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

FIRST SECTION

CASE OF TAŞ v. TURKEY

(*Application no. 24396/94*)

JUDGMENT

STRASBOURG

14 November 2000

In the case of Taş v. Turkey,

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

Mrs E. PALM, *President*,
Mrs W. THOMASSEN,
Mr L. FERRARI BRAVO,
Mr C. BÎRSAN,
Mr J. CASADEVALL,
Mr R. MARUSTE, *judges*,
Mr F. GÖLCÜKLÜ, ad hoc *judge,*
and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 18 October 2000,

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

PROCEDURE

1. The case was referred to the Court in accordance with the provisions applicable prior to the entry into force of Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention")[1] by the European Commission of Human Rights ("the Commission") (Article 5 § 4 of Protocol No. 11 and former Articles 47 and 48 of the Convention).

2. The case originated in an application (no. 24396/94) against 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 Beşir Taş ("the applicant"), on 7 June 1994.

3. The applicant, who had been granted legal aid, was represented by Mr K. Boyle and Ms F. Hampson, lawyers practising in the United Kingdom. The Turkish Government ("the Government") were represented by their Agents, Mr A. Gündüz and Mr S. Alpaslan.

4. The applicant alleged that his son Muhsin Taş had disappeared after being apprehended by the security forces in Cizre on 14 October 1993. He invoked Articles 2, 3, 5, 13, 14 and 18 of the Convention.

5. The application was declared admissible by the Commission on 5 March 1996. In its report of 9 September 1999 (former Article 31 of the Convention), it expressed the opinion by 27 votes to 1 that there had been a violation of Article 2, unanimously that there had been no violation of Article 3 in respect of the applicant's son, unanimously that there had been a violation of Article 3 in respect of the applicant himself, unanimously that

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Notes by the Registry

1. Protocol No. 11 came into force on 1 November 1998.

there had been a violation of Article 5, unanimously that there had been a violation of Article 13 and unanimously that there had been no violations of Articles 14 and 18 of the Convention. The case was referred by the Commission to the Court on 23 October 1999. Before the Court, the applicant withdrew his complaint under Article 14 of the Convention.

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

7. The applicant and the Government each filed observations on the merits, on 4 and 3 April 2000 respectively.

8. On 30 May 2000, having consulted the parties, the Chamber decided that no hearing on the merits was required (Rule 59 § 2 *in fine*).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The facts of the case, particularly concerning events from 14 October to 9 November 1993 when Muhsin Taş was held in custody by the security forces, were disputed by the parties. The Commission, pursuant to former Article 28 § 1 (a) of the Convention, conducted an investigation with the assistance of the parties.

The Commission heard witnesses in Ankara from 7 to 8 May 1998. These included the applicant; Atilla Ceyhan, the public prosecutor at Cizre who signed the request for the extension in detention of Muhsin Taş; Dr Zekeiye Palpas, doctor at Cizre State Hospital who treated Muhsin Taş for a bullet wound to the knee; Dr Ahmet Can who examined Muhsin Taş at the Şirnak Military Hospital; Major Cemal Temizöz, the Cizre district gendarme commander who apprehended Muhsin Taş; Sergeant Burhanettin Kiyak who was present at Muhsin Taş's apprehension; Colonel Erol Tuna, who was in charge of transferring Muhsin Taş from Cizre to Şirnak; Sergeant-Major Kemal Kılıçlı, Sergeant Adem Akyüz and Sergeant Dursun Öztürk, who worked in Şirnak provincial gendarme interrogation department at the time of Muhsin Taş's arrival at Şirnak; and Nedim Kaya, a "confessor", who had previously joined the PKK and had later given himself up to the authorities.

10. The Commission's findings of fact are set out in its report of 9 September 1999 and summarised below (Section A). The applicant accepts the Commission's findings of fact. The Government's submissions concerning the facts are summarised below (Section B).

A. The Commission's findings of fact

11. In October-November 1993, the Cizre region in the south-east corner of Turkey, close to the Iraq and Syrian borders, was the scene of intense terrorist activity. The town of Cizre was close to the Gabar mountains, where there were numerous PKK camps and shelters. The road between Cizre and Şirnak, the provincial centre, was subject to attack, necessitating military protection for convoys passing on the main road between the two towns.

12. The district gendarme commander in Cizre at the time was Captain Temizöz. The provincial gendarme headquarters, commanded by a colonel, was located in Şirnak, as was the 23rd gendarme border brigade. Though the two commands were distinct, it appeared from the evidence that the provincial gendarme command headed by a colonel was subordinate to the brigade command under a general. There was an interrogation centre at the provincial gendarme command, where the three interrogators Kemal Kılıçlı, Adem Akyuz and Dursun Özturk worked.

1. Concerning the apprehension and detention of Muhsin Taş

13. During an operation conducted in or around the Cudi district of Cizre by the police and district gendarmes early in the morning of 14 October 1993, Muhsin Taş was shot in the knee and taken into custody by gendarmes under Captain Temizöz's command at about 05.00 hours. In the search report of 14 October 1993 detailing this incident, it was stated that Muhsin Taş had been found in possession of a Kalashnikov rifle, handgun and hand grenades. According to this report and the oral evidence of Captain Temizöz, Muhsin Taş immediately revealed to the gendarmes his name, that his code name was "Hanemir" and that he had come to Cizre to carry out actions for the PKK. Captain Temizöz considered that it was apparent from what Muhsin Taş told him that he was a commander. However, he did not recall that Taş made any offer to him to give assistance in finding PKK locations. Sergeant Burhanettin Kiyak, who was also on the scene at this time, heard Taş give his name and code name and say that he was from the mountain. He did not hear Taş volunteer any assistance to the security forces.

14. After this initial exchange with the gendarmes at the scene of his capture, Muhsin Taş was taken to the Cizre State Hospital where he was admitted for treatment by Dr Palpas at 05.50 hours. Dr Palpas had no recollection of Muhsin Taş but was of assistance in deciphering his report

for the Commission Delegates. This recorded that Muhsin Taş had an entry and exit wound to the knee, with injury to the front lower right knee joint. He was conscious and at that point his life was not in danger. Due to the lack of equipment and orthopaedic expertise, Dr Palpas recommended his transfer to Mardin.

15. At a time unknown the same day, Muhsin Taş was handed over to Captain Erol Tuna, an officer from the Şirnak provincial gendarmerie who was in command of the convoys going between Cizre and Şirnak.

16. The Commission requested, on numerous occasions, the records which indicated the places and times of Muhsin Taş's detention following his apprehension. No record was provided indicating where he was held in Cizre between his treatment in hospital and his transfer to the Şirnak convoy. Captain Temizöz thought that Taş must have been entered in the Cizre district gendarme records as he was detained pursuant to the authority of the Cizre public prosecutor. Records provided by the Government from Cizre district gendarmerie contained no entry concerning Muhsin Taş.

17. The decision to transfer Muhsin Taş to Şirnak was taken by the Şirnak 23rd gendarme border brigade. Captain Temizöz had reported the capture of Taş to the brigade command and they requested his transfer to Şirnak. The transfer record of 14 October 1993 also referred to the brigade's request. The reason for the transfer was not expressed in that document. Captain Temizöz considered that Taş would have had to go to Şirnak as he was a commander with information about the Gabar mountains and it was the forces in Şirnak who conducted operations in that region.

18. The only record relating to Muhsin Taş's detention after his arrival in Şirnak was an entry in the Şirnak Military Hospital polyclinic record. This was dated 14 October 1993, giving no time. Neither Captain Erol Tuna nor the doctor who gave treatment had any recollection of the incident, so were unable to provide any explanations as to exactly when he arrived or to whom he was delivered. Dr Can, who treated Muhsin Taş, considered on the basis of his entry in the hospital record that he would have treated the injury, placing a long leg splint or supervising an assistant in doing so. He was of the opinion that Taş would not have been admitted to the hospital as his notes made no reference to this step being taken or considered necessary. The follow up treatment which he stated would be necessary – antibiotics, which would most likely have been handed to the patient on the spot, and the requirement for the wound to be dressed at three day intervals – did not require continuous hospital care.

19. Of the three officers identified by the Government as having interrogated Muhsin Taş at the Şirnak provincial gendarme headquarters – Kemal Kılıçlı, Adem Akyüz and Dursun Öztürk – only one, Adem Akyüz, remembered interrogating Muhsin Taş. No logs or records were provided by the Government from the interrogation department recording Muhsin Taş's interrogation, nor the interrogation notes which the witnesses said would

have been taken. The Government denied that these documents existed. The only source of information about the interrogation of Muhsin Taş therefore was the oral evidence of Adem Akyüz and the brief comments which appeared in various gendarme reports following Taş's alleged escape.

20. According to Adem Akyüz, he interviewed Muhsin Taş on one occasion, while Muhsin Taş was confined to bed either in the hospital or infirmary. He remembered taking notes which they gave to their superiors. He could recall that the information related to the area where the person had carried out activities but did not mention any alleged offer to assist the security forces by showing locations. The Delegates had also requested the infirmary records concerning Muhsin Taş's presence and treatment. The Government stated the infirmary records contained no information about Muhsin Taş.

21. Though the Commission did not exclude that the hospital or infirmary records were inaccurate, it noted that in its experience it had found the records made by doctors to be generally reliable, if sometimes brief, whereas the inaccuracy of, and omissions from, gendarme records had been the subject of adverse findings in a number of cases. Further, it found the testimony of the interrogation officers to be unconvincing, giving the impression of being selective or piecemeal accounts. From their evidence, it was generally expected for the same officers to follow through a suspect's interrogation to the stage when a statement was taken by the district gendarmerie who had the responsibility at the end of the custody period to deliver the suspect to the public prosecutor for judicial procedures to be followed. Adem Akyüz had no explanation however for why he only visited Muhsin Taş once. While Muhsin Taş's removal from the interrogation process must have been unexpected or unusual, he apparently knew nothing about it – nor about Taş's apparent involvement in an operation to locate shelters or his apparent escape afterwards. The Commission was not persuaded that a suspect in respect of whom the provincial gendarmerie had commenced interrogation would or could be transferred elsewhere without some information or explanation being provided to the officers involved in the interrogation. Furthermore, a single, apparently brief interrogation did not account for the two fifteen-day extended custody periods which were requested by the Cizre district gendarmerie on behalf of those holding Muhsin Taş.

22. The evidence of the interrogation officers was therefore unable to provide any approximate date as to when any interrogation took place or any reliable basis on which to reach any finding as to where Muhsin Taş was held after his examination by Dr Can. Though his wound should have been dressed every three days and Dr Can would have expected himself, or another doctor, to check the patient's state after a week or ten days, there is no evidence that he received any follow-up medical care after 14 October 1993.

23. A custody period of 15 days from the date of apprehension was granted by the Cizre public prosecutor at the request of the district gendarme commander. A further period of 15 days was granted by him on 29 October 1993 on the request of the district gendarmerie.

2. Concerning the alleged escape of Muhsin Taş

24. According to a hand written incident report dated 9 November 1993, 16.30 hours, signed by a gendarme captain group commander Şeyhmuz Kara and gendarme first lieutenants Burak Bugra and Tarik Göktürk, both of whom were team commanders, Muhsin Taş escaped from the security forces while assisting them on an operation in the Gabar mountains to find PKK shelters.

25. According to the evidence of the doctors who treated him, it was probable that Muhsin Taş was not rendered completely immobile by the injury to his knee. With the long leg splint, he would have been able to hobble, with a crutch or assistance. In the early days after the injury, he would have been in considerable pain. By 9 November 1993, a period of 25 days after his injury, he would have been expected to have made some recovery. Dr Can, the orthopaedics expert, estimated that the splint would have had to stay on for three to six weeks and that a patient might be able to run as well as walk within the same range of time. He pointed out that with sufficient motivation a person could run, notwithstanding a high level of pain. In the absence of medical notes, the Commission was unable to reach any firm conclusions as to what state of fitness Muhsin Taş would have been in on 9 November 1993. It found it highly unlikely however that he was fully fit or able to walk or run normally at this date.

26. The Commission found that the incident report of 9 November 1993 was an unreliable document. The report stated that Muhsin Taş ran off after a clash broke out, under cover of the fading light, precipitation and rocky terrain. It did not mention how many gendarmes were involved in the operation, how many were guarding the suspect and whether – and if not, why not – the suspect was restrained or handcuffed in some way. No details were given of the steps taken to recover the suspect. The times given on the report were particularly implausible. It was stated that the clash broke out at 16.15 hours following which there was a sequence of events – the escape, the discovery of the escape, an unsuccessful search, the monitoring of various radio conversations between terrorist – culminating in the drawing of the report and its signing by the three officers at 16.30 hours.

27. In these circumstances, the Commission considered that it was of crucial importance that the three signatories of the report gave explanations of the document and what they in fact saw and did. The Delegates in requesting the Government's assistance in summoning them to give evidence emphasised that the Government should at the same time identify the officers who personally witnessed Muhsin Taş's escape as the

Commission had experience that the signatories of reports did not necessarily have any direct knowledge of the contents. At the taking of evidence in May 1998, the Government Agent informed the Delegates that they had been unable to find three officers who signed the report and that they had recently received information that the names used were code names. In reply to the Delegates' request for steps be taken to identify the officers who used these code names in November 1993, the Government stated that it was not possible to identify the three officers. The Delegates also requested the other operation records or details which could cast light on the incident. The Government stated that no other records existed.

28. No document was provided recording authorisation for the transfer of Muhsin Taş to any particular operational command at Şirnak. In particular, there was no contemporaneous document or record indicating that he was transferred from the provincial gendarme interrogation unit elsewhere. It had not been established by the written or oral evidence that Muhsin Taş had in fact offered to show locations during his interrogation.

29. The Government relied principally on the evidence of two ex-PKK members or "confessors" – the written statements taken from Nedim Kaya and Süleyman Fidan, and the oral evidence of Nedim Kaya – as substantiating the allegation that Muhsin Taş had escaped and rejoined the PKK in the Gabar mountains on 9 November 1993. The Commission however did not find this material to be reliable or, on certain crucial aspects, credible. It referred, *inter alia*, to the lack of any explanation as to how the two confessors came to be identified at the same time as persons with relevant information about Muhsin Taş; that Nedim Kaya's and Süleyman Fidan's statements of 4 November 1995 referred to injuries suffered by Taş in 1992 and made no reference to the injury which he had received in October 1993; and the fact that Nedim Kaya's statement of 12 January 1996 stated that he joined the PKK in November 1993 becoming a friend of Muhsin Taş before his capture in Cizre, though that latter event occurred on 14 October 1993.

The Commission also found that Nedim Kaya's oral evidence was inconsistent and unconvincing. His story changed under questioning and gave the impression of embroidery. It was not reconciliable with uncontroverted facts. For example, Nedim Kaya was insistent that he spent a fifteen day training course with Muhsin Taş after he joined the PKK in October, which explanation formed the basis for his claim of forming a close friendship with Taş, whereas Muhsin Taş was apprehended in Cizre in the early hours of 14 October 1993. The Commission were accordingly not satisfied that he had seen Muhsin Taş after 9 November 1993 as asserted. It concluded that the Government's claim that Muhsin Taş escaped while assisting the security forces on an operation was not substantiated by the evidence given and could not be regarded as established as a fact or a significant probability. There was accordingly no explanation for what

happened to Muhsin Taş after he was treated by Dr Can at Şirnak Military Hospital on 14 October 1993.

3. Concerning the domestic proceedings and investigations

30. The applicant was informed on 15 October 1993 that his son had been apprehended and injured in a clash in Cizre. Arriving in Cizre on 17 or 18 October, he went to see the public prosecutor immediately. He was told to come back after the fifteen day extended custody period. Meanwhile, the applicant sought to visit, or discover further information, about his injured son by approaching the gendarmerie in Şirnak and Cizre but was turned away. On the expiry of the fifteen day period, at the end of October or beginning of November, he returned to the public prosecutor handing in a written petition. The public prosecutor signed the petition and he took it to the district gendarme commander who referred him back to the public prosecutor. During the second fifteen day period to end, the applicant returned to the public prosecutor repeatedly seeking for news and on one occasion, the public prosecutor contacted the district gendarmerie by telephone.

31. On the expiry of the second period, the applicant returned to the public prosecutor. On 18 November 1993, he handed in a further written petition which stated that he had no news although a week had passed from the end of the second custody period. He requested information and stated that he feared for his son's life. On or about this date, the public prosecutor informed him that it was reported that his son had escaped. The written report from the district gendarmerie to the prosecutor was dated 19 November 1993 but it was possible that the information was received by the public prosecutor prior to this date. The applicant informed the public prosecutor orally that he did not believe this story and that he believed his son had been tortured and killed.

32. The public prosecutor at Cizre took no steps to investigate the alleged escape of Muhsin Taş while in custody in reaction either to the applicant's expressed fears or to the fact that a prisoner awaiting judicial procedures had somehow been permitted to escape. On 13 December 1993, the public prosecutor issued a decision of withdrawal of jurisdiction and transferred the file concerning Muhsin Taş as a suspected member of the PKK to the Diyarbakır State Security Court (SSC) public prosecutor. It stated as an apparent fact that he had escaped to rejoin the PKK. The steps taken by the SSC prosecutor were related to investigating his membership of PKK and not related to investigating his disappearance.

33. The applicant returned to Cizre in January 1994 to see the public prosecutor, who informed him that the case had been transferred to Diyarbakır.

34. Following the communication of the case to the respondent Government by the Commission in October 1994, it appears that an

investigation was briefly pursued by the Cizre public prosecutor (file no. 1995/653) This was limited to an enquiry dated 27 November 1995 to the Cizre district gendarme command for the names of the officers who signed the report of 9 November 1993 to be identified. Following a letter dated 29 November 1995 from the Cizre district gendarmes which stated that enquiries should be addressed to the Şirnak gendarme border regiment command, and that the special operations group command were responsible, the Cizre public prosecutor declined jurisdiction in a decision of 7 December 1995, transferring his file to the Şirnak public prosecutor.

35. The Şirnak public prosecutor had meanwhile commenced an investigation (prel. 1995/665) under the prompting of Ankara. At this stage, the following steps were taken:

– on 10 December 1995, a request was made to the Şirnak 23rd gendarme border regiment for the identities of the personnel of the special operations group involved in the operation of 9 November 1993 to be identified;

– on 13 December 1995, a statement was taken from the applicant on 13 December 1995 by the Kastamonu public prosecutor;

– on 12 January 1996, a statement was taken from Nedim Kaya by a public prosecutor;

– on 4 April and 25 May 1996, an urgent reminder was sent requiring a response to the above request of 10 December 1995;

– on 27 May 1996, a request for information about the identities of personnel was sent to Şirnak provincial gendarme command who replied on 29 May 1996 that it was the Special Operations Group Command who had taken Muhsin Taş;

– following receipt of a letter on 14 June 1996, in which the Special Operations Group command denied knowledge of the three names on the report of 9 November 1993 but named three officers (Ozaricanlı, Tümöz and Çetin) as being group commander and team commanders at that time, a request was made for those three officers to be asked a list of four specific questions, namely, about whether they were serving in the Special Operations Group Command at the time, whether they or the Special Operations Group Command received Muhsin Taş, whether they knew the names on the report and where it would be possible to identify the names on the report;

– on 8 July 1996, a request was made of the Cizre public prosecutor for the transfer record concerning Muhsin Taş.

36. On 28 August 1996, the Şirnak public prosecutor issued a decision of withdrawal of jurisdiction, stating that it had not been possible to identify the officers involved in the alleged incident. The decision concluded that the matter should be investigated under the Official Conduct Act as it concerned special operations teams and that the file was to be transferred to the Şirnak provincial administrative council.

37. The investigation was taken over by the Administrative Council who by letter of 3 September 1996 appointed Major Doğan, a gendarme officer from the provincial gendarme command to investigate the allegations that Muhsin Taş had been killed and to identify the perpetrators. This stage of the investigation lasted until February 1998. During this period, Major Doğan again asked the Special Operations Group Command specifically to identify the three persons who signed the report. He received the reply on 7 February 1997 that the names were not found in the records and that the records had been burned in 1993 with the result that the names of the personnel who were on operation in Gabar at the time could not be determined. Major Doğan requested medical records and transfer details about Muhsin Taş from the Cizre district gendarmerie. Via a rogatory request, he obtained statements from the applicant, Nedim Kaya, Captain Erol Tuna and the three officers previously named as having served in Şirnak special operations at the relevant time. They stated, *inter alia*, that Muhsin Taş had not been delivered to them and that code names were not permitted, though Captain Ozaricanlı was noted as recognising his signature on the incident report of 9 November 1993. On the basis of this information, Major Doğan found in his report of 12 February 1998, that it was established that Muhsin Taş had been taken to Gabar mountain to locate PKK shelters by teams from the 23rd gendarme border brigade special operations group command and that he had escaped on 9 November 1993. The statements of Nedim Kaya and Süleyman Fidan were referred to as supporting this. The report noted that there were no interrogation records concerning Muhsin Taş though it appeared that Captain Erol Tuna had transferred him to the Interrogation Unit. The report concluded that it was not possible to establish the identities of the suspects, the identities of the persons of the report not being ascertainable due to changes in military personnel, the failure to keep records properly and the destruction of records. In those circumstances, a prosecution could not be brought. The provincial governor accepted this conclusion and the proceedings were terminated.

38. The investigation documents concerning the enquiries by the Şirnak public prosecutor and Major Doğan, the gendarme officer appointed by the Şirnak Provincial Administrative Council were submitted to the Commission by the Government on 11 August 1998, after the Commission had closed the taking of evidence and invited the parties to submit their oral observations. These documents included information about the possible identification of special operations group officers involved in the Muhsin Taş incident. Though the names of three officers were known to the investigating authorities in 1996, the Government did not bring them to the attention of the Commission or its Delegates who could have taken the decision to call them to give oral evidence. The Commission found that in failing to provide it with this information during the taking of evidence, the

Government had fallen short of its obligations under former Article 28 § 1 (a) of the Convention to furnish all the necessary facilities to the Commission in its task of establishing the facts of the case.

B. The Government's submissions on the facts

39. Muhsin Taş was apprehended on 14 October 1993 by the security forces during an armed clash with PKK terrorists. During interrogation, Mushin Taş said that he knew certain hideouts used by PKK members in the Gabar mountains. Upon this information, a search team went to the mountains with Muhsin Taş. This area was used frequently by the PKK. A clash started between the PKK and the security personnel. Benefiting from this clash, Muhsin Taş escaped and was lost immediately in the near darkness. He was not handcuffed and knew the area very well. It was very probable that he re-joined the PKK following his escape. He would have been able to run even though his leg was injured.

40. As Muhsin Taş escaped from the security forces, the Government stated that it was not for them to prove that he is still alive and they cannot give an explanation for his whereabouts.

II. RELEVANT DOMESTIC LAW AND PRACTICE

41. The principles and procedures relating to liability for acts contrary to the law may be summarised as follows.

A. Criminal prosecutions

42. Under the Criminal Code all forms of homicide (Articles 448 to 455) and attempted homicide (Articles 61 and 62) constitute criminal offences. It is also an offence for a government employee to subject some-one to torture or ill-treatment (Article 243 in respect of torture and Article 245 in respect of ill-treatment) or to deprive an individual unlawfully of his or her liberty (Article 179 generally, Article 181 in respect of civil servants).

43. The authorities' obligations in respect of conducting a preliminary investigation into acts or omissions capable of constituting such offences that have been brought to their attention are governed by Articles 151 to 153 of the Code of Criminal Procedure. Offences may be reported to the authorities or the security forces as well as to public prosecutor's offices. The complaint may be made in writing or orally. If it is made orally, the authority must make a record of it (Article 151).

If there is evidence to suggest that a death is not due to natural causes, members of the security forces who have been informed of that fact are required to advise the public prosecutor or a criminal court judge (Article 152). By Article 235 of the Criminal Code, any public official who

fails to report to the police or a public prosecutor's office an offence of which he has become aware in the exercise of his duty is liable to imprisonment.

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 (Article 153 of the Code of Criminal Procedure).

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

45. If the suspected offender is a civil servant and if the offence was committed during the performance of his duties, the preliminary investigation of the case is governed by the Law of 1914 on the prosecution of civil servants (sometimes referred to as the Official Conduct Act), which restricts the public prosecutor's jurisdiction *ratione personae* at that stage of the proceedings. In such cases it is for the relevant local administrative council (for the district or province, depending on the suspect's status) to conduct the preliminary investigation and, consequently, to decide whether to prosecute. Once a decision to prosecute has been taken, it is for the public prosecutor to investigate the case.

An appeal to the Supreme Administrative Court lies against a decision of the Council. If a decision not to prosecute is taken, the case is automatically referred to that court.

46. By virtue of Article 4, paragraph (i), of Legislative Decree no. 285 of 10 July 1987 on the authority of the governor of a state of emergency region, the 1914 Law (see paragraph 45 above) also applies to members of the security forces who come under the governor's authority.

47. If the suspect is a member of the armed forces, the applicable law is determined by the nature of the offence. Thus, if it is a "military offence" under the Military Criminal Code (Law no. 1632), the criminal proceedings are in principle conducted in accordance with Law no. 353 on the establishment of courts martial and their rules of procedure. Where a member of the armed forces has been accused of an ordinary offence, it is normally the provisions of the Code of Criminal Procedure which apply (see Article 145 § 1 of the Constitution and sections 9 to 14 of Law no. 353).

The Military Criminal Code makes it a military offence for a member of the armed forces to endanger a person's life by disobeying an order (Article 89). In such cases civilian complainants may lodge their complaints with the authorities referred to in the Code of Criminal Procedure (see paragraph 43 above) or with the offender's superior.

B. Civil and administrative liability arising out of criminal offences

48. Under section 13 of Law no. 2577 on administrative procedure, anyone who sustains damage as a result of an act by the authorities may, within one year after the alleged act was committed, claim compensation from them. If the claim is rejected in whole or in part or if no reply is received within sixty days, the victim may bring administrative proceedings.

49. Article 125 §§ 1 and 7 of the Constitution provides:

> "All acts or decisions of the authorities are subject to judicial review ...
>
> The authorities shall be liable to make reparation for all damage caused by their acts or measures."

That provision establishes the State's strict liability, which comes into play if it is shown that in the circumstances of a particular case the State has failed in its obligation to maintain public order, ensure public safety or protect people's lives or property, without it being necessary to show a tortious act attributable to the authorities. Under these rules, the authorities may therefore be held liable to compensate anyone who has sustained loss as a result of acts committed by unidentified persons.

50. Article 8 of Legislative Decree no. 430 of 16 December 1990, the last sentence of which was inspired by the provision mentioned above (see paragraph 49 above), provides:

> "No criminal, financial or legal liability may be asserted against ... the governor of a state of emergency region or by provincial governors in that region in respect of decisions taken, or acts performed, by them in the exercise of the powers conferred on them by this legislative decree, and no application shall be made to any judicial authority to that end. This is without prejudice to the rights of individuals to claim reparation from the State for damage which they have been caused without justification."

51. Under the Code of Obligations, anyone who suffers damage as a result of an illegal or tortious act may bring an action for damages (Articles 41 to 46) and non-pecuniary loss (Article 47). The civil courts are not bound by either the findings or the verdict of the criminal court on the issue of the defendant's guilt (Article 53).

However, under section 13 of Law no. 657 on State employees, anyone who has sustained loss as a result of an act done in the performance of duties governed by public law may, in principle, only bring an action against the authority by whom the civil servant concerned is employed and not directly against the civil servant (see Article 129 § 5 of the Constitution and Articles 55 and 100 of the Code of Obligations). That is not, however, an absolute rule. When an act is found to be illegal or tortious and, consequently, is no longer an "administrative act" or deed, the civil courts may allow a claim for damages to be made against the official concerned, without prejudice to the victim's right to bring an action against the

authority on the basis of its joint liability as the official's employer (Article 50 of the Code of Obligations).

THE LAW

I. THE COURT'S ASSESSMENT OF THE FACTS

52. The Court reiterates its settled case-law that under the Convention system prior to 1 November 1998 the establishment and verification of the facts was primarily a matter for the Commission (former Articles 28 § 1 and 31 of the Convention). While the Court is not bound by the Commission's findings of fact and remains free to make its own assessment in the light of all the material before it, it is however only in exceptional circumstances that it will exercise its powers in this area (see, among other authorities, the Akdivar and Others v. Turkey judgment of 16 September 1996, *Reports* 1996-IV, p. 1218, § 78).

53. The Government argued that the Commission gave undue weight to the evidence of the applicant. They also criticised the Commission for assessing the evidence of the official witnesses and confessors as unreliable and even incredible. The Court observes that the Government's submissions concerning these witnesses were taken into consideration by the Commission in its report, which approached its task of assessing the evidence with the requisite caution, giving detailed consideration to the elements which supported the applicant's claims and those which cast doubt on their credibility. It does not find that the criticisms made by the Government raise any matter of substance which might warrant the exercise of its own powers of verifying the facts. In these circumstances, the Court accepts the facts as established by the Commission (see paragraphs 11-38 above).

54. In addition to the difficulties inevitably arising from a fact-finding exercise of this nature, the Court recalls that the Commission found that the Government had failed to provide the Commission's delegates with the information about the domestic investigation into the disappearance, including information about special operation officers who had been identified as possibly involved in the incident.

The Court notes that it is of the utmost importance for the effective operation of the system of individual petition instituted under former Article 25 of the Convention (now replaced by Article 34) not only that applicants or potential applicants are able to communicate freely with the Convention organs without being subjected to any form of pressure from the authorities but also that States furnish all necessary facilities to enable a

proper and effective examination of applications (see former Article 28 § 1 (a) of the Convention, which concerned the fact-finding responsibility of the Commission, now replaced by Article 38 of the Convention as concerns the Court's procedures). The Court notes the lack of explanation given by the Government with regard to the late submission of the information which had been requested repeatedly by the Commission (see paragraphs 19, 25, 26, 29, 181-3, 189 and 195 of the Commission's report). This delay deprived the Commission of the opportunity of summoning witnesses with potentially significant evidence. Consequently, it confirms the finding, reached by the Commission in its report, that in this case the Government fell short of their obligations under former Article 28 § 1 (a) to furnish all necessary facilities to the Commission in its task of establishing the facts.

II. ALLEGED VIOLATIONS OF ARTICLE 2 OF THE CONVENTION

55. The applicant alleged that the authorities had failed to provide a plausible explanation for his son's disappearance in custody in breach of their obligation to protect his right to life and that it could be presumed that he was dead in circumstances for which the authorities were liable. He also complained that no effective investigation had been conducted into the circumstances of the murder. He invoked Article 2 of the Convention, which provides:

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

56. The Government disputed those allegations. The Commission expressed the opinion that Article 2 had been infringed on the ground that Muhsin Taş who had disappeared while in detention must be presumed to have died and that the authorities had failed to carry out an adequate investigation into the circumstances surrounding his death.

A. The parties' submissions

57. The applicant submitted that, where a person had been detained under the control of the authorities, the State was required to produce the detainee alive or provide a plausible explanation as to how he or she met their death, failing which there was a violation of the obligation to protect the right to life. As his son had been victim of an unacknowledged detention which was a life-threatening situation for which the State was responsible, their refusal or inability to provide a substantiated account of what happened to his son disclosed a violation of their obligation to protect his right to life.

58. The applicant also submitted that the State must be held responsible for his death itself, either since the circumstances disclosed a real likelihood that death had resulted from the unacknowledged detention or since there was sufficient circumstantial evidence to conclude that his son was dead. He referred *inter alia* to the findings of the European Commission for the Prevention of Torture (CPT) that torture in detention was a common occurrence, to the number of involuntary disappearances at this time (44 reported in 1993) and to the lack of effective investigations into such disappearances. In addition, his son had not been recorded in custody registers, there was no documentary evidence relating to what happened to him in custody, the Government had been unable to identify the three officers who signed the highly implausible report alleging that his son had escaped and the evidence of the confessors relied on by the Government to support the report was riddled with inconsistencies and contradictions.

59. Finally, the applicant submitted, agreeing with the Commission's findings, that the authorities had failed to carry out a prompt, adequate or effective investigation into his son's death. The Cizre public prosecutor had not reacted to the applicant's expressed fears that his son had been killed and no investigation was begun until almost two years later. The investigation was taken over by the provincial administrative council which could not be regarded as an independent body and failed to pursue with any determination the measures necessary to establish the facts of what happened, in particular, the identity of the officers involved in the purported escape.

60. The Government submitted that the applicant had not substantiated his claim that his son had died in custody. Muhsin Taş was alive as he had escaped from the security forces. He knew the Gabar mountain area very well and deliberately led the soldiers there, where the terrain, weather and clash made it easy for him to escape. This had been explained by the confessors Nedim Kaya and Suleyman Fidan and it was not the authorities' responsibility to prove that the renegade was still alive. As he had escaped, they could not give any explanation of his whereabouts.

61. The Government submitted that the competent public prosecutors carried out the necessary investigations. However, as the applicant could not substantiate his allegations, they did not pursue the investigations further.

B. Concerning responsibility of the State for Muhsin Taş's death

62. The Court has accepted above (paragraph 54) the Commission's establishment of facts in this case, namely, that Muhsin Taş was taken into custody on 14 October 1993, that no records exist detailing where he was held subsequent to that date and that the incident report and evidence from the confessors Nedim Kaya and Süleyman Fidan claiming that Muhsin Taş had purportedly escaped from the security forces were unreliable and lacking credibility. The question arises whether in those circumstances, as the applicant submits, the authorities of the respondent State should be considered to have failed in their obligation to protect his son's right to life under Article 2 of the Convention.

63. The Court has previously held that 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 (see the Tomasi v. France judgment of 27 August 1992, Series A no. 241-A, §§ 108-111, Ribitsch v. Austria judgment of 4 December 1995, Series A no. 336, § 34, and Selmouni v. France judgment of 28 July 1999, to be published in ECHR 1999, § 87). The obligation on the authorities to account for the treatment of an individual in custody is particularly stringent where that individual dies. 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 depends 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 (see the Çakıcı v. Turkey judgment of 8 July 1999, to be published in ECHR 1999, § 85; Ertak v. Turkey judgment of 9 May 2000, to be published in ECHR 2000, § 131 and Timurtaş v. Turkey judgment of 13 June 2000, to be published in ECHR 2000, §§ 82-86).

64. 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. Issues may therefore arise 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 (see, amongst other authorities, the above-mentioned Çakıcı judgment, § 86).

65. Turning to the particular circumstances of the case, the Court observes that although the applicant's son was taken into custody on 14 October 1993 no entries were subsequently made in any custody records and that no reliable evidence has been forthcoming as to where he was held. Although he was injured in the knee by a bullet, there are no medical records showing that he continued to receive treatment after being seen by Dr Can at Şirnak Military Hospital on the day of his apprehension. When, finally, more than a month later, the applicant received news of his son on or about 18 November 1993, he was told that his son had escaped from the security forces while on an operation with them in the Gabar mountains on 9 November 1993. This assertion, based on a report by three officers who allegedly used code names and could not be identified by the Government, was lacking entirely in credibility and has not been substantiated by any reliable evidence.

66. The Court draws very strong inferences from the lack of any documentary evidence relating to where Muhsin Taş was detained and from the inability of the Government to provide a satisfactory and plausible explanation as to what happened to him. It also observes that in the general context of the situation in south-east Turkey in 1993, it can by no means be excluded that an unacknowledged detention of such a person would be life-threatening. It is recalled that the Court has held in two recent judgments that defects undermining the effectiveness of criminal law protection in the south-east region during the period relevant also to this case permitted or fostered a lack of accountability of members of the security forces for their actions (see the Kılıç v. Turkey judgment of 28 March 2000, § 75, and the Mahmut Kaya v. Turkey judgment of 28 March 2000, § 98, both to be published in ECHR 2000).

67. For the above reasons, the Court finds that Muhsin Taş must be presumed dead following his detention by the security forces. Consequently, the responsibility of the respondent State for his death is engaged. Noting that the authorities have not accounted for what happened during Muhsin Taş's detention and that they do not rely on any ground of justification in respect of any use of lethal force by their agents, it follows that liability for his death is attributable to the respondent Government (see Çakıcı v. Turkey, *loc. cit.*, § 87). Accordingly, there has been a violation of Article 2 on that account.

C. Concerning the alleged inadequacy of the investigation into Muhsin Taş's death

68. The Court reiterates that the obligation to protect life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention "to secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see, *mutatis mutandis*, the McCann and Others v. the United Kingdom judgment of 27 September 1995, Series A no. 324, p. 49, § 161 and the Kaya v. Turkey judgment of 19 February 1998, *Reports* 1998-I, § 105).

69. In the present case, the Court recalls that the public prosecutor at Cizre undertook no investigative steps in response to the petitions of the applicant, in which he expressed his fear that his son had been killed in detention. While the Government maintained that the public prosecutor was not required to investigate an unsubstantiated claim, the Court would observe that it is incumbent on the competent authorities to ensure that persons in detention enjoy the safeguards accorded by law and judicial process. The lack of any reaction to a report that the security forces had "lost" a person detained on suspicion of committing serious offences is incompatible with this obligation.

70. It is true that an investigation was commenced two years after the events by the Şirnak public prosecutor, who took some steps seeking to identify the persons who were involved in the escape incident. However, he ceded jurisdiction after approximately nine months to the provincial administrative council, which appointed an inspector to continue the investigation. The investigation concluded on the basis that it was not possible to establish the identities of those officers involved in the incident. The Commission found that, although a number of essential investigative steps were taken, they were not followed up with any determination. For example, no statements were taken from the gendarme officers involved in Muhsin Taş's apprehension or any attempt made to question the personnel involved in interrogating him. The vague and contradictory claims made by the special operations group as to their inability to identify the personnel involved in operations in the Gabar mountains at the relevant time were accepted without further investigation, as were the denials given in brief statements by the three officers whose names were put forward.

71. The Court finds no basis to assess the investigation differently from the Commission. It has already found in a number of cases that the use of provincial administrative councils to investigate allegations of unlawful killings did not comply with the requirement that the investigation be carried out by an independent body in a process accessible to the alleged victim's close relatives, in particular since these councils were composed of

officials under the authority of the Governor who was administratively in charge of the security forces under investigation (see Güleç v. Turkey judgment of 27 July 1998, *Reports* 1998-IV, pp. 1732-33, §§ 80-81 and Oğur v. Turkey judgment of 20 May 1999, to be published in *Reports* 1999, §§ 91-92).

72. In the light of the foregoing, the Court finds that the investigation carried out into the disappearance of the applicant's son was neither prompt, adequate or effective and therefore discloses a breach of the State's procedural obligations to protect the right to life. There has accordingly been a violation of Article 2 of the Convention on this account also.

III. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

A. Concerning Muhsin Taş

73. The applicant complained that his son had been the victim of treatment contrary to Article 3 of the Convention which provides:

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

74. The applicant submitted that this provision had been breached, firstly, by the failure to afford his son the medical treatment needed for his injury, and, secondly, by the fact that his son had been subjected to 15 or 26 days incommunicado detention.

75. The Government did not address this aspect of the case.

76. The Court observes that the applicant's son did receive prompt and effective medical treatment for the injury to his knee as he was taken immediately to Cizre State Hospital and then received specialist care at Şirnak Military Hospital. It agrees with the Commission that in these circumstances the lack of records as to his subsequent care is an insufficient basis to conclude that he was the victim of treatment contrary to Article 3 of the Convention. Nor does it consider it appropriate to make any findings under this provision concerning the effect which the incommunicado detention might have had on Muhsin Taş.

Accordingly, the Court finds that there has been no violation of Article 3 in respect of Muhsin Taş.

B. Concerning the applicant

77. The applicant requested the Court to confirm the findings of the Commission that the disappearance of his son caused him such a degree of suffering as to constitute inhuman and degrading treatment contrary to Article 3 of the Convention.

78. The Government rejected the applicant's claims in this respect, as the disappearance of his son was not their responsibility, Muhsin Taş having escaped from official custody.

79. The Court observes that in the Kurt case (Kurt v. Turkey judgment of 25 May 1998, *Reports* 1998-III, pp. 1187-88, §§ 130-34), which concerned the disappearance of the applicant's son during an unacknowledged detention, it found that the applicant had suffered a breach of Article 3 having regard to the particular circumstances of the case. It referred particularly to the fact that she was the mother of a victim of a serious human rights violation and herself the victim of the authorities' complacency in the face of her anguish and distress. The Kurt case does not however establish any general principle that a family member of a "disappeared person" is thereby a victim of treatment contrary to Article 3.

Whether a family member is such a victim 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. The Court has emphasised 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 the Cakıcı v. Turkey judgment of 8 July 1999, to be published in *Reports* 1999, §§ 98-99).

80. In the present case, the applicant was the father of the disappeared person. On hearing that his son had been detained and injured, he went immediately to Cizre, where he tried over a period of a month to obtain news. He called frequently on the public prosecutor and attempted to visit his son by calling at the gendarmeries at Cizre and Şirnak, and was told either to go away or to come back later. When, after a month of waiting, the public prosecutor told him that his son had "escaped", the applicant's expressed fears that this meant his son had been killed in custody did not lead the public prosecutor to take any step to investigate. Having regard to the indifference and callousness of the authorities to the applicant's concerns and the acute anguish and uncertainty which he has suffered as a result and continues to suffer, the Court finds that the applicant may claim to be a victim of the authorities' conduct, to an extent which discloses a breach of Article 3 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

81. The applicant complained that the disappearance of his son in custody disclosed a violation, in numerous aspects, of Article 5 of the Convention which provides:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> (b) the lawful arrest or detention of a person for non- compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; …
>
> 2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
>
> 3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
>
> 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

82. The applicant submitted that the authorities had failed to provide a credible and substantiated explanation of what had happened to Muhsin Taş after he was apprehended and that their responsibility was engaged for his subsequent disappearance. The failure to record his son's detention in custody records disclosed the lack of a necessary safeguard to prevent the occurrence of such a disappearance, as did the failure to conduct a thorough and effective investigation into the fate of his son while in detention. He invoked, in addition, concerning the thirty day detention period authorised by the public prosecutor, Article 5 § 3 in respect of the excessive length of this period of pre-trial detention which elapsed without his son being brought before a judicial officer, Article 5 § 4 in respect of the inability to have the lawfulness of his detention decided speedily by a court during this

time and Article 5 § 5 in that it was not possible to obtain compensation in respect of these breaches.

83. The Government submitted that the Cizre and Şirnak public prosecutors carried out investigations into the applicant's allegations. As however there was no concrete evidence and the applicant did not substantiate his claims, there had been no requirement to continue the investigations.

84. The Court's case-law stresses the fundamental importance of the guarantees contained in Article 5 for securing the rights of individuals in a democracy to be free from arbitrary detention at the hands of the authorities. It has reiterated in that connection that any deprivation of liberty must not only have been effected in conformity with the substantive and procedural rules of national law but must equally be in keeping with the very purpose of Article 5, namely to protect the individual from arbitrary detention. In order to minimise the risks of arbitrary detention, Article 5 provides a corpus of substantive rights intended to ensure that the act of deprivation of liberty be amenable to independent judicial scrutiny and secures the accountability of the authorities for that measure. The unacknowledged detention of an individual is a complete negation of these guarantees and discloses a most grave violation of Article 5. Bearing in mind the responsibility of the authorities to account for individuals under their control, Article 5 requires them to take effective measures to safeguard against the risk of disappearance and to conduct a prompt and effective investigation into an arguable claim that a person has been taken into custody and has not been seen since (Kurt, *loc. cit*., pp. 1184-85, §§ 122-125; Çakıcı, *loc. cit.*, § 104).

85. The Court notes that its reasoning and findings in relation to Article 2 above leave no doubt that Muhsin Taş's detention was in breach of Article 5. He was apprehended on 14 August 1993 by gendarmes in Cizre and transferred the same day to a place of detention in Şırnak. The authorities have failed to provide a plausible explanation for the whereabouts and fate of the applicant's son after that date. The investigation carried out by the domestic authorities into the applicant's allegations was neither prompt nor effective. It regards with particular seriousness the lack of any entries in official custody records in respect of Muhsin Taş's detention. The recording of accurate and reliable holding data provides an indispensable safeguard against arbitrary detention, the absence of which enables those responsible for the act of deprivation of liberty to escape accountability for the fate of the detainee (see the Kurt v. Turkey judgment, *loc. cit*., § 125).

86. The Court further observes that Muhsin Taş's detention after 14 October 1993 was extended twice by a period of fifteen days by the Cizre public prosecutor. Only exceptionally can periods of more than four days before release or appearance before a judicial officer be justified under

Article 5 § 3 (see, for example, the Brogan and Others v. the United Kingdom judgment of 29 November 1988, Series A no. 145-B, p. 33, § 62; the Brannigan and McBride judgment of 26 May 1993, Series A no. 258-B, pp. 49-50, § 43; and the Aksoy v. Turkey judgment of 18 December 1996, *Reports* 1996-IV, pp. 2282-84, §§ 76-84). The period of thirty days' incommunicado detention authorised in this case is incompatible with both Article 5 §§ 3 and 4 of the Convention and the lack of available compensation for these breaches contrary to Article 5 § 5 of the Convention.

87. The Court concludes that Muhsin Taş was held in detention in the complete absence of the safeguards contained in Article 5 and that there has been a particularly grave violation of the right to liberty and security of person guaranteed under that provision.

V. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

88. The applicant asserted that he had been denied access to an effective domestic remedy and alleges a breach of Article 13, which 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."

89. The applicant, adopting the findings of the Commission, complained of a denial of an effective remedy in relation both to his son and in his own regard. He referred to the attitude of the public prosecutors, the security forces, the investigator appointed by the Administrative Council and the Administrative Council. He submitted that Article 13 required effective accountability by the authorities for arguable claims that persons had disappeared in custody. This case disclosed that they in fact enjoyed complete immunity. The failings were both systematic and systemic.

90. The Government reaffirmed that all the necessary enquiries had been made, but that the available evidence had not corroborated the applicant's allegations.

91. 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. Article 13 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 also 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 the aforementioned Çakıcı judgment, *loc. cit.*, § 112, and the other authorities cited there).

The Court has further previously held that where the relatives of a person have an arguable claim that the latter 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 and including effective access for the relatives to the investigatory procedure (see the Kurt judgment, *loc. cit.*, § 140, and the Yaşa v. Turkey judgment of 2 September 1998, *Reports* 1998-VI, p. 2442, § 114).

92. Turning to the facts of the case, the Court considers that there can be no doubt that the applicant had an arguable complaint that his son had disappeared after being taken into custody. In view of the fact, moreover, that the Court has found that the domestic authorities failed in their obligation to protect the life of the applicant's son, the applicant was entitled to an effective remedy within the meaning as outlined in the preceding paragraph.

93. Accordingly, the authorities were under the obligation to conduct an effective investigation into the disappearance of the applicant's son. For the reasons set out above (see paragraphs 68-72), 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 the Kaya judgment cited above, pp. 330-31, § 107). The Court finds therefore that the applicant has been denied an effective remedy in respect of the disappearance and death of his son and thereby access to any other available remedies at his disposal, including a claim for compensation.

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

VI. ALLEGED VIOLATION OF ARTICLE 18 OF THE CONVENTION

94. The applicant argued that by failing to enter the detention of his son in custody records or record his interrogations the authorities had subverted their own domestic safeguards and that the Government were thereby responsible for an abuse of power contrary to the rule of law and incompatible with Article 18 of the Convention which provides:

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

95. The Government did not address this complaint, whereas the Commission found that there had been no violation of this provision.

96. Having regard to its findings above, the Court does not consider it necessary to examine this complaint separately.

VII. ALLEGED PRACTICE BY THE AUTHORITIES OF INFRINGING ARTICLES 2 AND 13 OF THE CONVENTION

97. The applicant maintained that there existed in Turkey an officially tolerated practice of inadequate investigations into suspicious deaths and of failing to provide adequate and effective remedies, which aggravated the breaches of Articles 2 and 13 of the Convention, of which he and his son had been victims. Referring to other cases concerning events in south-east Turkey in which the Commission and the Court had also found breaches of these provisions, the applicant submitted that they revealed a pattern of denial by the authorities of allegations of serious human-rights violations as well as a denial of remedies.

98. Having regard to its findings under Articles 2 and 13 above, the Court does not find it necessary to determine whether the failings identified in this case are part of a practice adopted by the authorities.

VIII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

99. 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. Damages

100. The applicant claimed, having regard to the severity and number of violations, 40,000 pounds sterling (GBP) in relation to the violations suffered by his son, such sum to be held by the applicant on behalf of his son's heirs, GBP 10,000 in respect of the violations of Articles 3 and 13 of the Convention suffered by himself, and GBP 50,000 on account of the continuing character of the violations, unless the Government were to inform him of the fate of his son, where he was buried and to enable him to re-bury his son. This amounted to a total of GBP 100,000.

101. The Government made no response to these claims.

102. As regards the claim made for non-pecuniary damage on behalf of his deceased son, the Court notes that awards have previously been made to surviving spouses and children and, where appropriate, to applicants who were surviving parents or siblings. It has previously awarded sums as regards the deceased where it was found that there had been arbitrary

detention or torture before his disappearance or death, such sums to be held for the person's heirs (see Kurt v. Turkey judgment, cited above, §§ 174-175 and Cakıçı v. Turkey, cited above, § 130). The Court notes that there have been findings of violations of Articles 2, 5 and 13 in respect of the detention and failure to protect the life of Muhsin Taş, whose fate after his disappearance remains unknown. Having regard to awards in similar cases, it finds it appropriate in the circumstances of the present case to award GBP 20,000, to be converted into Turkish liras on the date of payment and which amount is to be paid to the applicant and held by him for his son's heirs.

103. As regards the applicant, the Court has found a breach of Articles 3 and 13 due to the conduct of the authorities in relation to his search for the whereabouts and fate of his son. The Court considers that an award of compensation is also justified in his favour. It accordingly awards the applicant the sum of GBP 10,000, to be converted into Turkish liras on the date of payment.

B. Costs and expenses

104. The applicant claimed a total of GBP 16,250 for fees and costs incurred in bringing the application, less the amounts received by way of Council of Europe legal aid. This included fees and costs incurred in respect of attendance at the taking of evidence before the Commission's delegates at a hearing in Ankara. A sum of GBP 4,198 was listed as fees and administrative costs incurred in respect of the Kurdish Human Rights Project (the KHRP) in its role as liaison between the legal team in the United Kingdom and the lawyers and the applicant in Turkey, which included GBP 2,742.50 for translation work. A sum of GBP 8,431 was claimed in respect of work undertaken by lawyers in Turkey.

105. The Government made no comment.

106. Save as regards the translation costs, the Court is not persuaded that the fees claimed in respect of the KHRP were necessarily incurred. Deciding on an equitable basis and having regard to the details of the claims submitted by the applicant, the Court awards him the sum of GBP 14,795 together with any value-added tax that may be chargeable, less the 9,700 French francs (FRF) received by way of legal aid from the Council of Europe. This sum is to be paid into the sterling bank account in the United Kingdom as set out in the applicant's just satisfaction claim.

C. Default interest

107. According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 7,5% per annum.

FOR THESE REASONS, THE COURT

1. *Holds* by six votes to one that the Government is liable for the death of Muhsin Taş in violation of Article 2 of the Convention;

2. *Holds* unanimously 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 death of Muhsin Taş;

3. *Holds* unanimously that there has been no violation of Article 3 of the Convention in respect of Muhsin Taş;

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

5. *Holds* by six votes to one that there has been a violation of Article 5 §§ 1, 3, 4 and 5 of the Convention;

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

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

8. *Holds* by six votes to one that the respondent State is to pay the applicant in respect of his son, within three months, by way of compensation for non-pecuniary damage, 20,000 (twenty thousand) pounds sterling to be converted into Turkish liras at the exchange rate applicable at the date of settlement, which sum is to be held by the applicant for his son's heirs;

9. *Holds* by six votes to one that the respondent State is to pay the applicant, within three months, in respect of compensation for non-pecuniary damage, 10,000 (ten thousand) pounds sterling to be converted into Turkish liras at the exchange rate applicable at the date of settlement;

10. *Holds* by six votes to one that the respondent State is to pay the applicant, within three months, in respect of costs and expenses and into the bank account identified by him in the United Kingdom, 14,795 (fourteen thousand seven hundred and ninety five) pounds sterling, together with any value-added tax that may be chargeable, less 9,700 (nine thousand seven hundred) French francs to be converted into

pounds sterling at the exchange rate applicable at the date of delivery of this judgment;

11. *Holds* unanimously that simple interest at an annual rate of 7.5% shall be payable from the expiry of the above-mentioned three months until settlement of the above sums;

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

Done in English and notified in writing on 14 November 2000, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Elisabeth PALM
President

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

E.P.
M.O'B.

PARTLY DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

(*Translation*)

To my great regret, I cannot concur with the majority on points 1, 5, 6, 8, 9 and 10 of the judgment's operative provisions, for the following reasons.

1. The parties disagree about the facts of the case. Muhsin Taş was arrested as a member of a PKK terrorist group during an operation conducted by the security forces in the Cizre region. After being shot in the knee and placed in police custody he was taken to various hospitals to be given the treatment he needed. The applicant, who is the victim's father, claims that his son died in custody, and therefore at a time when he was in the charge of the police. The Government assert that Muhsin Taş escaped while he was assisting the security forces during an operation in the Gabar mountains aimed at locating PKK hiding-places.

I consider that in order to refute the Government's argument it would first have been necessary to establish that Muhsin Taş was physically incapable of escaping on account of the injury to his knee, but that has not been proved at all. Despite the fact that the orthopaedic surgeon, Dr Can, had reached the opposite conclusion in his report, the Commission "... was unable to reach any firm conclusions as to what state of fitness Muhsin Taş would have been in on 9 November 1993 (the date of his escape). It found it highly unlikely however that he was fully fit or able to walk or run normally at this date" (see paragraph 25 of the judgment). I wonder what evidence the Commission based that conclusion on. It did not say. I deduce that it was a supposition, the result of speculation! In this case, in the final analysis, there is nothing other than suppositions and speculations in the Commission's findings of fact (see paragraphs 13 et seq. and above all paragraphs 24 et seq. of the judgment). But the Court has endorsed the Commission's speculative findings (see paragraphs 52 et seq. of the judgment).

In this case it has not been proved beyond a reasonable doubt that Mr Taş died while in police custody. On the basis of a presumption that the Government were culpable, the majority reached a presumption that he had died in police custody (see paragraph 63 of the judgment). I am astonished that, in the same paragraph, they referred, in support of their presumption, to the Çakıcı v. Turkey judgment of 8 July 1999 and the Ertak v. Turkey judgment of 9 May 2000. Those two cases have nothing in common with the present case; in each of them the death of the victims had been established, so they did not concern disappearances as the case of Muhsin Taş does. I think that there was no point in referring, in order to justify the presumption of death in police custody, to an *obiter dictum* taken from the cases of Çakıcı (paragraph 85) and Ertak (paragraph 131), which have nothing to do with the present case.

In my opinion, when death has not been proved beyond a reasonable doubt, the Court should confine itself to use of the term "forced disappearance", as it held in the Kurt judgment of 25 May 1998 and as the Commission did in its report of 29 October 1998 in the Timurtaş case (application no. 23531/94).

In its Timurtaş judgment of 13 June 2000 the Court departed from and reversed the line of case-law it had laid down in the Kurt judgment, a development of which I disapprove.

I remain convinced that as Muhsin Taş is to be considered a disappeared person Article 2 should not have been held to be applicable in the case. At a stretch, the Court could have approached the case from the standpoint of Article 5, as it did in the Kurt case. For a detailed explanation of my reasoning, I refer to my joint dissenting opinion in the previously cited Timurtaş v. Turkey case.

2. With regard to violation of Article 13, I consider that where the Court finds a violation of Article 2 in its procedural aspect, as the majority did in the instant case, no separate issue arises under Article 13, since the finding of a violation of Article 2 takes account of the fact that there has been neither an effective inquiry nor a satisfactory procedure after the incident.

For more details on that subject, I refer to my dissenting opinions in the Ergi v. Turkey judgment of 28 July 1998 (*Reports of Judgments and Decisions* 1998-IV) and the Akkoç v. Turkey judgment of 10 October 2000.

3. With regard to the application of Article 41, I find the sums awarded for damage to both the applicant and his disappeared son's heirs exorbitant in comparison with those awarded in similar cases against Turkey. On that point also, I refer, *mutatis mutandis*, to my dissenting opinion in the previously cited Akkoç judgment and the examples given in my dissenting opinion in the Salman v. Turkey judgment of 27 June 2000.

Nor do I share the majority's opinion that the sum awarded for costs should be paid into the applicant's London bank account, given that he is a Turkish national living in a small village in a remote corner of south-eastern Turkey. On that point too I refer to my dissenting opinion in the previously cited Salman judgment.