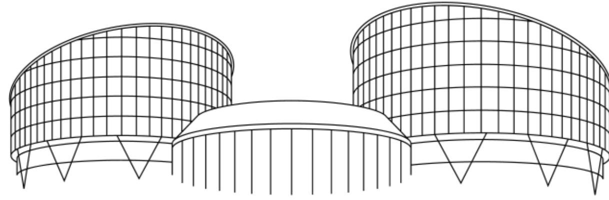

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF ER AND OTHERS v. TURKEY

(Application no. 23016/04)

JUDGMENT

STRASBOURG

31 July 2012

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 Er and Others v. Turkey,

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

Françoise Tulkens, *President,*
Danutė Jočienė,
Dragoljub Popović,
Isabelle Berro-Lefèvre,
András Sajó,
Işıl Karakaş,
Guido Raimondi, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 3 July 2012,

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

PROCEDURE

1. The case originated in an application (no. 23016/04) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by nine Turkish nationals, Mr Mehmet Er, Ms Gülşen Er, Mr İslam Er, Mr Adnan Er, Mr Hızır Er, Ms Hatice Er, Ms Belkısa Er, Mr Ali Er and Ms Mumi Er (“the applicants”), on 16 May 2004.

2. The applicants were represented by Mr Mikail Demiroğlu, a lawyer practising in Hakkari. The Turkish Government (“the Government”) were represented by their Agent.

3. The applicants alleged, in particular, that following his detention by gendarmerie soldiers their relative Ahmet Er had disappeared in circumstances engaging the responsibility of the respondent State under Articles 2, 3, 5, and 13 of the Convention.

4. On 26 February 2008 the Court decided to give notice of the application to the Government. It also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1980, 1974, 1978, 1984, 1989, 1990, 1994, 1954 and 1953 respectively and live in Hakkari. The first seven

applicants are the children of Mr Ahmet Er, who disappeared in July 1995, and the remaining two applicants are his siblings. At the time of his disappearance Ahmet Er was 44 years old.

A. Introduction

6. The facts of the case are disputed by the parties. The facts as presented by the applicants are set out in Section B below. The Government's submissions concerning the facts are summarised in Section C below. The documentary evidence submitted by the applicants and the Government is summarised in Section D.

B. The applicants' submissions on the facts

7. On 14 July 1995 an armed clash took place between members of the PKK[1] and members of the security forces in Kurudere village, which is located within the administrative jurisdiction of the town of Çukurca in south-east Turkey. After the operation the soldiers took the applicants' relative Ahmet Er and an elderly relative by the name of Hacı Mehrap Er from the village of Kurudere to the nearby Işıklı gendarmerie station.

8. The same day the applicants informed the prosecutor in Çukurca of the incident.

9. Hacı Mehrap Er was released on 15 July 1995 but nothing further was heard from Ahmet Er.

C. The Government's submissions on the facts

10. The Government submitted that Ahmet Er had not been taken into custody. He had assisted soldiers in searching for landmines planted in the area by terrorists and had been released following the soldiers' return to their barracks.

11. An effective investigation carried out by the judicial authorities had shown that following his release Ahmet Er had joined the terrorists in northern Iraq.

D. Documentary evidence submitted by the parties

12. The following information emerges from the documents submitted by the parties.

13. On 14 July 1995 Mr Ali Er, who is the brother of Ahmet Er and one of the applicants, informed the prosecutor in Çukurca in writing about the

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[1] The Kurdistan Workers' Party, an illegal organisation.

disappearance of his brother. He also stated that the family feared for Ahmet Er's life, and asked for the prosecutor's help.

14. On 16 July 1995 the Çukurca prosecutor recorded in a report that he had had a telephone conversation with Major C.Y. of the Çukurca Commando Headquarters. Major C.Y. had also been the commanding officer in charge of the soldiers who carried out the operation on 14 July. The major told the prosecutor that Ahmet Er had been taken from the village by his soldiers on 14 July to help them with their operations. However, he had been released on 16 July 1995 in an area near Narlı village.

15. On 18 July 1995 Ali Er made submissions to the offices of the governor and the prosecutor in Çukurca. He stated in his submissions that his brother Ahmet Er had not been released, contrary to the information given to him by the Çukurca prosecutor on 16 July. He added that he had tried unsuccessfully to find his brother in the surrounding villages and towns.

16. On the same day the Çukurca prosecutor initiated an investigation into Ahmet Er's disappearance and issued writs to the Çukurca Gendarmerie Headquarters and Çukurca Commando Headquarters requesting information about Ahmet Er's whereabouts. The prosecutor reminded the military authorities that if Ahmet Er was in their custody they needed to obtain official permission from the prosecutor's office in order to keep him in detention.

17. On 1 August 1995 the commander of the Çukurca Gendarmerie Headquarters, Captain S.A.U., responded to the Çukurca prosecutor's letter and informed him that Ahmet Er had not been detained at his headquarters. The village of Kurudere had been evacuated for security reasons and it was therefore impossible to trace Ahmet Er.

18. Following the failure of the Çukurca Commando Headquarters to respond to his request for information, the Çukurca prosecutor repeated his request in a letter of 25 August 1995. The prosecutor also referred to his telephone conversation with Major C.Y. (see paragraph 14 above), and asked the commando headquarters to inform him exactly where Ahmet Er had been released and whether there had been any eyewitnesses to the release.

19. In a letter of 22 September 1995 a military officer from the Çukurca Commando Headquarters informed the prosecutor that Ahmet Er and "his elderly relative" had been taken from their village by soldiers on 14 July 1995 to provide guidance about the area. The two men had helped the soldiers to locate a number of landmines in the area and had then "left the soldiers at 3.00 p.m." the same day. No documents had been drawn up concerning the two men as they had not been arrested or detained.

20. On 16 October 1995 a prosecutor questioned the applicant Ali Er, who repeated that his brother Ahmet had been taken away from their village

by soldiers on 14 July 1995. The gendarmerie first lieutenant who was with the soldiers had even slapped his brother in front of the villagers before taking him away. Following this incident the villagers had left the village the same day, but the applicant's elderly uncle, Hacı Mehrap Er, had stayed behind to wait for Ahmet. The latter had returned to the village with the soldiers the same evening, very distraught. The soldiers had then taken both Ahmet and Hacı Mehrap Er to Işıklı gendarmerie station, where they had tied them to a pole and left them until the following morning. The two men had also been beaten up. The following morning Hacı Mehrap Er and two other villagers who had also been taken away by the soldiers had been released. According to his uncle, Ahmet had been unconscious when he left him. Furthermore, Fettah Arslan, a fellow villager, had seen the applicant's brother being taken from Işıklı station to the commando unit in a military vehicle.

21. The prosecutor summoned Hacı Mehrap Er and Fettah Arslan to his office. On 23 October 1995 Fettah Arslan told the prosecutor that

he had seen Ahmet Er in a military vehicle, wearing handcuffs.

22. On 25 October 1995 Hacı Mehrap Er told the prosecutor that on the day of the incident the villagers had been preparing to leave their village as ordered by the military. However, some PKK members had heard about the evacuation and the presence of the soldiers in the village and had attacked the soldiers. During the armed clash that had ensued, Ahmet Er had wanted to leave the village in order to find his son who was out in the fields. However, the soldiers had misinterpreted Ahmet Er's intentions and had taken him to Işıklı gendarmerie station. Subsequently, Hacı Mehrap Er had also been taken to Işıklı gendarmerie station, where he and Ahmet had been tied to a pole and beaten up. The soldiers had also doused them with hot water. The bones in Ahmet's feet had been broken with a stone. When Hacı Mehrap Er was released the following morning, Ahmet was being dragged along the ground by ten or eleven soldiers. When he returned to the village, the soldiers had already burned it down.

23. After making two unsuccessful attempts to summon him to his office, the prosecutor finally questioned Major C.Y. of Çukurca Commando Headquarters on 14 December 1995. The major confirmed that he had heard that Ahmet Er had been taken from the village by his soldiers on 14 July 1995 to provide guidance about the area. After his telephone conversation with the prosecutor he had ordered Ahmet Er's release. However, he had later found out that the person released pursuant to his orders was not Ahmet Er. Major C.Y. added that he did not know whether Ahmet Er had been taken away by his soldiers.

24. First Lieutenant H.Ö., who had been in charge of one of the three units of soldiers which took part in the operation on 14 July 1995, was questioned by the prosecutor on 1 February 1996. The first lieutenant confirmed that he and his soldiers had gone to Kurudere village on the day

of the incident. Following an armed clash with members of the PKK, during which an officer had been killed and two soldiers injured, they had seen Ahmet Er running away from the village. A number of soldiers had then been sent to catch him. The soldiers had caught him and "might have slapped him a few times" because they believed that Ahmet Er had been helping the PKK. Ahmet Er had then helped the soldiers to find a number of landmines. On their way they had seen Hacı Mehrap Er, who had asked permission to go with the soldiers. They had then taken Ahmet Er and Hacı Mehrap Er to Işıklı gendarmerie station. The first lieutenant had telephoned his superior officers at the battalion's headquarters and told them about the two persons. His superior officers had told them that it was not necessary to take the men to headquarters as there was no evidence against them. Ahmet and Hacı Mehrap had spent the night with the soldiers at Işıklı gendarmerie station. It was possible that the soldiers "might have got angry with the two men and slapped them" but they had not tortured them or broken the bones in Ahmet's feet as alleged. The following day the "old man" had been released outside the station and Ahmet Er had been released some 200 metres away from the station.

25. First Lieutenant Ş.Ö. had been in charge of another unit on the day of the incident. He gave a similar statement to the prosecutor.

26. On 2 February 1996 the prosecutor questioned four other gendarmerie officers who had taken part in the operation on 14 July 1995. The officers confirmed that they had taken Ahmet Er and Hacı Mehrap Er to the Işıklı station but denied that they had ill-treated them. They maintained that the two men had been released the following day and added that Ahmet Er had even waved to them when he was being released. The officers also told the prosecutor that it was possible that Ahmet Er had subsequently joined the PKK.

27. On 16 February 1996 the Çukurca prosecutor issued an instruction to find Ahmet Er and asked to be given a progress report every three months. In his instruction the prosecutor stated that Ahmet Er had not been arrested by the soldiers but had been taken by them to provide guidance about the area. The prosecutor also stated that, since two of Ahmet Er's sons had joined the PKK, it was possible that Ahmet Er himself might also have joined the PKK.

28. It appears from the documents that the police and soldiers searched unsuccessfully for Ahmet Er and informed the prosecutor at regular intervals until 2 October 2000. On 1 February 2001 the Çukurca prosecutor requested the police to continue their search. After the prosecutor's letter the police continued informing the prosecutor at two-monthly intervals about the unsuccessful search for Ahmet Er.

29. On 3 May 2002 the first applicant, Mehmet Er, applied to the Hakkari Civil Court of First Instance and stated that his father had disappeared in life-threatening circumstances on 14 July 1995 and that

nothing had been heard from him since that date. He asked the Hakkari Civil Court to issue a decree stating that his father was to be presumed dead. This request was accepted on 29 May 2003. On 24 February 2004 custody of Ahmet Er's three youngest children – the applicants Mr Hızır Er, Ms Hatice Er and Ms Belkısa Er – was awarded to their elder brother İslam Er, who is also one of the applicants.

30. On 10 December 2003 the Çukurca prosecutor issued a decision stating that, according to the allegations and the information given to him by eyewitnesses, Ahmet Er had last been seen in a military area, where he had been "tortured by soldiers". Hence, the military were responsible for the incidents in question and the military prosecutor in the city of Van had jurisdiction to continue the investigation.

31. The military prosecutor in Van began his investigation on 14 January 2004 by requesting information from local military units about whether or not anything had been heard from Ahmet Er and whether he had sons who were PKK members. He also asked for regular updates every three months.

32. On 10 February 2004 the military units informed the military prosecutor that, according to information obtained from intelligence officers, Ahmet Er had been taken from his village by soldiers. Following his release on 16 July 1995, Ahmet Er had gone to Northern Iraq to join the PKK. Nothing had been heard from him since that date.

33. On 17 February 2004 the military prosecutor questioned the applicant Ali Er, and Hacı Mehrap Er. Both men reiterated the information they had already provided to the Çukurca prosecutor.

34. On 3 March 2004 the applicants' legal representative requested information from the Çukurca prosecutor about the investigation. He was informed of the transfer of the investigation to the military prosecutor's office in Van.

35. At regular intervals between 7 April 2004 and 23 November 2005 eight identical copies of a document stating that Ahmet Er had joined the PKK were signed by various military officers and sent to the Van military prosecutor in connection with his request of 14 January 2004 (see paragraph 31 above).

36. On 28 July 2005 the military prosecutor decided that he also lacked jurisdiction to investigate the disappearance. In his decision the prosecutor summarised the steps taken in the investigation and stated that on 14 July 1995 Ahmet Er had been acting suspiciously and had been taken away by soldiers. He had then been taken to various places where he had shown the soldiers explosives planted by members of the PKK. The soldiers had then taken him to the barracks. The military prosecutor concluded that, in taking Ahmet Er to their barracks in order to question him, the soldiers had been carrying out judicial rather than military functions. Military prosecutors could only investigate offences committed by members of the armed forces in the performance of their military duties. Hence, the civilian prosecutors

had jurisdiction to continue the investigation. The file was therefore sent back to the Çukurca prosecutor's office.

37. The Çukurca prosecutor continued his investigation by instructing the gendarmes to continue to search for Ahmet Er.

38. On 15 December 2005 the Çukurca prosecutor summarised his investigation in a report. According to the report, on 14 July 1995 Ahmet Er had been acting suspiciously and had therefore been taken away by soldiers. He had then assisted the soldiers in locating two landmines. He had stayed at the Işıklı gendarmerie station and had been "released" on 16 July 1995. According to "secret investigations" conducted by the gendarmes, Ahmet Er had joined the PKK following his release. The Çukurca prosecutor concluded that the Van prosecutor's office had jurisdiction to continue the investigation, and sent the investigation file there.

39. On 5 January 2006 a prosecutor in the city of Van issued a search and arrest warrant for Ahmet Er for the offence of membership of an illegal organisation, namely the PKK.

40. In response to an apparent query from the Çukurca gendarmerie, the Van prosecutor noted in a letter of 29 March 2006 that the fact that Ahmet Er's family had obtained a decree from a civil court presuming him to be dead did not mean that Ahmet Er had indeed died. He decided that the search for Ahmet Er should continue with a view to arresting him in accordance with the warrant of 5 January 2006.

41. On subsequent dates the Çukurca gendarmerie informed the Van prosecutor that their efforts to find and arrest Ahmet Er had been unsuccessful.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

42. The applicants complained that members of the armed forces had been responsible for the disappearance of their relative who, in their opinion, should be presumed dead in violation of Article 2 of the Convention. Under the same provision they also submitted that the authorities had failed to carry out a meaningful investigation into Ahmet Er's disappearance.

43. Article 2 of the Convention reads 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."

44. The Government contested that argument.

A. Admissibility

45. The Government submitted that the applicants had failed to exhaust domestic remedies within the meaning of Article 35 § 1 of the Convention. In this connection they referred to the decision in the case of *Uca v. Turkey* ((dec.), no. 3743/06, 29 April 2008), and submitted that the applicants could have applied for compensation in accordance with the 2004 Law on Compensation for Losses resulting from Terrorism and the Fight against Terrorism (see *İçyer v. Turkey* (dec.), no. 18888/02, § 44, ECHR 2006-I).

46. The Government argued, in the alternative, that the applicants had failed to comply with the six-month time-limit as required by Article 35 § 1 of the Convention. In this connection the Government submitted that the applicants should have applied to the Court within six months of the Hakkari Civil Court of First Instance's decision of 29 May 2003 (see paragraph 29 above). Referring to *Kıniş v. Turkey* ((dec.), no. 13635/04, 28 June 2005) and *Aydın and Others v. Turkey* ((dec.) no. 46231/99, 26 May 2005), the Government argued that when the Hakkari Civil Court of First Instance had issued the decree presuming Ahmet Er to be dead, the applicants should have realised that it would no longer be possible to find him.

47. The applicants challenged the Government's submissions and argued that the decree relating to the presumed death of Ahmet Er had been obtained in relation to the issue of inheritance; it had no bearing on the criminal investigation into his disappearance. They also maintained that, following the disappearance of Ahmet Er and the destruction of their village by the security forces, they had had to abandon their home and village and move to Hakkari. At the time of the incident some of the applicants had been very young. Moreover, they were poor and uneducated people and had been unaware of their rights. Only some years after they moved to Hakkari had they been able to instruct a lawyer.

48. As regards the Government's objection based on the applicants' failure to seek compensation, the Court points out that it has already examined and rejected the Government's reliance on the above-mentioned

Uca decision in two other cases which also concerned the issue of the right to life (see, *mutatis mutandis*, *Gasyak and Others v. Turkey*, no. 27872/03, §§ 66-72, 13 October 2009; *Fadime and Turan Karabulut v. Turkey*, no. 23872/04, § 38, 27 May 2010). It finds no particular circumstances in the instant case which would require it to depart from its findings in the above-mentioned cases.

49. Similarly, the Court cannot entertain the Government's submission that the six-month period started to run on 29 May 2003, when the Hakkari Civil Court of First Instance issued the decree of presumption of death. It notes in this connection that, in accordance with the applicable domestic law, the applicants took proceedings to establish a presumption of death with a view to dealing with property matters and regulating the issue of the custody of Ahmet Er's three young children.

50. Moreover, the obligation to account for the disappearance and to identify and prosecute any perpetrator of unlawful acts, as well as the procedural obligation to investigate, cannot come to an end on discovery of the body or the presumption of death (see, *mutatis mutandis*, *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 145, ECHR 2009). Indeed, a prosecutor also considered that the fact that a decree of presumption of death had been issued by a civil court did not mean that Ahmet Er was dead, and ordered that the search for him should continue (see paragraph 40 above).

51. In the light of the foregoing the Court concludes that the domestic proceedings concerning the issue of presumption of death cannot have a bearing on the issue of compliance with the six-month time limit. What remains for the Court to examine is whether the applicants can be criticised for having waited for a period of almost nine years after the disappearance of Ahmet Er before lodging their application with the Court.

52. The Court reiterates that, according to the case-law on the six-month rule in cases concerning deprivation of life, if no remedies are available or if they are judged to be ineffective, the six-month time-limit in principle runs from the date of the act complained of. Special considerations may apply in exceptional cases where an applicant first avails himself of a domestic remedy and only at a later stage becomes aware, or should have become aware, of circumstances which make that remedy ineffective. In such a situation, the six-month period might be calculated from the time when the applicant becomes aware, or should have become aware, of these circumstances (see *Hazar and others v. Turkey* (dec.), no. 62566/00, 10 January 2002; *Bulut and Yavuz v. Turkey* (dec.), no. 73065/01, 28 May 2002; *Bayram and Yıldırım v. Turkey* (dec.), no. 38587/97, ECHR 2002-III).

53. The decisions referred to by the Government (see paragraph 46 above) in support of their argument that the applicants should have become aware of the ineffectiveness of the domestic remedies at an earlier stage,

like the decisions referred to in the preceding paragraph, concern unlawful killings, where the nature and the aims of investigations differ from investigations into disappearances.

54. In investigations into killings, crucial evidence is usually available to the investigating authorities at the beginning of the investigation. The body of the victim, the scene of the incident, eyewitness evidence and the presence of weapons used in the commission of the offence, such as bullets and spent cartridges, stand investigators in good stead and provide them with pointers in the earliest stages of the investigation. Thus, if the national authorities, despite the availability of such leads, do not start taking meaningful steps to follow them up, or if the investigation quickly loses momentum, the applicants can reasonably be expected to become aware of the ineffectiveness of the investigation and to lodge their case with the Court without undue delay.

55. In most disappearance cases, on the other hand, the investigating authorities have to start with very little evidence and have to search for the evidence in order to trace the disappeared person or discover his or her fate. Crucial evidence may not come to light until later (see *Varnava and Others*, cited above, § 162).

56. Furthermore, unlike an investigation into a killing, an investigation into a disappearance does not serve the sole purpose of establishing the circumstances of the killing and finding and punishing the perpetrator. The crucial difference in investigations into disappearances is that, by conducting an investigation, the authorities also aim to find the missing person or find out what happened to him or her. Thus, as the Court held in its judgment in the case of *Varnava and Others*, in disappearance cases where there is a state of ignorance and uncertainty and, by definition, a failure to account for what has happened, if not an appearance of deliberate concealment and obstruction on the part of some authorities, the situation is less clear-cut compared with cases concerning killings. It is more difficult for the relatives of the missing to assess what is happening or what can be expected to happen. Allowances must be made for the uncertainty and confusion which frequently mark the aftermath of a disappearance (*ibid.*).

57. Moreover, as the Court held in *Varnava and Others*, there are two additional reasons which justify a less rigid approach when examining the issue of compliance with the six-month time-limit in disappearance cases. The first is the consensus in international law that it should be possible to prosecute the perpetrators of such crimes even many years after the events. The serious nature of disappearances is such that the standard of expedition expected of the relatives cannot be rendered too rigorous in the context of Convention protection (see *Varnava and Others*, cited above, §§ 162-164). In this connection, the Court also observes that the file was forwarded to a military prosecutor who began a new investigation in 2004. In the course of that investigation the military prosecutor requested further information from

local military units and questioned one of the applicants and the two eye-witnesses. Secondly, in line with the principle of subsidiarity, it is best for the facts of cases to be investigated and issues to be resolved in so far as possible at the domestic level. It is in the interests of the applicant, and the efficacy of the Convention system, that the domestic authorities, who are best placed to do so, act to put right any alleged breaches of the Convention.

58. In paragraph 166 of its judgment in *Varnava and Others* the Court further held as follows:

> "In a complex disappearance situation such as the present, arising in a situation of international conflict, where it is alleged that there is a complete absence of any investigation or meaningful contact with the authorities, it may be expected that the relatives bring the case within, at most, several years of the incident. If there is an investigation of sorts, even if sporadic and plagued by problems, the relatives may reasonably wait some years longer until hope of progress being made has effectively evaporated. Where more than ten years has elapsed, the applicants would generally have to show convincingly that there was some ongoing, and concrete, advance being achieved to justify further delay in coming to Strasbourg. Stricter expectations would apply in cases where the applicants have direct domestic access to the investigative authorities."

59. In the present case the Court notes that the applicants introduced their application with the Court within ten years of the disappearance of their relative. As to whether they have met the Court's stricter expectations on account of their direct access to the investigative authorities, the Court observes that they informed the prosecutor immediately of their relative's detention by the military. They subsequently cooperated with the prosecutor and provided the prosecutor with eyewitness evidence. The investigation opened by that prosecutor continued in an active manner until 16 February 1996. Further steps were taken in the investigation after the civilian prosecutor decided on 10 December 2003 that the military prosecutors had jurisdiction to continue the investigation. In the course of the new investigation started in 2004 the military prosecutor requested further information from local military units and summoned one of the applicants and the two eye-witnesses to his office. The family and the eyewitnesses cooperated with the military prosecutor and made further statements (see paragraph 33 above). A lawyer appointed by them at that stage also contacted the prosecutors and asked for information about the investigation (see paragraph 34 above).

60. The Court thus considers that an investigation, albeit a sporadic one (see *Varnava and Others*, cited above, § 166), was being conducted during the period in question and that the applicants were doing all that could be expected of them to assist the authorities. The Court further considers that the decision adopted in 2003 by the civilian prosecutor who deemed the evidence concerning the involvement of the military in the disappearance of the applicants' relative to be credible, as well as the subsequent investigation started by the military prosecutor, must have been regarded as

promising new developments by the applicants. In the light of the foregoing, the Court finds that the applicants did not fail to show the requisite diligence by waiting for the pending and the new investigations to yield results, and rejects the Government's objection as to the admissibility of this complaint based on the six-month time-limit.

61. The Court also notes that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

62. The applicants maintained their allegations and submitted, in particular, that even assuming that their relative had been taken by the soldiers as a guide for the area, the soldiers should still have complied with the applicable procedure by keeping an official record of the time of his entry into and release from the gendarmerie station and should have ensured that he was released after having been examined by a doctor.

63. The Government submitted that Ahmet Er had been taken away after a clash between members of the security forces and terrorists. He had subsequently helped the soldiers to locate a number of landmines planted by the terrorists. Following their arrival at the gendarmerie station and a number of routine checks, the soldiers had released Ahmet Er.

64. According to the Government, examination of the case file did not support the conclusion that Ahmet Er had died. Following his release he had joined the terrorists in northern Iraq.

65. In the opinion of the Government, since Ahmet Er had not been taken into custody it had not been necessary to take the procedural steps applicable to detained persons. Following Ahmet Er's disappearance, and at the request of his relatives, an effective investigation had been conducted during which evidence had been heard from witnesses and members of the security forces. There was no obligation on the national authorities to find a person who was no longer in the country.

1. The Court's assessment of the evidence and establishment of the facts

66. The Court reiterates that the national authorities are responsible for the well-being of persons in custody and that respondent States bear the burden of providing a plausible explanation for any injuries, deaths and disappearances which occur in custody (see, respectively, *Selmouni v. France* [GC], no. 25803/94, § 87, ECHR 1999-V; *Salman v. Turkey* [GC], no. 21986/93, § 99, ECHR 2000-VII; and *Tanış and Others v. Turkey*, no. 65899/01, § 160, ECHR 2005–VIII).

67. The Court notes that it is not in dispute between the parties that the applicants' relative Ahmet Er was taken to the gendarmerie station by soldiers on 14 July 1995. In this connection the Court notes that a number of military officers also acknowledged that Ahmet Er had been taken to the gendarmerie station (see paragraphs 14 and 26-27 above). What is disputed is whether he was released from there on 16 July 1995, as maintained by the Government.

68. In this connection the Court cannot accept the Government's argument that since Ahmet Er had not been taken into custody it had not been necessary to take the procedural steps applicable to a detained person.

69. In this connection, the Court notes that the unlawful nature of the detention of persons in south-east Turkey without any details being entered in custody ledgers has been noted by the Court in previous judgments (see, *inter alia*, *Orhan v. Turkey*, no. 25656/94, § 372, 18 June 2002). In a number of its judgments the Court has examined the failure by members of the armed forces to keep adequate custody records and concluded that the deficiencies in the keeping of such records attested to the absence of effective measures to safeguard against the risk of disappearance of individuals in detention (*ibid*., §§ 313 and 372 and the cases cited therein; see also *Çiçek v. Turkey*, no. 25704/94, § 137, 27 February 2001). Thus, the Court cannot attach any weight to the unsatisfactory and arbitrary distinction drawn between being taken into custody and being taken in for the purposes of assisting the military (see, *mutatis mutandis*, *Çiçek*, cited above, § 137).

70. The Court will deal with the unlawful nature of Ahmet Er's detention at the gendarmerie station when examining the complaint under Article 5 of the Convention (see paragraphs 98-105 below). It is sufficient to note at this stage that, for the purposes of Article 2 of the Convention, to regard a person as having been detained does not require adherence to the applicable rules of national procedure. The obligation to account for the well-being of a detainee exists even when it has not been proved that the person has been taken into custody by the authorities, if it is established that he or she was officially summoned by the military or the police, entered a place under their control and has not been seen since. In such circumstances, the onus is on the Government to provide a plausible explanation as to what happened on the premises and to show that the person concerned was not detained by the authorities, but left the premises without subsequently being deprived of his or her liberty (see *Tanış and Others*, cited above, § 160).

71. As the Court stated in its judgment in *Tanış and Others*, the authorities' obligation to account for the fate of a detained individual continues until they have shown that the person has been released. Similarly, in its judgment in the case of *Süheyla Aydın v. Turkey* (no. 25660/94, § 154, 24 May 2005), which concerned the unlawful killing of Mrs Aydın's husband after he was allegedly released from police

custody, the Court held that the absence of an official release document meant that the Government had failed to discharge their burden of proving that Mr Aydın had indeed been released, and found the respondent State responsible for the killing.

72. In reaching that conclusion in *Süheyla Aydın* the Court had regard to Article 11 of the Declaration on the Protection of all Persons from Enforced Disappearance (United Nations General Assembly resolution 47/133 of 18 December 1992), which provided that “[a]ll persons deprived of liberty must be released in a manner permitting reliable verification that they have actually been released and, further, have been released in conditions in which their physical integrity and ability fully to exercise their rights are assured” (see Article 21 of the International Convention for the Protection of All Persons from Enforced Disappearance, which entered into force on 23 December 2010).

73. In the present case, and as detailed above, although his presence at the gendarmerie station was acknowledged, no documents were drawn up by the military officials concerning Ahmet Er’s detention or his alleged release. Furthermore, the prosecutor investigating the disappearance was given confusing and contradictory information by the military officials concerning Ahmet Er’s alleged release from the gendarmerie station (see paragraphs 14 and 23 and 24 to 26 above).

74. In the light of the foregoing the Court finds it established that the applicants’ relative Ahmet Er remained in the custody of the State. It follows that the Government are under an obligation to account for his disappearance.

75. On the basis of this finding, the Court will proceed to examine the applicants’ complaints under Article 2 of the Convention.

2. Ahmet Er’s disappearance

76. In the *Timurtaş v. Turkey* judgment (no. 23531/94, §§ 82-83, ECHR 2000-VI) the Court stated as follows:

> ... where an individual is taken into custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which an issue arises under Article 3 of the Convention .... In the same vein, Article 5 imposes an obligation on the State to account for the whereabouts of any person taken into detention and who has thus been placed under the control of the authorities .... Whether the failure on the part of the authorities to provide a plausible explanation as to a detainee’s fate, in the absence of a body, might also raise issues under Article 2 of the Convention will depend on all the circumstances of the case, and in particular on the existence of sufficient circumstantial evidence, based on concrete elements, from which it may be concluded to the requisite standard of proof that the detainee must be presumed to have died in custody ....
>
> In this respect the period of time which has elapsed since the person was placed in detention, although not decisive in itself, is a relevant factor to be taken into account.

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

77. In the present case, the applicants’ relative Ahmet Er disappeared in 1995. The Court observes that his disappearance fits in with the pattern of disappearances of large numbers of persons in south-east Turkey between 1992 and 1996. In its examination of a number of those disappearances the Court reached the conclusion that the disappearance of a person in south-east Turkey at the relevant time could be regarded as life-threatening (see, among others, *Osmanoğlu v. Turkey*, no. 48804/99, 24 January 2008; *Akdeniz v. Turkey*, no. 25165/94, 31 May 2005; *İpek v. Turkey*, no. 25760/94, ECHR 2004-II (extracts); *Akdeniz and Others v. Turkey*, no. 23954/94, 31 May 2001; *Çiçek*, cited above; *Taş v. Turkey*, no. 24396/94, 14 November 2000; *Timurtaş*, cited above; *Ertak v. Turkey*, no. 20764/92, ECHR 2000-V; and *Çakıcı v. Turkey* [GC], no. 23657/94, ECHR 1999-IV).

78. Moreover, the Court considers that the lack of any documentary evidence relating to Ahmet Er’s detention at the gendarmerie station increased the risk to his life in the general context of the situation in south-east Turkey at the time of his disappearance.

79. For the above reasons, and taking into account the fact that no information has come to light concerning the whereabouts of Ahmet Er over the period of almost seventeen years since he was detained by the security forces, the Court accepts that he must be presumed dead. Consequently, the responsibility of the respondent State for his death is engaged. Noting that the authorities have not accounted for what happened during Ahmet Er’s detention and that they do not rely on any ground of justification in respect of the possible use of lethal force by their agents, it follows that liability for his death is attributable to the respondent Government. Accordingly, there has been a violation of Article 2 of the Convention in its substantive aspect.

2. *Effectiveness of the investigation into Ahmet Er’s disappearance*

80. 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 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 *McCann and Others v. the United Kingdom*, 27 September 1995, § 161,

Series A no. 324). 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).

81. The investigation must also be effective in the sense that it is capable of leading to the identification and punishment of those responsible (see *Oğur v. Turkey* [GC], no. 21594/93, § 88, ECHR 1999-III). 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*, eyewitness testimony (see *Tanrıkulu v. Turkey* [GC], no. 23763/94, § 109, ECHR 1999-IV). 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. The need for promptness is especially important when allegations are made of a disappearance in detention.

82. The above-mentioned obligations apply equally to cases where a person has disappeared in circumstances which may be regarded as life-threatening. In this connection, the Court has already held that the disappearance of the applicants' relative could be considered as life-threatening (see paragraph 77 above).

83. In the present case the prosecutor was informed of the detention of Ahmet Er the same day, that is, on 14 July 1995. However, the Court observes that the prompt, detailed and serious allegations concerning the detention of the applicants' relative by the security forces failed to spur the prosecutor into action.

84. No steps appear to have been taken by that prosecutor until some two days later when he contacted a commando major by telephone (see paragraph 14 above). Even when the commando major confirmed that Ahmet Er had been taken to the gendarmerie station, and the family confirmed that Ahmet Er had not been released, the prosecutor did not question any members of the security forces for a further period of five months (see paragraph 23 above).). Although the prosecutor made enquiries and diligently followed up the military personnel who failed to respond to his calls, his investigation seems to have lost momentum even after the military personnel confirmed that Ahmet Er had been kept in the military station without the applicable domestic procedure having been followed.

85. It appears that the prosecutor accepted without further investigation what the military officials told him about Ahmet Er's alleged release. The prosecutor did not take any steps, for example, to ensure that the military officials were called to account for Ahmet Er's unlawful detention at their station.

86. In the light of the above the Court considers that no serious attempts were made by the prosecutors to find out what had happened to the applicants' relative.

87. In the light of the foregoing the Court finds that the investigation carried out into the disappearance of the applicants' relative was inadequate and therefore in breach of the State's procedural obligations to protect the right to life. There has accordingly been a violation of Article 2 of the Convention in its procedural aspect.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION IN RESPECT OF AHMET ER

88. The applicants alleged a violation of Article 3 of the Convention and argued that their relative Ahmet Er had been subjected to ill-treatment when he was detained at the gendarmerie station

89. The Government contested that argument.

90. The Court has examined the applicants' allegation in the light of the evidence submitted to it. It considers that there is an insufficient basis to conclude that Ahmet Er was the victim of treatment contrary to Article 3 of the Convention at the gendarmerie station.

91. It follows that this complaint is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

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

92. The applicants alleged a violation of Article 3 of the Convention on account of the suffering stemming from their inability to find out what had happened to their relative. Article 3 of the Convention provides as follows:

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

93. The Court notes that this complaint is linked to the one examined above (paragraph 61) and must therefore likewise be declared admissible.

94. The Court reiterates that the question whether a family member of a "disappeared person" is a victim of treatment contrary to Article 3 of the Convention 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 (see *İpek*, cited above, §§ 181-183,

and the authorities cited therein). The Court further emphasises 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).

95. In the present case, the Court notes that the applicants are the children and siblings of the disappeared person Ahmet Er. Some of them witnessed Ahmet Er being taken away by soldiers almost seventeen years ago and the applicants have not heard from him since. Despite the applicants' having approached the domestic authorities to report the disappearance of their relative and to share with them the information they had about the unacknowledged detention, the authorities took no meaningful action, notwithstanding the unlawful nature of the detention (see paragraph 87 above

96. In view of the above, the Court finds that the applicants suffered, and continue to suffer, distress and anguish as a result of the disappearance of their relative and their inability to find out what has happened to him. The manner in which their complaints have been dealt with by the authorities must be considered to constitute inhuman treatment contrary to Article 3 of the Convention (see *Tanış and Others*, cited above, §§ 218-221).

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

IV. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

98. The applicants further complained that their relative had been deprived of his liberty in violation of Article 5 of the Convention

99. The Government contested that argument.

100. Article 5 of the Convention, in so far as relevant, provides as follows:

> "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.

....”

101. The Court notes that this complaint is linked to the one examined above (paragraph 61) and must therefore likewise be declared admissible.

102. The Court stresses the fundamental importance of the guarantees contained in Article 5 of the Convention for securing the right 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 of the Convention, namely to protect the individual from arbitrary detention.

103. In order to minimise the risks of arbitrary detention, Article 5 of the Convention provides a corpus of substantive rights intended to ensure that the act of deprivation of liberty is 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 of the Convention. Bearing in mind the responsibility of the authorities to account for individuals under their control, Article 5 of the Convention 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 (see *Akdeniz*, cited above, § 129 and the authorities cited therein).

104. The Court has already found that the applicants’ relative Ahmet Er was taken away from his village by members of the security forces on 14 July 1995 and that he was last seen in the hands of those forces at a gendarmerie station. His detention there was not logged in the relevant custody records and there exists no official record of his alleged release. 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,

the name of the person effecting it and the time and date of release must be seen as incompatible with the very purpose of Article 5 of the Convention (*ibid*., § 130).

105. Accordingly, the Court finds that Ahmet Er was held in unacknowledged detention in the complete absence of the safeguards contained in Article 5 of the Convention 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 13 OF THE CONVENTION

106. Lastly, the applicants complained that they had not had an effective remedy within the meaning of Article 13 of the Convention by which to obtain an investigation into the disappearance and subsequent death of their relative and to seek compensation.

107. The Government maintained that an effective investigation had been carried out by the national authorities.

108. Article 13 of the Convention provides:

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

109. The Court notes that this complaint is linked to the one examined above (see paragraph 61) and must therefore likewise be declared admissible.

110. The Court reiterates that Article 13 of the Convention guarantees the availability at 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. Article 13 of the Convention thus requires the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief, although the 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 of the Convention also varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 of the Convention 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*, 18 December 1996, § 95, *Reports of Judgments and Decisions* 1996-VI).

111. Furthermore, where relatives have an arguable claim that a member of their family has disappeared at the hands of the authorities, or where a right with as fundamental an importance as the right to life is at stake, 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 (see *Timurtaş*, cited above, § 111, and the other authorities cited therein).

112. In view of the fact that the Court has found that the domestic authorities failed in their obligation to protect the life of the applicants' relative, the applicants were entitled to an effective remedy within the meaning outlined in the preceding paragraph.

113. Accordingly, the authorities were under an obligation to conduct an effective investigation into the disappearance of the applicants' relative. Having regard to paragraphs 83 to 87 above, the Court finds that the respondent State failed to comply with this obligation.

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

VI. 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 first to seventh applicants, who are the children of Ahmet Er, claimed 25,000 Turkish liras[1] (TRY) each and the eighth applicant, Mr Ali Er, claimed TRY 45,000[2], in respect of pecuniary damage. The ninth applicant, Ms Mumi Er, did not make a claim for pecuniary damage.

116. The applicant Mr Ali Er submitted that two years after his brother's disappearance his brother's wife had died and the children had had no one to look after them. Mr Er maintained that he had been looking after his nephews and nieces following the disappearance of their father. In support of his submissions he sent the Court a letter signed by the local authority, showing that six of the first seven applicants still lived in Mr Ali Er's rented accommodation.

117. The Government were of the opinion that there was no causal link between the damage claimed by the applicants and their complaints. They also submitted that the sums claimed were devoid of any basis.

118. As regards the applicants' claim for pecuniary damage, 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*

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[1] Approximately 14,000 euros.

[2] Approximately 25,000 euros.

and Jabardo v. Spain (Article 50), 13 June 1994, §§ 16-20, Series A no. 285-C, and *Çakıcı*, cited above, § 127). The Court has found (see paragraph 79 above) that the authorities were liable under Article 2 of the Convention for the disappearance and subsequent death of the applicants' relative.

119. The Court also notes that the eighth applicant's submission that he had been looking after his brother's children following his relative's disappearance was not disputed by the Government. In these circumstances, a direct causal link has been established between the violation of Article 2 and the applicants' loss of the financial support provided by Ahmet Er.

120. In the light of the foregoing the Court, deciding on an equitable basis, awards the eighth applicant, Ali Er, the sum of 25,000 euros (EUR). It also awards the first to seventh applicants, namely Mr Mehmet Er, Ms Gülşen Er, Mr İslam Er, Mr Adnan Er, Mr Hızır Er, Ms Hatice Er and Ms Belkısa Er, jointly the sum of EUR 35,000.

B. Non-pecuniary damage

121. Each of the nine applicants claimed TRY 35,000[1] in respect of non-pecuniary damage.

122. The Government considered the sums claimed to be excessive and unsubstantiated. In their opinion a finding of a violation would constitute sufficient compensation for any non-pecuniary damage sustained by the applicants.

123. The Court observes that it has found that the authorities are to be held accountable for the disappearance and death of the applicants' relative. In addition to the violation of Articles 2, 3 and 5 in that respect, it has further found that the authorities failed to undertake an effective investigation or to provide a remedy in respect of those violations, contrary to the procedural obligation under Article 2 of the Convention and in breach of Article 13 of the Convention. In these circumstances, the Court awards each of the eight and ninth applicants, namely Mr Ali Er and Ms Mumi Er, EUR 5,000, and the remaining seven applicants jointly the sum of EUR 55,000 for non-pecuniary damage.

C. Costs and expenses

124. The applicants submitted that they had incurred costs and expenses in the course of their application, and forwarded to the Court documents showing that they had transferred a total of TRY 450[2] to their legal representative in respect of translation costs. The applicants also submitted

[1] Approximately 19,500 euros.
[2] Approximately 250 euros.

to the Court documents showing that they had had regular meetings with their legal representative.

125. The Government considered that the applicants had not made any claim in respect of their costs and expenses.

126. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court awards the applicants jointly the sum of EUR 250 in respect of translation costs.

D. Default interest

127. The Court considers it appropriate that the default interest rate 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. *Declares* the complaint concerning the alleged ill-treatment to which the applicants' relative Ahmet Er was subjected in the gendarmerie station inadmissible and the remainder of the application admissible;

2. *Holds* that there has been a violation of Article 2 of the Convention on account of the disappearance and presumed death of the applicants' relative;

3. *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 adequate and effective investigation into the disappearance of the applicants' relative and his subsequent presumed death;

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

5. *Holds* that there has been a violation of Article 5 of the Convention on account of the applicants' relative's unlawful detention at the gendarmerie station;

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

7. *Holds*

(a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 35,000 (thirty-five thousand euros), plus any tax that may be chargeable, jointly to the first to seventh applicants in respect of pecuniary damage;

(ii) EUR 25,000 (twenty-five thousand euros), plus any tax that may be chargeable, to the eighth applicant, Mr Ali Er, in respect of pecuniary damage;

(iii) EUR 5,000 (five thousand euros), plus any tax that may be chargeable, to each of the eighth and ninth applicants, namely Mr Ali Er and Ms Mumi Er, in respect of non-pecuniary damage;

(iv) EUR 55,000 (fifty-five thousand euros), plus any tax that may be chargeable, jointly to the remaining seven applicants in respect of non-pecuniary damage;

(v) EUR 250 (two hundred and fifty euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses;

(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;

8. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 31 July 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith Françoise Tulkens
Registrar President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge A. Sajó is annexed to this judgment.

F.T.
S.H.N.

CONCURRING OPINION OF JUDGE SAJÓ

I agree with my colleagues that the case is admissible. I also agree with the findings of violations on all counts. I would just like to add some reasons that justify the interpretation of the "six-month rule" that was applied in the present case.

Article 35 § 1 of the Convention provides that the Court may only deal with a matter within a period of six months from the date on which the final decision was taken. There is no specific rule applicable to situations where no final decision is taken, for example in cases of disappearance. In such circumstances the rule applicable to such situations has to be developed and interpreted in conformity with the purpose of the Convention, namely securing the effective recognition and observance of the rights protected by the Convention. Nevertheless, it is sometimes argued that the six-month rule must be interpreted strictly to satisfy the exigencies of legal certainty. However, in the context of the Convention such legal certainty attributed to the six-month rule would serve a very specific expectation, namely that, whatever had happened (even the most outrageous mass violation of human rights), the authorities and the State would not be held accountable. The logic applied in *Šilih v. Slovenia* [GC] (no. 71463/01, 9 April 2009) indicates that this is unacceptable to the Court. The State Party interest in the six-month rule is very different from the reliance interest generally protected in a domestic system with regard to the finality of a judgment. Lord Bingham has voiced the opinion that when it comes to procedure a non-formalistic approach is appropriate. ("Procedural idiosyncrasy is not (like national costume or regional cuisine) to be nurtured for its own sake, and in answering the question before us we must have regard to the realities of litigation in this country and the purpose of the Convention, not to tradition, nomenclature or rules developed for other purposes." [Dresser UK -v- Falcongate Freight Management Ltd; The Duke of Yare [1992] 5 CL 373; [1992] QB 502].)

The present judgment relied on the interpretation of the six-month rule that was adopted in a case concerning an international conflict: *Varnava and Others v. Turkey* [GC] (nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 166, ECHR 2009). Given the domestic difficulties in the present case, that extension is eminently reasonable. What I find difficult to follow is the logic that where more than ten years has elapsed the applicants would generally have to show convincingly that there was some ongoing, and concrete, advance being achieved to justify further delay in coming to Strasbourg. I understand that a clear rule like this offers guidance as to expectations and may push potential applicants to take action more swiftly, but on the other hand it may not serve the purposes of the Convention. There is nothing magical about the ten-year mark that would change an ongoing situation. As

long as there is a reasonable expectation that domestic remedies will be provided and the potential applicants behave reasonably in pursuing available remedies, the general principles of *Varnava* should apply. This is the interpretation that best satisfies the dictates of subsidiarity. Subsidiarity is based on the undertaking, entered into by the member States of the Council of Europe, to pursue the "further realisation of human rights and fundamental freedoms." Most importantly, this is the interpretation that best serves the interests of human rights protection in cases where the most serious breaches of human rights are alleged.