

(e) GBP 950 for administrative costs incurred by the lawyers based in Turkey;

(f) GBP 2,500 for the legal and administrative fees of the staff employed by the Kurdish Human Rights Project (KHRP);

(g) GBP 375 for administrative costs incurred by the KHRP; and, finally,

(h) GBP 1,425 for translation costs incurred by the KHRP.

124. The Government argued that the fees claimed by the applicant were excessive and fictitious. Moreover, the Government considered that no documentary substantiation of the costs allegedly incurred had been provided.

125. Making its own estimate based on the information available, the Court awards the applicant EUR 8,000, in respect of costs and expenses – exclusive of any value-added tax that may be chargeable – the net award to

be paid in pounds sterling into the bank account of the applicant's representative in the United Kingdom, as was requested and identified by the applicant.

D. Default interest

126. 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. *Dismisses* the Government's preliminary objection;

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

3. *Holds* that the Government are liable for the death of the applicant's brother in violation of Article 2 of the Convention;

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

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

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

7. *Holds* that it is unnecessary to determine whether there has been a violation of Article 14 of the Convention in conjunction with Articles 2, 3 and 6 of the Convention;

8. *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, EUR 60,000 (sixty thousand euros) and any tax that may be chargeable on this amount, in respect of pecuniary damage; this sum is to be converted into new Turkish liras at the rate applicable at the date of settlement and held by the applicant for the widow and children of Abdulkadir Çelikbilek;

(b) that the respondent State is to pay the applicant in respect of non-pecuniary damage, within the aforementioned three month period, the following sums, to be converted into new Turkish liras at the rate applicable at the date of settlement:

(i) EUR 20,000 (twenty thousand euros) to be held for the widow and children of Abdulkadir Çelikbilek;

(ii) EUR 3,500 (three thousand five hundred euros) in his personal capacity; and

(iii) any tax that may be chargeable on the above amounts;

(c) that the respondent State is to pay the applicant, within the same three month period, and into the bank account identified by him in the United Kingdom, EUR 8,000 (eight thousand euros) in respect of costs and expenses, together with any value-added tax that may be chargeable, to be converted into pounds sterling at the rate applicable at the date of settlement;

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

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

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

S. DOLLÉ
Registrar

J.-P. COSTA
President

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

J.-P.C.
S.D.

PARTLY CONCURRING OPINION OF JUDGE COSTA

I am in agreement with the conclusions of the judgment. On one point, however, I found it difficult to agree with my colleagues, since the case-law is, in my opinion, harsh and open to change. I refer to the applicant's allegation that his brother's abduction and death, and the indifference displayed by the authorities, had caused him grief and torment amounting to inhuman treatment. The Court dismissed this complaint.

The case-law is indeed full of nuances, and only rarely accepts that a family member of a victim is himself or herself the victim of a violation of Article 3 of the Convention. It accepted such a complaint, for instance, in the case of *Kurt v. Turkey* (judgment of 25 May 1998, *Reports of Judgments and Decisions* 1998-III), where the mother of an arrested person, who was present at the moment of arrest and was left without news of him (the prosecutor having not even examined her complaint), was considered to be the victim of a violation of Article 3 in her own right, on account of the prolonged anxiety that she had suffered.

In contrast, in the case of *Çakici v. Turkey* (no. 23657/94, ECHR 1999-IV), the Court did not accept that the applicant had been the victim of a violation of Article 3, since he had not been present when the security forces had taken his brother, had not personally borne the brunt of making petitions and enquiries to the authorities, and there had not been any aggravating features arising from the response of the authorities (see *Çakici,* § 99). I note that the Commission, by a very large majority, had expressed the opposite view.

In this case, the applicant, the victim's brother, was not present during the latter's abduction by the police, which was witnessed by several others. However, he himself took numerous steps, particularly in contacting the prosecutor and the court. A week after the abduction, alerted by the police, he saw his brother's corpse, which showed particularly horrible signs of torture. In addition, the present judgment finds that the Government were responsible for the death and that their authorities failed to carry out an effective investigation into the circumstances of the murder (a two-fold violation of Article 2).

In those circumstances, one could have argued that the applicant's sufferings in the present case amounted to inhuman treatment.

I have not gone that far, for two reasons. Firstly, the distress arising from a lengthy disappearance, which, incidentally, prevents a family from going through what is known as the grieving process, is probably more inhuman than rapid discovery of a murder, although grief itself may give rise to very great suffering. Secondly, the case-law takes account of the proximity of the family tie and attaches greater weight to the parent-child bond than to the sibling bond (see *Çakici*, § 98). Nonetheless, I remain very hesitant in the present case.