CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

CASE OF DÜNDAR v. TURKEY

(Application no. 26972/95)

JUDGMENT

STRASBOURG

20 September 2005

FINAL

20/12/2005

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

In the case of Dündar v. Turkey,

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

Mr J.-P. COSTA, *President*,
Mr A.B. BAKA,
Mr R. TÜRMEN,
Mr K. JUNGWIERT,
Mr M. UGREKHELIDZE,
Mrs A. MULARONI,
Mrs E. FURA-SANDSTRÖM, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 30 August 2005,

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

PROCEDURE

1. The case originated in an application (no. 26972/95) against the Republic of Turkey lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Mr Zübeyir Dündar ("the applicant"), on 3 March 1995.

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

3. The applicant alleged that his son had been unlawfully killed by State agents and that the investigating authorities had failed to carry out an effective investigation into the circumstances of the killing. He invoked Articles 2, 3, 6, 13 and 14 of the Convention.

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

5. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. By a decision of 24 August 1999, the Court declared the application partly admissible.

7. The applicant, but not the Government, filed observations on the merits (Rule 59 § 1).

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

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant, a Turkish citizen of Kurdish origin, was born in 1940 and lives in the town of Cizre, in south-east Turkey.

A. Introduction

10. The facts surrounding the death of the applicant's son, Mesut Dündar, are disputed by the parties.

11. The facts as presented by the applicant are set out in Section B below (see paragraphs 12-23). The Government's submissions concerning the facts are summarised in Section C below (see paragraphs 24-35). Documentary evidence submitted by the Government is summarised in Section D (see paragraphs 36-57 below).

B. The applicant's submissions on the facts

12. The applicant's son Mesut Dündar was born in 1972. When he was a child Mesut Dündar suffered from meningitis. The applicant was unable to have him treated and he remained mentally disabled.

13. Mesut Dündar was always interested in Kurdish national music, poetry and colours and on many occasions used to walk in front of the crowd on Kurdish national holidays, carrying the Kurdish colours; yellow, red and green.

14. These activities of Mesut Dündar attracted the attention of the police, who took to following him and, on occasions, raided his family home. Mesut Dündar was taken into custody three times, and on each such occasion he was beaten and tortured by the police.

15. In about July 1992, police officers from Cizre Police Headquarters raided the applicant's home and told the applicant that they had come to take Mesut Dündar to Elazığ Psychiatric Hospital for treatment. They took the applicant and Mesut Dündar to the Police Headquarters. Mesut Dündar was terrified that he would be killed in the hospital and jumped out of a window and escaped.

16. Thereupon the police officers took the applicant around Cizre town centre and neighbouring villages for three days, during which they unsuccessfully looked for Mesut Dündar. The police officers beat the applicant and threatened him by saying that they would kill him if he did not find his son and hand him over to the police. The applicant was released at the end of the third day, only after having promised the police officers that if he saw his son he would bring him in himself.

17. Mesut Dündar did not return home because of his fear of the police. He stayed with friends and telephoned the applicant's house every day in order to speak to his mother. The police often visited the applicant's house to ask about Mesut Dündar's whereabouts.

18. After some time, Mesut Dündar no longer telephoned and the police no longer came to the applicant's home. The applicant therefore began to suspect that the police had caught Mesut Dündar.

19. On 6 September 1992 Mesut Dündar's strangled body was found near the Şeyh Değirmenci watermill, near the Sulak village. A report of an interview with four women from Sulak, who had been taking yoghurt to the market in Cizre in the early hours of that day, and another person, was published in Özgür Gündem newspaper on 19 November 1992. According to this interview, four armed persons, one of whom was thought to be a police officer, had strangled Mesut Dündar while his arms were tied behind his back. Soldiers, who had come to the place where Mesut Dündar had been strangled following the killing, had dragged his body behind an armoured personnel carrier, claiming that they were doing so because they thought there might be a booby-trap under the body.

20. The applicant's family heard at a later stage that Mesut Dündar's corpse was at the hospital. A member of the family went to the hospital where the body was handed over to him. The whole of Mesut Dündar's ribcage, throat and neck were covered in bruises. His face and eyes were dirty with mud and there were red spots and bruises in 34 places on his neck.

21. The police took a statement from the applicant, asking him, “Who could have killed your son? Who do you suspect? Did you have any enemies?” Mesut Dündar's possessions were then handed over to the applicant.

22. The applicant contacted the Prosecutor and asked him what had happened to his son. The Prosecutor told him that Mesut Dündar had been strangled. He did not take any statements from the applicant, nor did he ask the applicant whether he wished to start legal proceedings.

23. On 13 September 1994 the applicant and his family lodged a petition with the Cizre Prosecutor to find out whether there was an on-going investigation and what stage it had reached. The prosecutor had been friendly until the applicant mentioned the case of Mesut Dündar. The

applicant was told by the Prosecutor's clerk that the case was closed. The applicant later discovered that the investigation was continuing.

C. The Government's submissions on the facts

24. The authorities were informed about the killing when the headman (*muhtar*) of the Sulak village approached the Gendarme Headquarters on 7 September 1992 and reported that he had seen a body at the road intersection of his village.

25. In his testimony of 18 October 1992, the *muhtar* stated that, after he had informed the gendarmerie, the Prosecutor and a number of gendarmes had arrived at the scene. The Prosecutor had warned those present that the body could be booby-trapped and a decision was taken to trail the body for a short distance with a rope attached to an armoured vehicle. When it was clear that the body had not been booby-trapped, the Prosecutor and the doctor carried out an *in situ* examination of the body. The body was then taken to Cizre by car.

26. On 8 September 1992 the Gendarme Headquarters forwarded their reports of the incident, together with a sketch showing the position of the body where it was found, to the Prosecutor's office in Cizre. The Gendarmerie Headquarters informed the Prosecutor that the identity of the person(s) who had strangled the victim was not known.

27. A criminal investigation was opened immediately by the Cizre Prosecutor. The Prosecutor instructed the Cizre Gendarmerie Headquarters on 10 September 1992 to carry out a comprehensive investigation and to keep him informed on a regular basis about this investigation.

28. On 7 September 1992 the Prosecutor took a statement from the applicant. He told the Prosecutor that his son had been mentally ill and beyond his control. He further said that he had no complaints against anyone.

29. The Cizre Gendarmerie Headquarters informed the Cizre Prosecutor on 14 November and 14 December 1992 and 24 February and 30 May 1993 that the investigation was still continuing and that there had not been any developments.

30. On 7 December 1993 the Prosecutor instructed the Cizre Gendarmerie Headquarters to up-date him every three months. On 31 May 1994 the Prosecutor instructed the Cizre Gendarmerie Headquarters to continue the investigation until the expiry of the statutory limitation period.

31. The Cizre Gendarmerie Headquarters regularly continued to inform the Prosecutor that there had been no developments in the investigation.

32. On 19 February 1996 the Mayor of Şırnak informed the Gendarmerie Headquarters in Ankara that the allegation that Mesut Dündar had been taken into custody prior to his death was baseless. In support of his

submissions, the Mayor enclosed copies of the custody ledgers in which Mesut Dündar's name did not feature.

33. The Cizre Prosecutor informed the Ministry of Justice that the allegation that the applicant had not been given any information by his office was baseless.

34. According to an indictment filed by the Midyat Prosecutor with the Midyat Assize Court on 11 December 1989, a certain T.M. and the applicant's deceased son, Mesut Dündar, had raped a nine-year old boy in breach of Article 414 of the Criminal Code. As a result, Mesut Dündar had been arrested on 1 December 1989.

35. On the basis of a report prepared by the Forensic Medicine Directorate on 25 October 1991, which stated that Mesut Dündar was seriously, mentally impaired, the trial court held that Mesut Dündar could not be held criminally responsible for his actions. On 17 December 1991 the trial court ordered Mesut Dündar to be detained in a mental institution for a minimum period of one year. The decision became final on 27 May 1992 and was forwarded to the office for the execution of judgments on 22 June 1992. This had been the reason for police officers' visit to the applicant's house in July 1992 - to take Mesut Dündar to the Elazığ Psychiatric Hospital.

D. Documentary evidence submitted by the Government

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

37. On 11 December 1989 the Midyat Prosecutor filed an indictment with the Midyat Assize Court in which Mesut Dündar was charged with the rape of a nine year old boy on 29 November 1989.

38. Pursuant to a request made by the Miday Assize Court, the Forensic Medicine Directorate examined Mesut Dündar on 16 October 1991. The Forensic Medicine Directorate concluded in their report, drawn up on 25 November 1991, that Mesut Dündar was an imbecile and therefore he did not have criminal culpability. The report recommended the detention of Mesut Dündar in a mental institution.

39. On 17 December 1991 the Midyat Assize Court established that Mesut Dündar and a certain T.M. had raped the nine-year old child. Taking into account the report of the Forensic Medicine Directorate, the Assize Court ordered Mesut Dündar's detention in a mental institution for a minimum period of one year, during which time he would receive psychiatric treatment. This judgment became final on 27 May 1992, following the rejection by the Court of Cassation of the appeal lodged by T.M.

40. On 8 September 1992, the Cizre Prosecutor and a doctor carried out an *in situ* examination of Mesut Dündar's body at a location near the Sulak

village, approximately 7 kilometres from the town of Cizre. They recorded their findings. According to their report, the body had been trailed with a rope in case there had been a booby-trap under it. After it had been established that it was safe, the body had been searched and a PKK flag found in one of the pockets.

41. The cause of death was established by the doctor as asphyxiation, caused by strangulation. Rigor mortis and post mortem hypostasis had set in. The cause of death having been thus established, the doctor decided that a full autopsy was not necessary. The Prosecutor issued a burial license.

42. Also on 7 September 1992 the Cizre Prosecutor questioned the applicant. He told the prosecutor that his son had been mentally ill and beyond his control. The applicant did not have any complaint against anyone for the murder of his son.

43. According to a report which was prepared by the deputy commander of the Cizre District Gendarmerie Headquarters on 8 September 1992 and forwarded to the Prosecutor's office in Cizre, it had been established that Mesut Dündar had been strangled elsewhere and his body dumped at the place where it was found.

44. On 10 September 1992 the Cizre prosecutor instructed the Cizre Gendarmerie Headquarters to carry out a "secret and a proper search" for the perpetrator(s) of the murder. The Prosecutor also asked to be kept informed regularly about the investigation.

45. On 14 September 1992 the Cizre Prosecutor summonsed the applicant and his son Esvet Dündar to his office.

46. According to a report drawn up by three gendarme soldiers on 13 November 1992, "the perpetrator(s) of the murder of Mesut Dündar had been secretly and properly searched for by the soldiers but could not be found. The office of the Prosecutor would be informed once the perpetrator(s) were found".

47. Between 19 February 1993 and 15 February 1996, the Cizre Prosecutor repeated his above mentioned instructions to the Cizre Gendarmerie Headquarters (paragraph 44) and asked the Gendarmerie to continue to inform his office every three months of any developments until the expiry of the statutory limitation period on 7 September 2007.

48. Gendarmes from the Cizre Gendarmerie Headquarters drew up identical reports on 29 May 1993, 18 April and 18 May 1994, 28 March, 3 June and 18 June 1995, and finally on 19 June 1995. These reports were forwarded to the Cizre Prosecutor.

49. According to a report, drawn up by gendarmes on 5 January 1996, it had been established that Mesut Dündar had been killed by members of the PKK who had then left the PKK flag in the deceased's pocket.

50. On 18 February 1996 the gendarmerie informed the Prosecutor that they were unable to find any person who knew the identity of the perpetrators.

51. On 18 March 1996 the Cizre Prosecutor summonsed the applicant and two of his relatives to his office.

52. On 19 March 1996 the Cizre Prosecutor sent a letter to the Ministry of Justice's International Law and Foreign Affairs Directorate (hereinafter "the Directorate") in which he stated that the investigation into the murder was continuing and that his office was being kept informed every month by the gendarmerie. The applicant had not informed the Prosecutor's office of his allegations, namely that his son had been detained at the police headquarters and that his son had subsequently escaped, or that four female villagers had seen four armed men strangling Mesut Dündar. The Prosecutor had not, therefore, taken these allegations into account in his investigation. He would, however, from that moment on.

53. On 12 April 1996 a statement was taken from the applicant by the Cizre Prosecutor. The applicant confirmed the accuracy of the contents of the statement he had made on 7 September 1992 (see paragraph 42 above) and further stated that his son had been arrested by police who had wanted to take him to a psychiatric hospital. However, his son had managed to escape from the window of the police station. The applicant and police officers had unsuccessfully searched for him for three days. Mesut Dündar had never returned since that date. The applicant had been told by a number of children that they had seen Mesut Dündar. Police officers had also visited his home and looked for Mesut Dündar. Following the discovery of the body of his son, the applicant had been told by a number of people that four women from the Sulak village had seen his son while he was being beaten up by four people. The women did not know whether the four men had been police officers. The reason why the applicant suspected that the police were responsible for the murder of his son was because the police officers had insisted on finding Mesut Dündar following his escape from the police station and had repeatedly come to his house to find Mesut Dündar.

54. On 17 and 19 April 1996 the Cizre Prosecutor questioned Esvet and Abdulaziz Dündar, the brothers of Mesut Dündar. Both brothers gave similar statements to that of their father.

55. On 19 April 1996 the Cizre Prosecutor asked the Cizre Gendarmerie Headquarters to find the four women who, according to the applicant, had witnessed the strangulation of Mesut Dündar.

56. On 20 May and 26 June 1996 the deputy commander of the Cizre Gendarmerie Headquarters informed the Cizre Prosecutor that none of the villagers in Sulak had witnessed the strangulation of Mesut Dündar.

57. The gendarmerie continued to draw up similar reports until 1999 which were then forwarded to the Cizre Prosecutor.

II. RELEVANT DOMESTIC LAW AND PRACTICE

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

THE LAW

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

A. Arguments of the parties

1. The applicant

59. The applicant submitted that his son had been killed intentionally by agents of the State. In support of his allegation, the applicant argued that the Government, by submitting on the one hand that Mesut Dündar had not been taken into custody, and confirming on the other that the police officers had been acting in execution of a court order when they attempted to take Mesut Dündar to the hospital, had provided contradictory information.

60. The applicant further argued that the authorities had failed to offer any credible and substantiated explanation for the whereabouts and fate of his son after he had been detained.

2. The Government

61. The Government argued that the events which had taken place following the escape of the applicant's son from the police were entirely unknown. The applicant's allegation that his son was killed while in custody had therefore no basis.

62. They further argued that it could not be excluded that Mesut Dündar had joined the PKK and that he was killed by members of the PKK who feared that Mesut Dündar, because of his lack of intelligence, could have divulged information about PKK activities.

B. The Court's evaluation of the facts

63. The Court reiterates that persons in custody are in a vulnerable position and that the authorities are under a duty to protect them. It has previously held that, where an individual is taken into police custody in

good health and is found to be injured on release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused (see, among other authorities, *Selmouni v. France* [GC], no. 25803/94, § 87, ECHR 1999-V). The obligation on the authorities to account for the treatment of an individual in custody is particularly stringent where that individual dies (*Salman v. Turkey* ([GC], no. 21986/93, § 99, ECHR 2000-VII).

64. In the present case, it is not disputed between the parties that the applicant's son was taken to the police station in July 1992 by police officers who wanted to take him to a psychiatric hospital. According to the applicant, however, his son had escaped through a window (see paragraph 15 above).

65. The Court notes that Mesut Dündar was killed in September 1992 (see paragraph 40 above), that is some two months after he had escaped from the police station, during which time he was at large. It follows, therefore, that it is not for the respondent Government to account for the death of the applicant's son. In the circumstances of the present case, the burden of proving the allegation that his son was killed by agents of the State remains on the applicant.

66. The applicant has not submitted to the Court any evidence implicating any State agents in the murder of his son. In particular, he did not provide any information regarding the identity of the four women whom he alleged had witnessed his son being strangled.

67. In the light of the foregoing, the Court concludes that the actual circumstances in which the applicant's son died remain a matter of speculation. Accordingly, there is an insufficient evidentiary basis on which to conclude that the applicant's son was killed by, or with the connivance of, State agents.

68. The Court will now proceed to examine the applicant's complaints under various Articles of the Convention.

II. ALLEGED VIOLATIONS OF ARTICLE 2 OF THE CONVENTION

69. Article 2 of the Convention provides as follows:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection."

A. The killing of the applicant's son by agents of the State

70. The applicant alleged that his son had been killed by security forces, in violation of Article 2 of the Convention.

71. According to the Government, State agents were not involved in the murder of the applicant's son.

72. The Court has already found that it had not established that the applicant's son was killed by or with the connivance of State agents (see paragraph 67 above). It follows, therefore, that there has been no violation of Article 2 of the Convention on that account.

B. Alleged inadequacy of the investigation

73. The applicant alleged that there had been a violation of Article 2 of the Convention on account of the State's failure to carry out an adequate and effective investigation into the murder of his son.

74. In support of this allegation the applicant highlighted the following shortcomings in the investigation:

(a) the authorities' failure to question the police officers who were responsible for executing the court order to take the applicant's son to the psychiatric hospital and the police officers on duty at the police station at the time of escape of the applicant's son;

(b) the authorities' failure to try to obtain information from the applicant and members of his family as to what happened when the police officers went to his house;

(c) the authorities' failure to locate and take statements from all potential eye-witnesses, including the alleged eye-witnesses to the incident; and, finally,

(d) the failure to take statements from the doctors or admission staff from the psychiatric hospital.

75. The Government submitted that all necessary steps had been taken by the authorities following the discovery of the body of Mesut Dündar and that an autopsy had been carried out. The Cizre Prosecutor had opened an *ex officio* investigation which had been extended in the light of the applicant's allegations that security forces had been implicated in Mesut Dündar's murder.

76. The Court reiterates that the obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone

within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see, *mutatis mutandis*, *McCann and Others*, cited above, p. 49, § 161, and *Kaya v. Turkey*, judgment of 19 February 1998, *Reports of Judgments and Decisions*, 1998-I, p. 329, § 105). In that connection, the Court points out that this obligation is not confined to cases where it is apparent that the killing was caused by an agent of the State (see *Salman*, cited above, § 105).

77. The obligation to carry out effective investigations involves, where appropriate, an autopsy which provides a complete and accurate record of possible signs of ill-treatment and injury and an objective analysis of clinical findings, including the cause of death (*ibid*).

78. The Court notes that it appears from the report drawn up on 7 September 1992 that the finding that the death had been caused by strangulation was sufficient for the Cizre Prosecutor and the doctor to conclude that a full autopsy was not necessary (see paragraph 41 above). They apparently gave no thought to the possibility that a full autopsy might have substantially increased their chances of finding evidence to verify the cause of death, to establish the time of death and to offer clues about the perpetrator(s) of the killing.

79. It appears from the report drawn up by the gendarmes on 8 September 1992 (see paragraph 43 above), that there was no meaningful examination of the scene where the body was found. For example, although it was stated in that report that Mesut Dündar had been killed elsewhere and his body dumped in the place where it was later found, the Government have provided no information from which it can be deduced that the scene where the body was found had been searched for footprints or tyre-marks. Furthermore, despite the finding that the victim had been strangled, there is no evidence in the investigation file indicating that the body had been forensically examined to verify whether it bore any DNA evidence or fingerprints.

80. In the light of the foregoing, the Court concludes that neither the report drawn up by the Cizre Prosecutor and the doctor, nor the report drawn up by the gendarmerie is capable of disclosing any leads that could have assisted in the establishment of the author(s) of the killing.

81. The Court cannot but remark critically on the subsequent investigation carried out by the Cizre Prosecutor which was limited to issuing instructions to the gendarmerie to carry out a "secret and proper" search for the perpetrator(s) of the murder (see paragraphs 44 and 47 above) and to take four statements from the applicant and his two surviving sons (see paragraphs 42, 53 and 54 above). Although the investigation into the murder will be ongoing until the expiry of the statutory limitation period, no

documents have been submitted by the Government indicating that any steps have been taken by the investigating authorities since 1999.

82. As regards the pro-forma reports drawn up by the gendarmes (see paragraphs 46, 48, 49, 50 and 57 above), the Court – observing that they do not indicate what actual steps were taken – finds that they cannot be considered as proof of any investigative action.

83. The Court further observes that no statements were taken from any villagers from Sulak despite the fact that Mesut Dündar's body had been found close to that village (see paragraph 40 above) and that a newspaper had published an interview conducted with a number of villagers who had allegedly witnessed the murder (see paragraph 19 above).

84. The serious shortcomings thus identified are sufficient for the Court to conclude that the domestic authorities failed to carry out any meaningful investigation, let alone an adequate and effective one, into the killing of the applicant's son as required by Article 2 of the Convention.

85. The Court finds, therefore, that there has been a violation of Article 2 of the Convention under its procedural limb.

III. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

86. The applicant submitted that there had been a violation of Article 3 of the Convention on account of the anguish and distress suffered by him following the killing of his son and on account of his inability to discover the circumstances in which his son had been killed.

87. The Government rejected the allegation that the applicant's son had been killed by agents of the State.

88. Article 3 of the Convention provides as follows:

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

89. The Court reiterates that it has not been established that State agents were responsible for the murder of the applicant's son (see paragraph 67 above).

90. It considers that the question whether the applicant's inability to discover the circumstances of the killing of his son, as a result of the authorities' failure to conduct an effective investigation into the killing, amounted to treatment contrary to Article 3 of the Convention in respect of the applicant himself, is a separate complaint from that brought under Article 2 of the Convention which relates to procedural requirements and not to ill-treatment in the sense of Article 3 (see *Tahsin Acar v. Turkey* [GC], no. 26307/95, § 237, 8 April 2004).

91. Although the inadequacy of the investigation into the killing of his son will obviously have caused the applicant feelings of anguish and mental suffering, the Court considers that it has not been established that there were

special factors which would justify finding a violation of Article 3 of the Convention in relation to the applicant himself (*ibid*, at § 239, and the cases cited therein).

92. It therefore finds no breach of Article 3 of the Convention.

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

93. The applicant complained under Article 6 of the Convention that, as a result of the inadequate criminal investigation into the murder of his son, he had no access to court to bring civil proceedings against the perpetrators, who have remained unidentified. He further argued that the inadequacy of the investigation constituted a violation of Article 13 of the Convention.

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

95. The Court notes that the applicant's complaint is entirely directed against the investigation carried out by the Prosecutor into the killing of his son, and that he did not attempt to bring any civil proceedings himself.

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

97. The Court finds, therefore, that the complaint is to be examined under Article 13 of the Convention alone, which provides as follows:

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

98. The Court recalls that Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law. In particular, its exercise must not be unjustifiably hindered by the acts or

omissions of the authorities of the respondent State (see *Aksoy v. Turkey*, judgment of 18 December 1996, *Reports* 1996-VI, p. 2286, § 95; *Aydın v. Turkey*, judgment of 25 September 1997, *Reports* 1997-VI, pp. 1895-96, § 103; *Kaya*, cited above, § 106).

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

100. On the basis of the evidence adduced in the present case, the Court has not found it established that the applicant's son was killed by or with the connivance of State agents (see paragraph 67 above). As it has held in previous cases, however, that does not preclude the complaint in relation to Article 2 from being an "arguable" one for the purposes of Article 13 (see *Boyle and Rice v. the United Kingdom*, judgment of 27 April 1988, Series A no. 131, p. 23, § 52; *Kaya*, cited above, § 107). In this connection, the Court observes that it is not in dispute that the applicant's son was the victim of an unlawful killing and the applicant may therefore be considered to have an "arguable claim" that there has been a breach of Article 2 of the Convention.

101. The authorities thus had an obligation to carry out an effective investigation into the circumstances of the death of the applicant's son. For the reasons set out above (see paragraphs 73-85), no effective criminal investigation can be considered to have been conducted in accordance with Article 13, the requirements of which may be broader than the obligation to investigate imposed by Article 2 (see *Kaya*, cited above, at § 107). The Court finds, therefore, that the applicant has been denied an effective remedy in respect of the death of his son, and has thereby been denied access to any other available remedies at his disposal, including a claim for compensation.

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

V. ALLEGED VIOLATION OF ARTICLE 14 IN CONJUNCTION WITH ARTICLES 2, 3, 6 AND 13 OF THE CONVENTION

103. The applicant maintained that, because of their Kurdish origin, he and his deceased son have been subjected to discrimination in breach of Article 14 of the Convention, in conjunction with Articles 2, 3, 6 and 13 of the Convention. Article 14 provides as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language,

religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

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

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

105. 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. Damage

106. The applicant did not make a claim for pecuniary damage due to his deceased son's lack of income.

107. In respect of non-pecuniary damage, the applicant claimed, on his own behalf, the sum of 40,000 pounds sterling (GBP) on account of the deprivation of the life of his son. He also claimed, on behalf of his deceased son, the sum of GBP 10,000 for his son's unlawful detention, the inhuman treatment to which his son was subjected and his son's unlawful death.

108. The Government considered the applicant's claim for non-pecuniary damage to be excessive. They suggested that, if the Court deemed it appropriate to award compensation to the applicant, the sum awarded should not lead to unjust enrichment.

109. The Court reiterates that that the authorities failed to carry out an effective investigation into the circumstances surrounding the killing of the applicant's son, contrary to the procedural obligation under Article 2 of the Convention. Consequently, and having regard to the awards made in comparable cases, the Court, on an equitable basis, awards the applicant the sum of EUR 10,000 for non-pecuniary damage, to be held by him on behalf of the beneficiaries of the estate of Mesut Dündar.

Furthermore, the distress and anguish suffered by the applicant on account of the manner in which the authorities dealt with his complaints has been found to constitute a violation of Article 13 in respect of the applicant. In this connection, the Court considers that an award of compensation in his favour is also justified. Accordingly, it awards the applicant the sum of EUR 3,500 in his personal capacity.

B. Costs and expenses

110. The applicant claimed a total of GBP 13,989.30 for the fees and costs incurred in bringing the application. His claim comprised:

(a) GBP 7,850 for the fees of his lawyers based in the United Kingdom;

(b) GBP 1,950 for the fees of his lawyers based in Turkey;

(c) GBP 3,264.30 for administrative costs, such as telephone, postage, photocopying and stationary, incurred by the United Kingdom-based lawyers; and, finally,

(d) GBP 925 for administrative costs, such as telephone, postage, photocopying and stationery, incurred by his lawyers based in Turkey.

111. In support of his claims for the fees of his lawyers, the applicant submitted a detailed schedule of costs.

112. The Government argued that the applicant's claims for legal costs and expenses were fictitious and excessive.

113. The Court notes that the applicant has only partly succeeded in making out his complaints under the Convention and reiterates that only legal costs and expenses necessarily and actually incurred can be reimbursed under Article 41 of the Convention. Making its own assessment based on the information available, the Court awards the applicant EUR 10,000 in respect of costs and expenses – exclusive of any value-added tax that may be chargeable –, the net award to be paid in pounds sterling into his representatives' bank account in the United Kingdom, as identified by the applicant.

C. Default interest

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

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been no substantive violation of Article 2 of the Convention in respect of the death of the applicant's son;

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 the applicant's son;

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

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

5. *Holds* by six votes to one that it is unnecessary to examine separately the applicant's complaint under Article 14 of the Convention;

6. *Holds* unanimously
(a) that the respondent State is to pay to the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 10,000 (ten thousand euros) and any tax that may be chargeable on this amount, in respect of non-pecuniary damage; this sum is to be converted into new Turkish liras at the rate applicable at the date of settlement and held by the applicant for the beneficiaries of the estate of his son Mesut Dündar;
(b) that the respondent State is to pay to the applicant, within the same three month period, EUR 3,500 (three thousand five hundred euros) and any tax that may be chargeable on this amount, in respect of the applicant's personal, non-pecuniary damage; this sum is to be converted into new Turkish liras at the rate applicable at the date of settlement;
(c) that the respondent State is to pay the applicant, within the same three month period, EUR 10,000 (ten thousand euros) in respect of costs and expenses, together with any value-added tax that may be chargeable, to be converted into pounds sterling at the rate applicable at the date of settlement, and transferred to the bank account of his representatives in the United Kingdom identified by him;
(d) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 20 September 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President

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

J.-P.C.
S.D.

PARTLY DISSENTING OPINION OF JUDGE MULARONI

Unlike the majority, I believe that it is necessary for the Court to examine separately the applicant's complaint under Article 14 of the Convention.

After examining tens and tens of similar applications lodged by Turkish citizens of Kurdish origin, and very often concluding that there was a violation of Articles 2 and 3 of the Convention, I felt uncomfortable in not examining such a complaint even before the Grand Chamber judgment of 6 July 2005 in the *Nachova and Others v. Bulgaria* cases (nos. 43577/98 and 43579/98). After such a judgment I feel even more uncomfortable. I am really unable to understand why the Court decided to examine such a complaint in the *Nachova and Others* case and continues to consider that it is unnecessary to do that in cases like the present one.

The examination of the complaint under Article 14 does not mean, of course, that in the end the Court will find that there has been a violation of Article 14. I simply cannot agree with the majority approach, which to me is tantamount to considering that the prohibition of discrimination in this type of cases is not an important issue when the respondent State is Turkey.